

*BY GORDON HUNTER*

A Houston jury's \$536.2 million "groundbreaking" award to a gas producer is believed to be the first case in which a pipeline company was found to have repudiated its take-or-pay contract. And the award is "by far the largest" against a pipe-line in any of the hundreds of take-or-pay cases filed in recent years as gas prices plummeted far below contract prices, said J. Michael Medina. He is a producers' attorney, author of two legal articles on repudiation claims and a shareholder in Tulsa's Holliman, Langholtz, Runnels & Dorwart who tracks such cases in gas-producing states, including Texas.

El Paso Natural Gas Co., the pipeline company, chose to have the repudiation case heard by a jury in the 127th District, reflecting the venue of choice for many pipeline companies in take-or-pay cases.

It was a choice, however, that backfired as the 12-member jury took only four hours to decide a seven-week-long trial, giving plaintiff TransAmerican Natural Gas Corp. all that it wanted, including \$1.84 million for attorneys' fees. The jury award adds to nearly \$66.6 million awarded to TransAmerican assessed last fall against El Paso Natural Gas by presiding Judge Sharolyn Wood. From the outset, the case was earmarked for superlatives based on the magnitude of the allegations and the caliber of attorneys involved, Wood said March 23. "This one was never in the bow-and-arrow stage. It was into the iron age from the start and rapidly got up to the atomic-bomb stage, she said.

El Paso, a Burlington Northern Inc. subsidiary with 80 percent of its market in California, issued a three-paragraph statement March 22 saying it would appeal the jury verdict. "El Paso is disappointed in the verdict, which, in essence, directs El Paso to buy out the remaining term of its gas purchase contract with TransAmerican Natural Gas Corp.," the statement said.

"It's going to be reversed," pipe-line attorney W. Robert Brown of Houston's Miller, Bristow & Brown predicted March 24. He said there was substantial error in an October 1986 ruling by the judge granting partial summary judgment on liability issues.

"She ruled out all our defenses and then told the jury about her decision," Brown said. Because of the 1986 ruling, the judge also restricted the evidence that could be presented to the jury, he said.

TransAmerican attorney Mark Wawro, a partner at Houston's Susman, Godfrey & McGowan, said March 22 there were settlement talks leading up to trial, "but the parties never got any closer than \$50 million." Although contract repudiation long has been included in the Uniform Commercial Code under sec. 2-610, "This one is one of the first to go to trial on repudiation claims," said Wawro, who tried the case with Susman, Godfrey partner John McArthur. Those claims were the last to be inserted by TransAmerican into the case and were the impetus for El Paso to chose a jury to hear the arguments on the claims.

The two companies signed a "farmout" contract in 1975 to develop the La Pearla Ranch gas field in Zapata County south of Laredo. Under this arrangement, both companies had mineral rights to the property and El Paso reserved the right to buy back the gas.

In 1981, El Paso signed a 15-year contract to buy gas from Trans-American, a contract that contained the take-or-pay clause.

Estimates of the combined potential liability from these so-called take-or-pay cases have ranged from \$6 billion to \$15 billion. Federal Energy Regulatory Commission chairman Martha Hesse estimated earlier this year that "through 1986, the total take-or-pay liability appears to be about \$10 billion."

In this case, El Paso started cutting back in mid-1985 on the amount it took from TransAmerican and by the end of the year faced a \$10 million "prepayment" bill for the gas it did not take, according to testimony in the case. El Paso bought some gas in early 1986, but by the end of that year, the amount owed as prepayments totaled \$51 million. While the prepayment bill mounted, El Paso headed for the courtroom,

claiming in 5-1985 suit that the original firm out agreement with TransAmerican had been breached by the producer.

TransAmerican filed a counter suit in 1986 based on the 1985 prepayment El Paso owed under the take-or-pay agreement.

And in August last year, the stakes were upped when Trans-American's attorneys added the El Paso attorney Brown added in August, the trial was scheduled for the following month. El Paso attorney Brown came up with the proposal to have the judge hear the case based on the producer's claims covering 1985 and 1986 and have the jury consider the repudiation arguments, Wawro said.

Brown said his choice did not misfire. He said the jury's decision was "predictable" based on prior ruling by Judge Wood. "The jury was clearly prejudiced" by the judge's legal rulings, Brown said.

Wood presided over a five-week trial last fall and in the end found in favor of TransAmerican, awarding the producer \$66.58 million.

Of his opponents' move to have the jury hear the second stage of the case - the stage involving the repudiation claim - TransAmerican's Wawro said, "I don't frankly know what they were thinking. But I feel they thought it was a cheaper route to go.

Medina, the Tulsa oil and gas attorney, said pipelines traditionally have opted for juries so they can portray producers as greedy and as the cause of current or future rate increases. Whatever the reasons in this case the jury trial opened Jan. 29 and most of the time dealt with arguments about the amount of gas the La Pearl Ranch field could produce in the future.

In the end, Wawro said 11 of the Jurors agreed the repudiated contract carried a \$536.2 million price tag. The 12th juror agreed that El Paso repudiated the contract, but set the value at \$480 million, Wawro said. "It was a once-in-a-lifetime case for the judge and lawyers," Judge Wood said. While about a third of the case dealt with the repudiation claim Wood said the balance included just about every component of other take-or-pay cases.

*"We tried about 15 lawsuits in this case," she said. "It is the kitchen sink."*

Denver attorney William Watson, a partner with Holm Roberts and Owen, compiled a list in mid-1987 of 382 oil and gas cases - most of them containing take-or-pay issues -for the Rocky Mountain Mineral Land Institute. There are certainly more cases now, he said March 23. A typical case is defended with force majeure arguments that federal regulations affected the transaction after the contract was signed, Watson said. The Denver attorney said these cases generally have been unsuccessful for the pipelines. An exception is an August 1989 case in Houston in which a state district court jury found that ANR Pipeline Co. did not breach a \$4 million contract to purchase gas from ARCO because federal regulations affecting the transaction after the contract was signed were a force-majeure, commonly known as an "act of God."

Watson said pipelines throughout the gas-producing states, including Texas, have had "amazing success convincing producers to forego pursuing their rights under take-or-pay contracts. Tulsa's Medina said the "boom" in filing take-or-pay litigation is over, although few of the cases have gone to trial. He suggested the El Paso case may be of psychological importance in take-or-pay litigation because pipelines now face the prospect of paying the price for the duration of the contract. In the typical take-or-pay case, Medina said, the pipeline faces a possible bill only for the gas it refused to take up to the time a suit was filed. Last week's jury verdict included an award of attorneys' fees to Susman, Godfrey of \$1.49 million for the trial and preparation and \$350,000 for the stages of any future appeal. The firm more frequently operates on a contingency.

"Here the client was smarter Warn said. "He knew he was going to win."

