Cited as "1 ERA Para. 70,760"

Mobil Gas Company Inc. (ERA Docket No. 87-19-NG), March 7, 1988.

DOE/ERA Opinion and Order No. 213-A

Order Denying Rehearing and Stay of Order

I. Background

On January 6, 1988, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) issued DOE/ERA Opinion and Order No. 213 (Order 213),1/ in ERA Docket No. 87-19-NG, granting Mobil Gas Company Inc. (MOGASCO) blanket authority to import up to 100 Bcf of Canadian natural gas over a two-year term for itself or on behalf of others beginning on the date of first delivery.

A joint motion to intervene by ten producer associations (Producers)2/ opposed the application. Producers requested summary denial of the application, or alternatively, requested that the ERA either hold a trial-type hearing or impose conditions on the authorization that would (1) require any gas imported under the authorization to be transported through pipelines providing open access transportation under the Federal Energy Regulatory Commission's (FERC) Order No. 436 (now Order No. 500) program,3/ (2) require issuance of a certificate authorization by the FERC to make sales for resale in interstate commerce, (3) eliminate MOGASCO's two-part rate, and (4) set a date certain to begin the two-year term. Producers also requested the ERA to authorize the conduct of discovery, alleging that additional information was needed to determine: (1) the identity of the parties to MOGASCO's import proposal; (2) the competitive effects of the proposed import on domestic producers; and (3) data confirming the reasonableness of MOGASCO's claim that the imported gas is needed and cannot be supplied more economically from domestic sources.

Order 213 denied Producers' requests for summary denial of the application, a trial-type hearing, imposition of conditions on the authorization, and discovery, and approved MOGASCO's request for a blanket authorization to import up to 100 Bcf over a two-year term.

Producers filed an application for rehearing of Order 213 on February 5, 1988. The application also seeks a stay of the order pending judicial review.

In support of their request for rehearing, Producers argue that the ERA

erred in: (1) relying on the DOE natural gas policy guidelines 4/ in making its determination; (2) assigning the burden of proof to the Producers; (3) failing to assess the need for the imported gas; (4) failing to conform to the Secretary's recent findings regarding the lack of competitive domestic markets;5/ (5) failing to consider the anti-competitive effects of the order without adequate conditions to protect against long-term harm to domestic supplies; (6) failing to follow its own regulations regarding the information that must be disclosed to permit adequate public discussion of the applicant's proposal; (7) failing to conduct the trial-type hearing requested by Producers; (8) failing to permit discovery of facts central to the ERA determinations; (9) failing to consider the cumulative effects of this and the other blanket import authorizations already granted by the ERA; and (10) failing to conduct an environmental assessment, or to otherwise meet the requirements of the National Environmental Policy Act of 1969 (NEPA).6/

II. Decision

All of the arguments made by Producers to support the alleged errors identified above have been raised previously in one form or another in this proceeding, or by Producers or a member association, Panhandle Producers and Royalty Owners Association, in earlier proceedings, and have been rejected.7/ Producers have submitted no information in their request for rehearing which would compel the ERA to reconsider the positions it has taken on these issues. With the exception of certain aspects of these issues, discussed below, we do not intend to revisit all of Producers' arguments in this order.

A. Discussion of Issues

1. The ERA Can Rely on the Secretary's Guidelines

Producers have presented no new information which would cause the ERA to reconsider its rejection of their argument made many times over that the policy guidelines are a nullity and cannot be relied on in issuing Order 213, nor do they distinguish the facts underlying Order 213 in any significant respect from previous cases in which this argument was rejected. In a suit brought by a member association of Producers, the D.C. Circuit Court of Appeals reviewed the DOE policy statement as applied by the ERA in a particular case, a review that encompassed most of the major material issues raised by Producers in this docket, and upheld the guidelines and the ERA's reliance on the rebuttable presumptions which the guidelines established.8/

As part of their challenge to the ERA's reliance on the policy guidelines, Producers again claim that the ERA failed to comply with Section

404 of the Department of Energy Organization Act (DOE Act)9/ in promulgating the Secretary's guidelines. Specifically, Producers allege that the FERC never formally voted to accept or deny referral of the guidelines to the FERC for consultation and have filed affidavits from J. David Hughes and Kenneth F. Plumb 10/ attesting to the lack of a formal Commission vote. Section 404 provides for mutual consultation between the ERA and the FERC on certain Secretarial actions of inter-agency concern. The specific mechanism agreed to by the ERA and the FERC to carry out this consultation process was never intended to be second guessed by private parties. Further, as we stated in Order 213, the FERC was an active participant in developing the guidelines and has expressly acknowledged and followed them since their issuance.

2. The Burden of Proof Analysis Is Consistent with Statute and Policy

Producers offer no new argument or information in support of their related contention that the policy guidelines wrongly reallocate the burden of proof from the proponents to the opponents of an import arrangement. Their argument ignores the Section 3 statutory presumption favoring import authorization. In addition, their argument relies on a former delegation order that has been superseded by Delegation Order No. 0204-111 as explained in the policy guidelines and therefore is no longer a valid precedent and binding on the ERA. Their argument also ignores the explicit finding of the D.C. Circuit of the U.S. Court of Appeals on this issue in Panhandle Producers.11/ In making its determination in Order 213, the ERA considered and weighed all the information provided by the parties to the proceeding, considered precedent, and acted in accordance with statute, delegation order and policy.

3. The Record Shows That the Proposed Import Will Provide for a Competitive, Needed, and Secure Supply of Gas

As part of their arguments challenging ERA's finding of need for the imported gas, Producers furnished a statement by David W. Wilson12/ attached to their intervention and protest to "rebut any possible presumption that the subject gas is needed." This statement added nothing of substance to arguments made in Producers' intervention motion and, contrary to Producers' insistence, failed to provide convincing evidence to rebut the presumption of need and the finding of competitiveness.

As part of their rehearing request, Producers filed an updated statement by Mr. Wilson repeating the questions and answers supplied in their intervention and protest, and containing revised and new information and raising new issues. The new statement revised the cited 1987 average drilling count from the "800 level" to 936 and increased the ERA import authorization

level from 11 to 14 Tcf. The new issues and information included the following: additional comments arguing that ERA's grant of import authorizations to marketing affiliates forestalls adoption of non-discriminatory open access transportation; comments on the discriminatory potential afforded imported gas because of delays and concessions to pipelines in the implementation of FERC Orders No. 436 and 500 either preventing domestic producers from getting to the city gate so they could compete or paying such high transportation tariffs that they cannot compete; comments on whether FERC Opinion No. 256 levels the playing field; assertions that Canadians have not been reliable suppliers of energy to the United States; and conclusions by Mr. Wilson doubting whether ERA "has enough understanding of the gas industry to be able to sort out the anti-competitive effects of what they consider to be `competitive'." He states that, "[G]iven the ERA's track record of never finding any contract to be uncompetitive and its illogical position of assuming that any contract with a buyer and a seller is a competitive contract, it appears that the ERA has reduced the Congressionally mandated public interest inquiry into giving some GS-2 employee a rubber stamp without even the facade of any serious analysis of the situation."

By virtue of Mr. Wilson's revised statement, Producers for the first time in this proceeding raise the issue of security of supply from Canadian sources. Producers assert that Canadian suppliers are not reliable because of their historical nationalistic approach to energy sales including Canada's previous controlled pricing of its exported natural gas and the establishment, from time to time, of high national reserve requirements applicable to its natural gas export policy. However, past trade barriers as described in the statement do not constitute evidence that Canadian suppliers of gas are unreliable. The ERA considers Canadian natural gas a secure and reliable source of supply, particularly in light of the short-term nature of the import authorized by Order 213 and because of the large proven natural gas reserves in Canada, the availability of gas pipeline transportation to the U.S. border and the reasons discussed in Section IIA4 of this order.

The revised Wilson statement specifically refers to the Canadian Free Trade Agreement signed by the President on January 2, 1988, and now awaiting action by Congress. This agreement seeks to establish free trade between the United States and Canada. Producers contend that to comply with the agreement, the ERA must end the "artificial" competitive advantages, which the ERA has conferred upon Canadian natural gas over domestic natural gas, including ERA's refusal to prohibit two-part rates for imported gas or insert FERC Order 256 requirements which, according to the Wilson statement, would "level the playing field."

The ERA believes that its import and export policies have and will continue to provide fair and open natural gas trade with Canada and in, keeping with the Free Trade Agreement's energy provisions, provides the basis for the private sector to decisions about energy trade without fear of undue government interference. Further, the present ERA policies coincide with DOE's energy policy objectives to provide consumers with a greater choice among dependable energy sources and to assure domestic producers greater certainty about investment decisions. The ERA's position is rooted in the belief that a greater security of energy supply can contribute to market expansion, enhance opportunities for all producers, and contribute to the long-term stability of the national economy.

In issuing Order 213, as in other blanket authorizations, the public interest inquiry into the competitiveness of an import, and resulting presumption of need if an import is found to be competitive, focuses on whether the negotiated arrangement, taken as a whole, provides the importer with the ability to compete in the marketplace, and with the flexibility to respond to market changes and thereby enhance competitive pressure on market participants. It does not focus on the competitive effect of an arrangement upon domestic producers, nor on whether the gas can be supplied more economically by domestic or other suppliers in a particular instance. In this case, as noted in Order 213, the ERA determined, based on the record, that MOGASCO's import arrangement is competitive and therefore in the public interest. Producers have provided no new information that would convince the ERA to reconsider its finding in Order 213 that the imported gas is competitive and is needed within the meaning of Section 3 of the NGA and DOE policy.

4. Order 213 Is Not Inconsistent With The Secretary of Energy's Statement on Lack of Open Access Transportation

Producers argue that Order 213 fails to conform to recent findings by the Secretary of Energy regarding the lack of a competitive domestic market and allege that the lack of competitiveness is aggravated by preferential treatment for available pipeline transportation arising from affiliated relationships with Canadian suppliers. Producers have taken the Secretary's statement out of context. Producers are referring to the Secretary's report on energy security13/ which expresses concern that willing buyers and sellers cannot always deal directly with each other because of lack of open access to transportation. We agree that lack of open access transportation inhibits competition, but it is a problem that affects both domestic and Canadian suppliers. For this reason, the DOE has supported the open access transportation program established by FERC Order No. 500,14/ which does not

differentiate based on source of supply, and has proposed legislation authorizing the FERC to mandate transportation. Order 213 is not inconsistent with the Secretary's statement.

Further, the Energy Security report specifically addresses the role imported gas plays in enhancing our energy security by stating:

> Imports from reliable sources can provide a stable and secure addition to domestic resources. Although imports make up only about 5 percent of U.S. consumption, they have contributed to a decline in the average prices U.S. consumers pay for natural gas. Eliminating the remaining barriers to trade will ensure that the lowest cost supplies of natural gas are brought to consumers.15/

With respect to Producers' contention that affiliated relationships with Canadian suppliers unfairly restrict the availability of open access pipeline transportation, the ERA notes that affiliate relationships also exist between domestic suppliers and transporters. Producers offer no evidence to support this allegation and, further, we note that this alleged affiliate problem, if it exists, is subject to an ongoing FERC proceeding in which discrimination charges involving affiliated relationships are being examined.16/

5. Conditioning of Order 113 Is Not Needed

In their request for rehearing, the Producers repeat their request for imposition of the four conditions listed in Section I of this order. Producers, however, provide no information to convince the ERA that it should reconsider its decision to deny these conditions, we are therefore are not addressing the conditions again in this opinion.

6. Producers' Request for Discovery Was Properly Denied

Producers contend that the ERA erred in failing to follow its regulations in seeking more detailed information concerning the proposed import and in failing to permit discovery of such facts by the Producers. Producers seek discovery of information as to: (1) the identity of the parties to MOGASCO's proposal; (2) the competitive effects of the proposed import on domestic producers; and (3) whether the imported gas is needed and cannot be supplied more economically from domestic sources.

The ERA's decision in Order 213 was based upon the entire record in this proceeding which is available to all parties. The ERA has concluded that the record is adequate to support its decision and will not entertain Producers'

request for discovery. If Producers believe that the record is inadequate, they have the right to seek judicial review of the ERA's decisionmaking process.

The first and second categories of information which Producers seek to discover from MOGASCO relate to matters that reflect Producers' differing policy perspective rather than undisclosed and relevant facts. As previously stated in this order in Section IIA3, the public interest inquiry into the competitiveness of an import proposal does not focus on the competitive effect of an arrangement on domestic producers nor on whether the gas can be supplied more economically by another supplier in a particular instance. Rather, it focuses on whether the arrangement is competitive in the marketplace and on its responsiveness to market changes. Need for the gas is presumed if an import arrangement is found to be competitive. The information necessary to determine whether MOGASCO's import proposal is inconsistent with the public interest is in the record, and ERA is not persuaded that it should reconsider its position on Producers' discovery request.

7. The ERA Has Complied With the National Environmental Policy Act (NEPA)

Producers again argue that an environment impact assessment must be prepared to meet NEPA requirements and comply with DOE's implementing environmental regulations even though the import arrangement authorized by Order 213 does not involve construction of new facilities. Producers state that "the subject order entails a very substantial environmental impact with the authorization of up to 73 Bcf of gas over a two-year period." 17/ (The 73 Bcf presumably relates to a previous rehearing request filed by Producers in ERA Docket No. 87-22-NG. Order 213 authorizes an import of up to 100 Bcf over a two-year period.) In performing an environmental evaluation Producers contend the ERA must consider the secondary socio-economic effects of the proposed import.

The ERA has considered Producers' argument previously 18/ and concluded, on the basis of facts not significantly different from the facts involved in Order 213, that the argument is without merit. DOE guidelines for NEPA compliance 19/ provide for three possible levels of analysis, depending on the potential for environmental impact. In cases where there is clearly a potential for significant impact, an EIS is prepared. In uncertain cases, an EA is prepared to determine if an EIS is needed. In situations when clearly no significant impacts will occur which could necessitate the preparation of an EIS, a memorandum to the file is prepared to document this fact. A memorandum of this type was prepared in this instance. The analysis contained therein supports the conclusion that, because existing pipeline facilities will be

used, clearly there should be no significant impact to the physical environment. Moreover, it is well established by both case law and by regulation that socio-economic impacts, alone, do not establish a basis for requiring an EIS.20/ Therefore, a memorandum to the file is the appropriate level of NEPA compliance when no other concerns involving the physical environment are at issue.

8. Producers' Request for a Stay Should Not Be Granted

Producers' request that a stay of Order 213 be granted pending judicial review. MOGASCO filed its opposition to that request stating that Producers make no effort to justify a stay under any established criteria or for that matter on any basis.21/ Producers present no reason other than an inference that they may file a law suit in this matter and therefore have provided no information in their rehearing request that would persuade the ERA that a stay of MOGASCO's import authorization at this time is necessary or appropriate.

B. Conclusion

The ERA has determined that the Producers' application for rehearing presents no information that would merit reconsideration of our findings in Order 213. Accordingly, this order denies Producers' request for rehearing and request for stay of the subject order.

Order

For the reasons set forth above, pursuant to Sections 3 and 19 of the National Gas Act, it is ordered that: The application for rehearing and request for stay of DOE/ERA Opinion and Order No. 213 filed jointly by Independent Petroleum Association of America, California Independent Producers Association, Energy Consumers and Producers Association, Independent Oil & Gas Association of New York, Inc., Independent Petroleum Association of Mountain States, North Texas Oil & Gas Association, Panhandle Producers and Royalty Owners Association, West Central Texas Oil and Gas Association, Independent Petroleum Association of New Mexico, and East Texas Producers & Royalty Owners Association are hereby denied.

Issued in Washington, D.C., on March 7, 1988.

--Footnotes--

1/ Mobil Gas Company Inc., 1 ERA Para. 70,745.

2/ Independent Petroleum Association of America, California Independent Producers Association, Energy Consumers and Producers Association, Independent Oil & Gas Association of New York, Inc., Independent Petroleum Association of Mountain States, North Texas Oil & Gas Association, Panhandle Producers and Royalty Owners Association, West Central Texas Oil and Gas Association, Independent Petroleum Association of New Mexico, and East Texas Producers & Royalty Owners Association.

3/ The FERC's Order No. 436 established a voluntary program under which a pipeline agrees to provide non-discriminatory transportation for all customers. Open-access 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. On June 23, 1987, the U.S. Court of Appeals for the District of Columbia Circuit vacated Order No. 436 and remanded it to the FERC. Associated Gas Distributors v. FERC, No. 85-1811, slip op. (D.C. Cir. June 23, 1987). On August 7, 1987, the FERC issued Order No. 500 readopting the open-access provisions of Order No. 436 and modifying or adopting certain other provisions, including a take-or-pay crediting mechanism. Order No. 500 became effective September 15, 1987. Interim rules adopted in FERC Order Nos. 500-A, 500-B, and 500-C issued October 14, October 16, and December 23, 1987, made minor modifications to the take-or-pay crediting mechanism. The FERC anticipates issuing a final rule in this proceeding in April 1988.

4/ 49 FR 6684, February 22, 1984.

5/ Energy Security, A Report To The President of the United States, DOE/S-0057 (March 1987) at 124-125.

6/ U.S.C. 4321, et seq.

7/ Panhandle Producers and Royalty Owners Association v. Economic Regulatory Administration, 822 F.2d 1105 (D.C. Cir., June 30, 1987); Bonus Energy, Inc., 1 ERA Para. 70,691 (March 24, 1987); Bonus Energy, Inc., Rehearing Denied, 1 ERA Para. 70,702 (May 26, 1987); Tennessee Gas Pipeline Company, 1 ERA Para. 70,674 (November 6, 1986); Western Gas Marketing U.S.A., Ltd., 1 ERA Para. 70,674 (November 6, 1986); Enron Gas Marketing Inc., 1 ERA Para. 70,676 (November 6, 1986); Tennessee Gas Pipeline Company, Western Gas Marketing U.S.A., and Enron Gas Marketing, Inc., Rehearing Denied, 1 ERA Para. 70,684; Minnegasco, Inc., 1 ERA Para. 70,721 (September 21, 1987); Minnegasco, Inc., Rehearing Denied, 1 ERA Para. 70,738 (November 20, 1987); Texas Eastern Transmission Corporation, 1 ERA Para. 70,733 (October 30, 1987); Texas Eastern Transmission Corporation, Rehearing Denied, 1 ERA Para. 70,744 (December 30,

1987); Texaco Gas Marketing, Inc., 1 ERA Para. 70,740, (December 11, 1987); Texaco Gas Marketing, Inc., Rehearing Denied, 1 ERA Para. 70,756 (February 10, 1988); and Mobil Gas Company Inc., 1 ERA Para. 70,745 (January 6, 1988).

8/ Id., Panhandle Producers, at 1110.

9/ 42 U.S.C. 7174.

10/ Mr. Hughes was a member of the Federal Energy Regulatory Commission from September 8, 1980, to July 13, 1984. Mr. Plumb served as Secretary of the Commission from its inception on October 1, 1977, until his retirement in 1987.

11/ See supra note 8, at 1111.

12/ Mr. Wilson is President of Gas Acquisition Services, Inc. Producers attached a statement by Mr. Wilson to their motion to intervene in this docket in which he expresses his opinion that, in general, additional imports of Canadian gas are not needed in U.S. markets, and open access to gas markets is needed by domestic producers to be competitive.

13/ See supra note 5.

14/ See supra note 3.

15/ See supra note 5, at 126.

16/ Hadson Gas Systems, Inc., FERC Docket No. RM86-19-000. In August 1986, the FERC initiated a generic rulemaking proceeding in this FERC docket to examine the potential anti-competitive impact on natural gas markets of interrelationships between non-jurisdictional marketing affiliates and the pipelines.

17/ Request of the Producers for Rehearing, at 25.

18/ See Tennessee Gas Pipeline Company, Western Gas Marketing U.S.A., Ltd., and Enron Gas Marketing, Inc., 1 ERA Para. 70,684 (January 5, 1987); Bonus Energy, Inc., 1 ERA Para. 70,702 (May 26, 1987); (Texas Eastern Transmission Corporation, 1 ERA Para. 70,744 (December 30, 1987); Mobil Gas Company Inc., 1 ERA Para. 70,745 (January 6, 1988); and Texaco Gas Marketing, Inc., 1 ERA Para. 70,740.

19/ Department of Energy Guidelines for Compliance with the National Environmental Policy Act, (45 FR 20694, March 28, 1980; as amended at 47 FR

7976, February 23, 1982; 48 FR 685, January 6, 1983; and 50 FR 7629, February 25, 1985).

20/ National Association of Government Employees v. Rumsfield, 418 F.Supp. 1302 (ED Pa. 1976); and 40 CFR Sec. 1508.14.

21/ Answer of Mobil Gas Company Inc. To Motion For Stay, at 3.