Cited as "1 ERA Para. 70,674"

Tennessee Gas Pipeline Company (ERA Docket No. 85-40-NG), November 6, 1986.

DOE/ERA Opinion and Order No. 151

Order Granting Blanket Authorization to Import Natural Gas from Canada

I. Background

On December 18, 1985, Tennessee Gas Pipeline Company, a division of Tenneco Inc. (Tennessee), filed an application with the Economic Regulatory Administration (ERA) of the Department of Energy (DOE), pursuant to Section 3 of the Natural Gas Act (NGA), for blanket authorization to import up to 200 Bcf of Canadian natural gas over a two-year period beginning on the date of first delivery. Tennessee proposes to purchase the gas from reliable Canadian producers and pipelines on a short-term or spot basis. The gas would be purchased either on Tennessee's own account for system supply or on behalf of domestic customers.

Prices and quantities of the imported gas would be negotiated by the parties and would be competitive with purchases otherwise available to Tennessee or its customers. Tennessee proposes to buy Canadian spot gas only if the price, plus transportation costs, is lower than the cost of other available gas supplies. Transportation arrangements would be made on a best-efforts basis and no new facilities would be required.

Tennessee proposes to file quarterly reports with the ERA, indicating for each month details of transactions including purchase and sales prices, volumes, any special contract price adjustments, duration of the agreements, ultimate sellers and purchasers, transporters, points of entry, and markets served.

II. Procedural History

A. ERA Notice, Initial Interventions and Comments and Tennessee's Answer

The ERA issued a notice of the application on December 31, 1985, inviting protests, motions to intervene, or comments to be filed by February 5, 1986.1/ The ERA received 16 timely and two late motions to intervene.2/ The timely interventions included two joint filings, one by five producer associations (hereinafter referred to collectively as the Producers) and one by a gas distribution company and its two wholly-owned subsidiaries. Late movants were National Fuel Gas Distribution Corporation and Northern Indiana Public Service Company. Producers and Champlin Petroleum Company (Champlin) opposed the application. Long Island Lighting Company expressed support. All other intervenors were silent on the proposal's merits and none of these requested additional procedures.

The opposition of Producers can be characterized generally as concern over the alleged negative impact on domestic producers of competition from Canadian imports which, they perceive, receive unequal access to domestic gas markets. They request that the ERA summarily deny Tennessee's application. In the alternative, Producers request that the ERA either hold a trial-type hearing or impose a condition on Tennessee's authorization that would require that any gas imported under the authorization be moved only over pipelines providing open access under the Federal Regulatory Commission's (FERC) Order 436.3/ Champlin, a domestic natural gas producer, also protests that Tennessee's import proposal is not in the public interest, alleging that Tennessee seeks to purchase Canadian gas instead of "domestic supplies already under contract at low prices," and then suggests unspecified limitations to any import authorization.

On February 20, 1986, Tennessee filed a response to these comments. Tennessee provided further support for its application and argued that opponents had failed to show that the proposed arrangement was inconsistent with the public interest, or to show that further proceedings or the condition requested by the Producers were necessary. In response to Champlin's allegation, Tennessee noted that such private contractual matters are not at issue in an import application proceeding.

B. ERA Order Requesting Comments

Producers also opposed two other similar blanket import applications4/ and requested the same condition in those proceedings. In order to give Producers a full and complete hearing and to give other parties an opportunity to comment on the proposed condition and its ramifications, on May 5, 1986, the ERA issued a procedural order5/ granting motions to intervene6/ in all three dockets and requesting comments on the principal policy issues raised by the proposed open access condition and on practical issues related to whether the proposed condition would be effective if imposed on all import authorizations or just in the instant dockets.

More specifically, the procedural order asked that comments focus on whether the proposed condition would conflict with the DOE's policy that all gas should compete on an equal basis, and whether it would be consistent with the DOE's policy that parties should freely negotiate import arrangements that respond competitively to changes in the market over time. In addition, the order asked whether the proposed condition would accomplish the goal desired by its proponents, how it would affect pending applicants or authorized importers not now importing, and what the effects would be of imposing the proposed condition on the current flow of imported gas and on the markets served.

The procedural order requested submission of comments by June 5, 1986, and answers to these comments by June 20, 1986. The ERA received 24 comments, including 16 late motions to intervene.7/ In addition, six answers to comments were received.8/ The parties' comments focused largely on the general issues and specific questions raised in the procedural order and are discussed in Section III of this opinion. No delay in the proceeding or prejudice to any party will result from granting intervention to late movants for the purpose of providing further comment. The late filings are accepted9/ and this order grants intervention to all movants.

III. Comments Received

A. Open-Access Condition

(1) Position in Support of Condition

The overriding complaint of Producers in this and other blanket import cases is that they may be denied an opportunity to compete for domestic gas markets by pipelines who are willing to import gas or to transport for other importers but will not make capacity available for domestic producers. According to Producers the decline in the domestic drilling rig count since adoption of the DOE's February 22, 1984, policy guidelines "demonstrates the devastating effect that the ERA policy is having on the domestic gas industry." 10/ They attribute to imports the declining development of domestic gas reserves and any long-term effects felt by future gas consumers. For these reasons, they request that the ERA condition authorizations to require that imports be transported only by pipelines that have become open-access carriers under FERC Order 436.

Of the total of 25 commenters responding to the May 5 procedural order, six supported the proposed condition. The six supporters are: Producers, Michigan Consolidated Gas Company (MichCon), Sun Exploration and Production Company (Sun), Northridge Petroleum Marketing, Inc. (Northridge), the Process Gas Consumers Group and the American Iron and Steel Institute (PGC et al.), filing jointly, and Representative Beau Boulter. In responding to the May 5 procedural order, Producers repeated the comments they filed in response to the December 31, 1985, notice of Tennessee's application.

The major argument made by Producers, MichCon, and Northridge is that without the open-access condition pipelines will, or have the potential to, favor imports and protect their own sales in their market areas by limiting access to these markets. They allege that the interstate pipelines can refuse to transport gas sold by off-system producers to end-users in the pipeline's market area. Further, they contend that pipelines and their affiliates will continue to use their NGA Section 7(c) certificates and "grandfathered" Section 311 arrangements under the Natural Gas Policy Act of 1978 (NGPA) to preserve their superior access to downstream markets.

Producers, Representative Boulter, and Sun contend that the open-access condition is necessary to allow equal competition between domestic and imported gas in the markets served by imports. They state that in the California, Pacific Northwest, and northern tier state markets, producers from the Southwest and Gulf States regions have found transportation availability very limited. They believe that the proposed condition would help domestic producers sell their gas in these market areas.

MichCon, Northridge, Producers, and Representative Boulter contend that the open-access condition would promote competition in the marketplace by allowing additional and probably more competitive sources of natural gas into the markets now served almost exclusively by interstate pipeline suppliers. MichCon and Northridge contend that this greater competition will come not only from domestic producers but also from Canadian gas that is not presently contracted to the interstate pipelines.

MichCon, Northridge, and Producers contend that the proposed condition would not be inconsistent with the DOE's goal of promoting competition in the marketplace. Competition will be encouraged, they argue, since all gas will have the same access to each market. In this way the goal of increased competition will be advanced by allowing all sellers access to the market and letting the market control the competition rather than the limited number of interstate pipelines who presently control transportation to the market.

Northridge states that the proposed condition would not conflict with the current U.S. policies of equal treatment and freedom to negotiate. Northridge contends that while there would be a temporary benefit for U.S. gas suppliers because of the proposed condition, this would be offset by the benefits derived from opening substantial markets in the northern tier of the

U.S. to equal competition. Further, Northridge argues that the condition is consistent with the policy of free negotiation since it will free negotiating parties from the shackles imposed by the transportation limitation imposed by the five interstate pipelines who control the border crossing points into the U.S.

Of the six supporters of the proposed condition responding to the May 5 procedural order, only PGC et al. directed comments specifically to this Tennessee proceeding. They support the condition in Tennessee's case because, they contend, some of their members have been unable to obtain transportation from Tennessee for gas that might displace the latter's sale service. They therefore contend that Tennessee's application should be denied unless it agrees to transport other's gas on a non-discriminatory basis.

In summary, supporters of the open-access condition feel that the proposed condition would promote greater competition in the marketplace and that without the condition independent suppliers of domestic gas may not be able to reach the markets where imports are sold because of the limited transportation availability.

(2) Position of the Applicant and Comments Opposed to the Condition

Of the 25 parties filing comments and answers in response to the May 5 procedural order, 19 opposed the condition.11/

While generally supportive of Producers' goal of achieving greater open-access to transportation, without exception all 19 of the opponents believe it would be contrary to current U.S. trade policy which promotes competition on an equal basis between imported and domestic supplies of gas. The opponents state that such a condition would be either restrictive, discriminatory or would place Canadian gas at a distinct disadvantage relative to domestic gas. They argue that imposition of the open-access condition would be directly in conflict with the policy focus articulated in the DOE's February 1984 import guidelines.12/

All opponents except ANR Pipeline Company (ANR), Enron Gas Marketing, Inc. (Enron), Independent Petroleum Association of Canada (IPAC), and Transcontinenal Gas Pipe Line Corporation and Transco Energy Marketing Company (Transco) maintain that the requested condition is inconsistent with the voluntary nature of the FERC Order 436 program and its non-discriminatory provisions. The American Gas Association (AGA) in particular contends that the proposal to deny a pipeline the right to import gas if it has not elected to become an Order 436 transporter goes far beyond the FERC's intent in issuing

Order 436.

All opponents except ANR and the Alberta Petroleum Marketing Commission (APMC) contend that the proposed condition would be in conflict with the policy goal of allowing parties to negotiate their own contracts free of government interference. The Canadian Embassy contends that the imposition of the proposed condition would be a step in the wrong direction considering the successful trade flow in natural gas that has resulted from the U.S. and Canada working toward a less regulated North American gas market. Enron contends that the proposed condition represents a direct and inappropriate interference by government in the ability of buyers and sellers to freely negotiate.

All opponents except Northwest Pipeline Corporation (Northwest) and ANR argue that the open-access condition would not achieve the Producers' stated goal of increasing competition, but rather would stifle competition by limiting Canadian gas in the marketplace. They argue that pipelines would view the condition as mandatory carriage and would purchase domestic gas exclusively to avoid an unwanted regulatory requirement. Commenters argue that the condition could be used by domestic pipelines as a lever to either force contract renegotiation or to cancel the contract.

All opponents except the Canadian Petroleum Association (CPA), Foothills PipeLines (Yukon) Ltd. (Foothills), IPAC, ProGas Limited (ProGas), Transco, Texas Eastern Transmission Corporation (Texas Eastern), and Westcoast Transmission Company Limited and Westcoast Resources, Inc. (Westcoast) claim that the condition would create a dual regulatory standard by mandating a condition for imported gas that is not required for domestic gas. Purchasers of domestic gas could avail themselves of any available transportation, whether the transporting pipeline had accepted Order 436 or not, while purchasers of imported gas would be at a distinct disadvantage due to the limited number of pipelines that have adopted FERC Order 436. Further, they argued that unless the importer itself is responsible for transportation arrangements, it has no legal control over the transportation arrangements. The effect of this dual standard would be to preclude importers from using numerous interstate pipelines to move their gas.

APMC, Enron, Northwest Pipeline Corporation (Northwest), Pan-Alberta Gas Ltd. and Natgas (U.S.) Inc. (Pan-Alberta), ProGas, Transco, Foothills, Tennessee, Boundary Gas, Inc. (Boundary), Texas Eastern, and the Canadian Embassy assert that both Canadian and U.S. gas sellers face the same restricted transportation in the marketplace, and thus, for both groups competition is equally affected. If a pipeline refuses to transport gas for others, the impediment exists for all suppliers, regardless of their national origin. They argue that adoption of the proposed condition would alter the current balance by imposing an onerous and discriminatory burden on imports.

Pan-Alberta, IPAC, and Foothills refute Producers' claim that declining U.S. drilling rig counts and U.S. gas sales are evidence that Canadian gas is unfairly displacing domestic gas sales in the U.S. marketplace. They present evidence that Canadian producers are in the same condition as U.S. producers, stating that the percentage of drilling and exploration has declined at a greater rate in Canada than in the United States. In Canada, as of June 2, 1986, drilling rigs in operation were down approximately 83 percent from the previous year compared with a reduction of only 62 percent for U.S. drilling rigs. Further, they assert that Canadian gas sales to the U.S. were down 20 percent for the first quarter of 1986 from the same period in 1985.

B. Other Issues

Producers raised a number of other issues in both their original filing and their response to their procedural order. They challenge Tennessee's application by alleging that Tennessee has not met the burden of proof necessary to demonstrate that there is need for the proposed import. Further, Producers claim that the ERA cannot make a determination on the need for the proposed import because of the "unrest and turmoil" in today's gas market. On February 20, 1986, Tennessee responded that the ERA has repeatedly found that spot imports and sales are competitive and permit response to a changing market.

Producers contend that, since Tennessee has not sought transportation certificates under Section 7(c) of the NGA, its application is incomplete and should therefore be rejected by the ERA as deficient. Tennessee responds that it seeks authority from the ERA only to import gas, not to transport it, and that it does not need transportation authority for its system supply and will obtain or utilize FERC authority to transport any gas purchased for customers.

Producers request that the ERA conduct a trial-type hearing to examine five "disputed issues of material fact." Producers raise these issues: (1) whether blanket importation authorizations are inconsistent with the national security objectives that Section 3 is designed to protect; (2) the identity of Tennessee's prospective suppliers and purchasers and security of these suppliers; (3) whether the proposed importation serves the needs of specific gas markets; (4) whether the proposed import price is consistent with the public interest and whether that price includes any brokering fees; and (5) whether Tennessee's application would hinder competition by forestalling

Tennessee's ultimate need to become an Order No. 436 transporter. Tennessee responds that all of these issues are policy objections applicable to blanket certificates as a whole. Tennessee maintains that to the extent these issues raise any factual issues the ERA has already determined that they are not material.

Producers contend that the authorization, if granted, would confer upon Tennessee the right to collect a fee for what should be available without cost directly from the Federal government. Thus, Producers contend, Tennessee would be brokering its import authorization and that is not allowed under the NGA. Tennessee responds that the ERA has rejected this argument in prior decisions granting blanket authority and that it should be rejected here.

IV. Decision

The application filed by Tennessee has been evaluated in accordance with the Administrator's authority to determine if the proposed import arrangement meets the public interest requirements of Section 3 of the NGA. Under Section 3, an import is to be authorized unless the Administrator finds that it "will not be consistent with the public interest." 13/ The NGA thus establishes a presumption in favor of authorizing an import of natural gas.

The Administrator is guided in making his determination by DOE's natural gas import policy guidelines. Under these guidelines, the competitiveness of an import in the markets served is the primary consideration for meeting the public interest test. In asserting that an import should be denied, an opponent therefore should persuade the ERA that granting the application would reduce competition in gas markets or would otherwise not be in the public interest.

Producers have proposed a condition that raises a number of significant issues of questionable consistency with current U.S. policy on natural gas imports.14/ The ERA's May 5 procedural order outlined these policy issues for comment, and in the analysis that follows, we discuss the proposed condition in the context of these policies and the comments received.

Current DOE policy provides for equal treatment of imported and domestic gas supplies. It supports efforts, including FERC's Order 436 program,15/ to bring about open access to transportation and markets as a means of reducing barriers to competition and to encourage the establishment of a fully competitive North American natural gas market. In accordance with this objective, the U.S. and Canada signed a trade declaration that endorses mutual open access to each country's energy markets.16/ Consistent with this trade declaration and DOE policy, the ERA has authorized many blanket import arrangements similar to the arrangement proposed by Tennessee.17/ We have found these flexible, market-responsive arrangements to be in the public interest because they facilitate and encourage the creation of an international spot market where both countries are allowed to compete on an equal basis and where competitive pressure is enhanced to the ultimate benefit of all parties.

Similarly, the FERC rules and regulations governing the transportation of natural gas in interstate commerce do not discriminate among gas supplies based on their country of origin. Imported supplies and domestic supplies traditionally have been treated equally. FERC Order 436 bears out this policy, not just in substance but in application as well. The DOE's comments in that proceeding argued against any regulatory distinction between imports and domestic supplies18/ and Order 436 itself applies without discrimination to the transport of domestic and imported gas.19/

Current U.S. policy allows and encourages parties to freely negotiate import arrangements. This policy "presumes that buyers and sellers, if allowed to negotiate free of constraining governmental limits, will construct competitive import agreements that will be responsive to market forces over time." 20/ U.S. and Canadian policies have been moving in concert towards this objective and the recent changes in the polices of the two countries are enabling importers serving traditional U.S. markets for Canadian gas to compete more effectively with domestic gas supplies. These changes also have allowed U.S. gas suppliers to begin to compete in Canada, particularly for short-term Canadian markets.

The policies described above are not truly distinct. The first supports non-discriminatory removal of regulatory impediments to competition. The second presumes commercial parties will negotiate competitive, market-responsive agreements in the absence of those regulatory impediments. Both represent a belief that competitive markets are in the public interest and that increased competition, particularly increased activity in the gas spot market, will benefit consumers with lower gas prices, expand markets for gas sellers, and result in greater use of pipeline capacity.

The proposed condition would require that imported gas be transported only over open-access pipelines. It would impose a requirement that applies to imported but not domestic supplies of gas and that is discriminatory on its face. Further, it would impose a regulatory burden on commercial parties attempting to negotiate import arrangements.

Producers argue that the condition is necessary if they are to compete on an equal basis with imported gas for domestic markets. They contend that imported gas currently enjoys superior and unequal access to domestic transportation and markets, largely on the basis of "grandfathered" transportation arrangements, and that the condition would eliminate this discrepancy, bring greater competition to gas markets, and thus be consistent with current policy. In support of their characterization of the problem, the Producers point to market statistics and cite the depressed state of the domestic oil and gas industry, primarily recent drilling rig counts which show more than a 40 percent decline since early 1984. Other comments filed in support of their proposed condition, to the extent they address the same points, do not present materially different arguments.

Without exception, opposing comments argue that the proposed condition is wholly inconsistent with current U.S. policy. The comments of APMC, Northwest, and Pan-Alberta are fairly representative. They state that the unilateral imposition of an open-access condition on imported gas is not only contrary to the DOE's policy of moving to less regulated markets, but also ignores the recent initiatives of both governments to permit and encourage market-responsive contract arrangements. Its implementation, they suggest, would place severe restrictions on imported volumes and would limit competition, if not altogether exclude Canadian gas from U.S. markets.

We do not find the arguments made by Producers or by other proponents of the condition or the evidence presented in support of their arguments persuasive. U.S. producers and Canadian suppliers of gas are treated equally under the FERC's Order 436 and Producers have not shown that either sector enjoys any generic benefit or suffers any generic detriment from relationships under this rule. The proposed condition would disturb the current equal footing of U.S. and Canadian participants in the gas market, and would discriminate by requiring mandatory compliance with the voluntary FERC Order 436 program for importers but not for domestic suppliers. Imposition of the condition would also interfere with the ability of all parties to freely negotiate import arrangements. Therefore, after examination of the record in this proceeding, we conclude that the proposed condition is discriminatory and not in the public interest.

Producers also allege that corporate affiliations between importers, particularly between importing pipelines and Canadian suppliers, suggest an unfair disincentive to participate in the FERC Order 436 program, as well as unfair supply arrangements and inequitable resolution of take-or-pay liabilities. These relationships also exist between domestic suppliers and transporters. The FERC is the proper forum for examination of affiliate relationships, and, in fact, the FERC has undertaken such a proceeding.21/ The proposed condition will not solve this problem if it does exist.

The ERA has followed closely events in the domestic and international gas markets, and we find that the evidence submitted by Producers and Representative Boulter on drilling rig counts does not support their conclusion that domestic gas exploration has suffered as a result of gas imported from Canada. On the contrary, Canadian imports account for only four to five percent of annual domestic gas consumption, and cannot be held responsible for all market losses experienced by domestic producers. Marketing difficulties of domestic producers have been caused, not by competition with Canadian imports, but rather by the interaction of numerous economic factors, including a leveling off of U.S. demand and significantly reduced oil prices. Canadian gas suppliers face similar market problems. As noted by Foothills, Pan-Alberta and IPAC, drilling rigs in operation have fallen even more in Canada during the last year than in the U.S.22/

Another thrust of the ERA's procedural order was to elicit comments on whether the proposed condition would be practical--whether it would in fact, accomplish the goals established by Producers to ensure equal access to domestic gas markets and thereby ensure that imports would be truly competitive in those markets.23/ The procedural order directed attention to a number of specific questions all related to the issue of effectiveness.

The major aspects of this practical question have already and unavoidably been examined and answered in this discussion of policy issues. The proposed condition would not apply to domestic supplies and, inasmuch as domestic and imported gas are treated equally now, the condition would deny imported gas equal access to U.S. markets. As a consequence of this impediment, U.S. markets would not have access to the same portfolio of supplies nor Canadian suppliers the same range of markets, and the result would be an obvious constraint on competition. Thus, there is no need to examine the practical effects of the proposed condition further, since the ERA has determined, on policy grounds, that it is anticompetitive, discriminatory, and thereby not in the public interest.

We understand Producers' concerns about falling sales and significantly reduced natural gas exploration. However, these problems and others present in the currently unsettled North American gas market are not caused by Canadian imports in the U.S. gas market. Rather, they are caused by a combination of factors, including reduced demand for gas generally because of consumer conservation, interfuel competition, significantly lower world oil prices, and the resulting intense price competition and pressure on the whole gas industry to adjust to a changing marketplace. To discriminate against imports for the temporary, short-term benefit of U.S. producers would harm the marketplace, reduce customer access to competitively priced gas supplies, and in the long term be contrary to the public interest, even for the Producers. Government-controlled markets or government-controlled access to markets can only lead to distortions in the supply and demand signals that keep the marketplace in balance and healthy. The reintroduction of government controls, as represented by the proposed condition, is contrary to the Administration's policy of eliminating government interference in the marketplace and could lead to the same kind of distortions in the natural gas market that previous government controls have caused.

In summary, based on the extensive record in this proceeding, the ERA finds that the condition requested by Producers is inconsistent with the commitment to equal treatment and free negotiation embodied in current U.S. gas import policy. The condition would discriminate against foreign supplies of gas and those seeking to import this gas and it would lessen competition in the marketplace. We have thus determined that the condition is inconsistent with the public interest and it is therefore denied.

The other objections raised by Producers have been raised in prior ERA proceedings by the Panhandle Producers and Royalty Owners Association (PPROA). No information has been presented in this docket to lead us to change our position on these issues from that taken in previous proceedings. We therefore discuss them only briefly.

In support of their request for summary denial of the application, Producers argue that Tennessee has failed to meet its burden of proof to demonstrate a need for gas imported under the requested authorization. They also argue that the application is deficient because Tennessee has not sought authority from the FERC to transport the gas under Section 7(c) of the NGA or FERC Order 436.

The ERA has made it clear that need is addressed in terms of marketability of the proposed import and is a function of competitiveness.24/ Further, contrary to the argument advanced by the Producers in this proceeding and by PPROA in prior proceedings, import arrangements, if they are freely negotiated and provide for a supply of gas that is marketable over the term of the contract, are presumptively competitive and in the public interest. Producers suggest that current "unrest and turmoil" in the market prevent the ERA from making a determination of need. Competitive markets, particularly during periods of transition, are not static environments. Producers' argument, if accepted, could stop the ERA from authorizing imports whenever the market is in transition. We believe the market will determine need if allowed to function free from unnecessary governmental interference. Producers' need argument appears to be an attempt to insulate themselves from competition.

The ERA disagrees with Producers' contentions with respect to certification of transportation arrangements. While certainly of importance to the commercial parties to an import proposal, arrangements for domestic transportation of imported gas are not relevant to the ERA's determination of whether an import is consistent with the public interest. The ERA believes that it can determine whether Tennessee's proposed blanket import arrangement is in the public interest without knowing the precise details of each transaction. Neither the NGA nor ERA regulations limit agency authority to approve import applications to those where the FERC already has certificated downstream transportation. Moreover, the gas clearly would not flow unless effective transportation arrangements are certified.

The import authorization sought by Tennessee would provide it with blanket approval, within prescribed limits, to negotiate and transact individual, short-term import arrangements without further regulatory action. This arrangement, as set forth in the application, is consistent with DOE policy guidelines. The fact that each sale will be voluntarily negotiated, short-term, and market-responsive provides assurance that the transactions will be competitive and will not take place if the gas is not marketable. Producers have failed to demonstrate otherwise. Tennessee's proposed arrangement, like other similar blanket imports, will encourage the spot market and will enhance the competition that such short-term spot sales bring to the marketplace.25/ We have determined that Tennessee's import arrangement is competitive and therefore is consistent with the public interest.

Producers requested an "evidentiary hearing on the record to determine disputed issues of material fact" in the event that the ERA denies their requested summary dismissal of Tennessee's application or denies their proposed open-access transportation condition. In their list of allegedly disputed issues requiring a trial-type hearing, Producers include need, security of supply, the consistency of blanket import authorizations with other, unspecified national security objectives, the identity of prospective suppliers and purchasers, the proposed import price including any brokering fees, and whether approval of Tennessee's application would "forestall" the decision of pipelines to become open-access transporters under FERC Order 436.

Apart from the last issue, which concerns the FERC's voluntary Order 436 program and which was discussed above in this order, all other issues allegedly in dispute bear on the general nature of blanket import arrangements. These issues do not involve adjudicative facts but rather are matters of policy. The ERA believes that the availability of specific pricing information and the specific identity of suppliers and purchasers are not necessary for the agency to determine the public interest when the application contemplates a short-term spot transaction. Nor do security of supply or other "national security objectives" constitute adjudicative facts in the context of short-term, spot market transactions and in light of both Canada's historical reliability as a supplier and the current free trade focus of bilateral negotiations.

Producers also claim that approval of the import would give Tennessee the right to sell or broker its Section 3 authorization, and contend this is not permissible under the statute. As the ERA has stated previously, an import arrangement where the importer is a broker does not constitute a delegation of Section 3 authority but rather is a determination that the public interest does not rely on whether title to the gas has been taken.26/ If the delivered cost of imported gas includes a broker's commission and "is not competitive with other available supplies, the transaction presumably would not take place."27/

The ERA has reviewed Producers' request for a trial-type, comparative hearing and has determined that, after multiple opportunities to present information, Producers have failed to demonstrate that any genuine issues of adjudicative fact material to making a decision on Tennessee's application remain in dispute. The ERA has decided that a trial-type hearing would not contribute to the development of issues relevant to this proceeding, is not in the public interest, and therefore is denied.

Champlin, a domestic natural gas producer, also protests that Tennessee's import proposal is not in the public interest and suggests unspecified limitations to any import authorization. Champlin is concerned that Tennessee will use the proposed import volumes to displace its purchases of domestic gas. Tennessee has stated in its application that it proposes to buy Canadian spot gas only if the price, plus transportation costs, is lower than the costs of other available gas supplies. It is the DOE's policy to consider the competitiveness of imported gas as the primary consideration in assessing whether the import is in the public interest. Tennessee has indicated that it will only purchase the imported gas when it is competitive. Thus, the proposed import is in the public interest and Champlin's request for additional limitations is denied.

V. Conclusion

After taking into consideration all the information in the record of this proceeding, I find that granting Tennessee blanket authority to import up to 200 Bcf of Canadian natural gas over a two-year period beginning on the date of first delivery, the gas to be purchased on a short-term or spot basis either on Tennessee's own account for system supply or on behalf of domestic customers, is not inconsistent with the public interest.28/

ORDER

For the reasons set forth above, pursuant to Section 3 of the Natural Gas Act, it is ordered that:

A. Tennessee Gas Pipeline Company (Tennessee) is authorized to import up to a maximum of 200 Bcf of Canadian natural gas over a two-year period beginning on the date of first delivery.

B. Tennessee shall notify the ERA in writing of the date of first delivery of natural gas imported under Ordering Paragraph A above within two weeks after the date of such delivery.

C. With respect to the imports authorized by this Order, Tennessee shall file with the ERA within 30 days following each calendar quarter, quarterly reports indicating whether sales of imported gas have been made, and if so, giving, by month, the total volume in MMcf of the imports and the average purchase and sales price per MMBtu at the border. The reports shall also provide the details of each transaction including the names of the sellers and purchasers, duration of the agreements, transporters, points of entry, markets served, and, if applicable, any demand/commodity charge breakdown of the contract price, any special contract price adjustment clauses, and any take-or-pay or make-up provisions.

D. The requests by Panhandle Producers and Royalty Owners Association, West Central Texas Oil and Gas Association, North Texas Oil and Gas Association, East Texas Producers & Royalty Owners Association, and Independent Petroleum Association of New Mexico for a trial-type hearing, summary dismissal of Tennessee's application, and imposition of a condition requiring that all gas imported under this authorization be transported only by open-access transporters under the Federal Energy Regulatory Commission's Order No. 436, are denied.

E. The request by Champlin Petroleum Company for imposition of additional limitations on this authorization is denied.

F. The motions to intervene, as set forth in this Opinion and Order, are hereby granted, provided that participation of each intervenor shall be limited to matters specifically set forth in its motion to intervene and not herein specifically denied, and that the admission of each intervenor shall not be construed as recognition that it might be aggrieved because of any order issued in these proceedings.

Issued in Washington, D.C., on November 6, 1986.

--Footnotes--

1/ 51 FR 427, January 6, 1986.

2/ The initial intervenors were:

Algonquin Gas Transmission Company

Brooklyn Union Gas Company

Champlin Petroleum Company

Columbia Gas Transmission Corporation

Consolidated Edison Company of New York

Elizabethtown Gas Company

Equitable Gas Company

Long Island Lighting Company

National Fuel Gas Distribution Corporation

National Fuel Gas Supply Corporation

Natural Gas Pipeline Company of America

Northern Indiana Public Service Company

Northwest Pipeline Corporation

Pacific Gas Transmission Company

Producers:

Panhandle Producers and Royalty Owners Association

West Central Texas Oil and Gas Association

North Texas Oil and Gas Association

East Texas Producers & Royalty Owners Association

Independent Petroleum Association of New Mexico

Public Service Electric and Gas Company

Texas Eastern Transmission Corporation

Washington Gas Light Company, and its subsidiaries:

Frederick Gas Company, Inc.

Shenandoah Gas Company

3/ FERC's Order 436 established a voluntary program under which a pipeline agrees to provide non-discriminatory transportation for all customers on a first-come, first-served basis. Open access to such transportation would allow non-traditional suppliers such as independent producers to ship their gas to any market where they could find customers. FERC Statutes and Regulations Para. 30,665.

4/ The other two cases are Western Gas Marketing, U.S.A. Ltd. in ERA Docket No. 86-08-NG, and HNG/InterNorth Gas Marketing, Inc. in ERA Docket No. 86-09-NG.

5/ Tennessee Gas Pipeline Company, Western Gas Marketing, U.S.A., Ltd., HNG/InterNorth Gas Marketing, Inc., Order Providing Opportunity for Further Comments and Granting Interventions, May 5, 1986.

6/ See supra note 2 for the initial intervenors in this docket.

7/ Parties filing comments in response to the May 5 procedural orders were:

Alberta Petroleum Marketing Commission

American Gas Association

ANR Pipeline Company

Representative Beau Boulter

Boundary Gas, Inc.

Canadian Embassy

Canadian Petroleum Association

Enron Gas Marketing, Inc. (formerly HNG/InterNorth Gas Marketing Inc.)

Foothills PipeLines (Yukon) Ltd.

Great Lakes Gas Transmission Company

Independent Petroleum Association of Canada

Michigan Consolidated Gas Company

Northern Border Pipeline Company

Northridge Petroleum Marketing, Inc.

Northwest Pipeline Corporation

Pan-Alberta Gas Ltd. and Natgas (U.S.), Inc. (joint)

Pacific Gas Transmission Company

Process Gas Consumers Group and the American Iron and Steel Institute

The Producers:

Panhandle Producers and Royalty Owners Association

West Central Texas Oil and Gas Association

North Texas Oil and Gas Association

East Texas Producers & Royalty Owners Association

Independent Petroleum Association of New Mexico

ProGas Limited

Sun Exploration and Production Company

Tennessee Gas Pipeline Company

Transcontinental Gas Pipe Line Corporation and Transco Energy Marketing Company

Westcoast Transmission Company Limited and Westcoast Resources, Inc.

8/ Parties filing answers to the May 5 procedural order were:

Enron Gas Marketing, Inc.

Foothills Pipe Lines (Yukon) Ltd.

Pan-Alberta Gas Ltd. and Natgas (U.S.), Inc.

The Producers

Texas Eastern Transmission Corporation

Westcoast Transmission Company Limited and Westcoast Resources, Inc.

9/ Parties granted intervention in this order are:

Alberta Petroleum Marketing Commission

American Gas Association

ANR Pipeline Company

Boundary Gas, Inc.

Canadian Petroleum Association

Foothills Pipe Lines (Yukon) Ltd.

Great Lakes Gas Transmission Company

Independent Petroleum Association of Canada

Michigan Consolidated Gas Company

Northridge Petroleum Marketing, Inc.

Pan-Alberta Gas Ltd. and Natgas (U.S.), Inc.

Process Gas Consumers Group and the American Iron and Steel Institute

ProGas Limited

Sun Exploration and Production Company

Transcontinental Gas Pipe Line Corporation and Transco Energy Marketing Company

Westcoast Transmission Company Limited and Westcoast Resources, Inc.

10/ Comments and Petition for Leave to Intervene of the Producer Associations, March 26, 1986, at 7.

11/ The opponents are:

Alberta Petroleum Marketing Commission

American Gas Association

ANR Pipeline Company

Boundary Gas, Inc.

Canadian Embassy

Canadian Petroleum Association

Enron Gas Marketing, Inc. (formerly HNG/InterNorth)

Foothills PipeLines (Yukon) Ltd.

Great Lakes Gas Transmission Company

Independent Petroleum Association of Canada

Northern Border Pipeline Company

Northwest Pipeline Corporation

Pacific Gas Transmission Company

Pan-Alberta Gas Ltd. and Natgas (U.S.), Inc.

ProGas Limited

Texas Eastern Transmission Corporation

Tennessee Gas Pipeline Company

Transcontinental Gas Pipe Line Corporation and Transco

Energy Marketing Company

Westcoast Transmission Company Limited and Westcoast

Resources, Inc.

12/ 49 FR 6684, February 22, 1984.

13/ 15 U.S.C. Sec. 717b.

14/ See supra note 10.

15/ Comments of the United States Department of Energy, FERC Docket No. RM85-1-000 (Parts A-D), July 15, 1985, at 2, 12-17.

16/ "Declaration by the Prime Minister of Canada and the President of the United States of America Regarding Trade in Goods and Services"; March 18, 1985; Weekly Compilation of Presidential Documents, March 25, 1985, (Vol. 21 No. 12, pp. 325-26).

17/ See e.g., Chieftain International, Inc. 1 ERA Para. 70,644 (May 16, 1986); NHP Energy, Inc., 1 ERA Para. 70,655 (June 19, 1986); ITRP/Kimball Gas Ventures, A Joint Venture, 1 ERA Para. 70,656 (June 24, 1986); and Tricentrol

Petroleum Marketing, Inc., 1 ERA Para. 70,662 (August 1, 1986).

18/ See supra note 13.

19/ FERC Statutes and Regulations, Para. 30,665.

20/ See supra note 12, at 6687.

21/ Hadson Gas Systems Inc. (FERC Docket No. RM 86-19-000). On August 7, 1986, Hadson petitioned the FERC to initiate a generic rulemaking proceeding to examine the potentially anticompetitive impact on the natural gas markets of the non-jurisdictional, affiliated gas marketing companies. On September 11, 1986, the FERC requested its legal staff to expedite preparation of a recommendation on Hadson's generic rule request, thus further indicating its interest in fully exploring the discrimination charges surrounding the marketing activities and interrelationships between non-jurisdictional marketing affiliates and the pipelines.

22/ Both sides of the question rely on the Hughes Rig Report for the United States and Canada for the period July 1985 to July 1986. As cited by the opponents to the condition the report was referenced by Oil Daily, July 29, 1986, at 2. The ERA notes that the U.S. rig count fell from 1,890 to 716--approximately a 62 percent decline. However, during this same period, the number of rigs in operation in Canada declined from 340 to 69 for a drop of almost 80 percent. Related ERA analysis indicates that Canadian gas imports dropped 16.6 percent in July 1986 from the year before to 47.9 Bcf and fell 17.2 percent in the November 1985 to July 1986 contract period to 593.7 Bcf. U.S. gas consumption dropped 2% in July 1986 from the year before and fell 3% in the November to July 1986 period to 13,733 Bcf from 13,333 Bcf for the previous year's period. Revenues for the nine month period fell to $1.4 billion (U.S.) from $2.3 billion for the same period of the preceding year. Also, during the same nine month period, the average border price fell 14.9 percent to $2.78 per MMBtu (U.S.) from $3.27 per MMBtu (Source: Natural Gas Week, September 22, 1986, at 7).

23/ We note that most of the comments, both those supporting and opposing the proposed condition, discuss the ERA's legal authority to impose such a condition. Although we believe that the ERA possesses this authority, we have decided that there is no need to reach to this issue at this time since we are not granting the open-access condition requested by the Producers.

24/ See supra note 12.

25/ In Increasing Competition in the Natural Gas Market; Second Report Required by Section 123 of the Natural Gas Policy Act of 1978, submitted in January 1985, the DOE observed that an active spot market will allow the natural gas market to allocate risks efficiently and will help minimize price and supply fluctuations as the market moves from a tightly regulated environment towards fully competitive market conditions. See Summary, at S-1, S-5, and Ch. 6, at 75.

26/ See e.g., Natural Gas Clearinghouse, Ltd., 1 ERA Para. 70,602 (July 5, 1985) at 72,421; Northridge Petroleum Marketing U.S. Inc., 1 ERA Para. 70,605 (September 27, 1985) at 72,433.

27/ Northridge Petroleum Marketing U.S. Inc., 1 ERA Para. 70,610 (November 27, 1985).

28/ Because the proposed importation of gas will use existing pipeline facilities, the DOE has determined that granting this application clearly is not a Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act (42 U.S.C. 4321, et seq.) and therefore an environmental impact statement or environmental assessment is not required.