

Cited as "1 ERA Para. 70,786"

National Steel Corporation (ERA Docket No. 87-63-NG), July 11, 1988

DOE/ERA Opinion and Order No. 251

Order Granting Blanket Authorization to Import Natural Gas from Canada and Granting Interventions

I. Background

On November 13, 1987, National Steel Corporation (National), a large end-user of natural gas, 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 authority to import on a short-term, spot market basis up to 67,000 Mcf per day and up to a total of 50 Bcf of Canadian natural gas over a period of two years, beginning on date of the first delivery. The imported gas would be purchased by National from a variety of Canadian suppliers, including producers, marketers and pipelines, for use at its Great Lakes Steel plant located at Ecorse and River Rouge, Michigan. National is a Delaware corporation with places of business in Minnesota, Illinois, Indiana, Michigan, and Pennsylvania. National is 50 percent owned by National Intergroup, Inc., a Delaware corporation, and 50 percent owned by Nippon Kokan K.K., a Japanese corporation. Great Lakes Steel is a steelmaking division of National.

In its application, National proposes to import natural gas directly from Canada through a 12-inch pipeline to be built under the Detroit River between its Great Lakes Steel property and the Union Gas Limited main line in Windsor, Ontario, Canada. On January 28, 1988, National filed an amendment to its application in which it proposes to import the gas through a 16-inch pipeline instead of a 12-inch pipeline in order to meet peak period deliverability requirements without compression. National states in the amendment that it has entered into a spot market contract to purchase Canadian gas from Hunter Exploration Ltd. at the rate of 10,000 Mcf per day for 60 days but that no other spot market arrangements have been negotiated. National intends to submit quarterly reports to the ERA describing the import transactions into which it has entered.

In support of its application, National asserts that the blanket authorization requested will provide National with the flexibility to negotiate with different suppliers and thereby take advantage of competitive, spot market prices. National also asserts that it is in an economic struggle

to survive and that direct access to competitive, alternative sources of supply will help reduce its energy costs. Further, according to National, the construction of a new pipeline under the Detroit River to transport the gas will have no significant environmental impact since it would be drilled for only a short distance, and above-ground facilities would be located on existing industrial sites.

II. Interventions and Comments

The ERA issued a notice of the application on February 3, 1988, inviting protests, motions to intervene, notices of intervention and comments to be filed by March 14, 1988.^{1/} Motions to intervene without comment or request for additional procedures were filed by Southern California Gas Company, Pacific Interstate Transmission Company, and Northwest Alaskan Pipeline Company. A motion to intervene in opposition to the application and requesting a trial-type hearing was filed by Michigan Consolidated Gas Company (MichCon). MichCon is a local distribution company which has been providing natural gas service to National for over 50 years. On March 29, 1988, National filed an answer in opposition to MichCon's substantive arguments and request for a trial-type hearing. This order grants intervention to all movants.

III. Decision

The ERA has evaluated National's application under Section 3 of the NGA. Section 3 requires approval of this application unless the ERA finds that the proposed arrangement "will not be consistent with the public interest," ^{2/} thereby establishing a statutory presumption in favor of authorizing this import of natural gas.

A. Competitiveness of Import Proposed By National

The Administrator is guided in making the Section 3 determination by the DOE's natural gas import policy guidelines.^{3/} Under these guidelines, the competitiveness of an import in the market served is the primary consideration for meeting the public interest test.

Under the import authorization requested, National would be granted blanket approval, within prescribed limits, to negotiate and transact individual short-term import arrangements without further regulatory action. Further, under National's import proposal, each sale would be voluntarily negotiated, short-term, and market-responsive, providing assurance that the transactions would be competitive and will not take place if the gas is not marketable. This arrangement, like other blanket imports authorized by the

ERA,^{4/} is inherently competitive. Furthermore, each sale would be a direct sale to a single end-user, National, who is a party to the transaction. There are no downstream gas customers.

MichCon, however, opposes the application, contending that the price of the imported gas is not competitive with available domestic supplies and that the only savings occurring to National from the proposed import would be the avoidance of the fixed costs of using MichCon's pipeline system by bypassing that system with the new proposed pipeline. MichCon further argues that the effect of National's proposal to "segregate its Great Lakes facility from [MichCon's] domestic supply network" is subsidization of National's gas costs by domestic consumers and producers who will have to bear a significantly greater portion of the fixed costs associated with MichCon's pipeline system as a result of reduced usage by National.

In response, National states that if the imported gas is not competitive, it will not be bought. National argues that no subsidization of gas costs would occur, noting that this argument had previously been rejected by the Federal Energy Regulatory Commission (FERC)^{5/} in approving direct gas service to National by Panhandle Eastern Pipeline Company (Panhandle), and interstate pipeline. In addition, National contends that what MichCon is seeking is a regulatory guarantee that all deliveries of natural gas to National must be made through MichCon's transportation system, rather than through the new proposed pipeline, Panhandle's system, or other alternative means of transportation.

After considering MichCon's and National's comments, the ERA concludes that this proposed alternative source of natural gas supplies would mean that National could choose between MichCon's service, Panhandle's service, and its own direct pipeline service. The ERA believes that the flexibility provided thereby should enhance competition by providing a greater range of choices to National in its gas purchases on the spot market. The ERA notes that approval of the construction and operation of the proposed new pipeline system, including the size and cost of the pipeline and approval of the facility site and the place of entry, are matters within the jurisdiction of the FERC.^{6/} Although the new proposed pipeline would mean a reduction in National's usage of MichCon's pipeline system, the proposed import does not preclude MichCon from making the unused pipeline capacity available to other customers or from competing for National's business. To conclude that National should not be allowed to reduce its usage of MichCon's system because the remaining customers would have to pay a greater portion of the fixed costs is speculative, as the FERC has also concluded,^{7/} and would mean that no one could ever reduce its usage or leave a pipeline system unless another customer

was immediately available to purchase the unused pipeline capacity. MichCon has not rebutted the presumption that the short-term, spot-market arrangements to be negotiated by National would be competitive and market-responsive. The ERA, therefore, finds that the proposed import would be competitive over the term of import authorization requested.

B. Need

Under the DOE guidelines, need is a function of competitiveness, and the gas is presumed to be needed if it is found to be competitive in the proposed market. In this case, the proposed gas import is competitive and is therefore presumed to be needed.

In rebuttal, MichCon argues that the imported gas is not needed because National has access to domestic supply sources through MichCon's system sufficient to meet all of its gas needs. Further, MichCon contends that National's request for authorization to import up to 25 Bcf of Canadian natural gas annually far exceeds the stated annual requirements of National's Great Lakes facility. These assertions, however, do not rebut the presumption that the gas is needed if it is competitive in the markets to be served. If the spot market gas which National seeks authorization to import is not competitive with domestic supplies, it will not be bought and will not be imported.

The fact that National has requested import authority for spot market gas for use at its Great Lakes facility in excess of stated annual requirements does not demonstrate that the gas is not needed to meet peak day deliverability requirements as asserted by National. The authorization requested, if granted, would merely permit National to take advantage of opportunities to purchase competitively-priced Canadian gas. It would not require National to purchase or import gas that is not needed. Accordingly, the ERA finds that MichCon has not presented any evidence that would provide the Administrator a basis on which to find that gas imported under the import authorization requested would not be needed.

C. Request for Trial-Type Hearing

MichCon requests a trial-type hearing to resolve the issues of the competitiveness and need for the proposed import, contending that there are material issues of fact to be resolved, including whether the proposed import will result in subsidization of National's gas costs by producers and consumers and whether competitiveness of the proposed import can be based on a significant reallocation of costs to other domestic gas consumers.

Section 590.313 of the ERA administrative procedures require any party filing a motion for a trial-type hearing to demonstrate that there are factual issues in dispute, relevant and material to the decision, and that a trial-type hearing is necessary for a full and true disclosure of the facts. No party is entitled as a matter of right to a trial-type hearing for policy or legal issues.

The ERA has examined the issues raised by MichCon in requesting a trial-type hearing and concludes that, however characterized by MichCon, their concerns relate to the DOE's policy of encouraging competition and the availability of alternative sources of competitively-priced gas. MichCon's assertion that National's gas costs will be subsidized by domestic producers is not logical since the actions of domestic producers or their loss of sales cannot subsidize gas which National purchases directly and transports outside of MichCon's supply system. Further, the public interest inquiry into the competitiveness of an import proposal focuses on whether a freely negotiated import arrangements, as proposed, and taken as a whole, provides the importer the flexibility to respond to market changes and thereby enhances competitive pressure on market participants. The possibility that National's reduced usage of MichCon's system may result in some reallocation of fixed costs does not demonstrate that the import arrangement is not competitive. Accordingly, the ERA does not believe that further illumination of the issues raised by MichCon would be materially aided by a trial-type hearing nor that such a hearing is necessary to assure the adequacy of the record or the fairness of this proceeding. Accordingly, the ERA has determined that a trial-type hearing would not be in the public interest and MichCon's request is therefore denied.

D. Environmental Determination

DOE guidelines for NEPA compliance^{8/} provide for three possible levels of environmental analysis, depending on the potential for environmental impact. In cases where there is clearly a potential for significant impact, an environmental impact statement (EIS) is prepared. In uncertain cases, an environmental assessment (EA) is prepared to determine if an EIS is needed. If it is determined that an EIS is not required, a Finding of No Significant Impact (FONSI) is prepared. In situations where 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. In this case, an EA was prepared by the FERC,^{9/} and after independently reviewing the analysis contained therein, the DOE has concluded that the proposed import of natural gas and the related construction and operation of a new pipeline running from Canada under the Detroit River to National's Great Lakes Steel facility does not constitute a major Federal action significantly affecting the quality of the human

environment. The DOE has prepared a FONSI to that effect, and it has been made part of the record in this docket.

IV. Conclusion

National's proposed arrangement for the import of Canadian gas, including the place of entry, is consistent with the DOE import policy guidelines. The fact that each spot sale will be voluntarily negotiated, short-term, and market-responsive, as asserted in National's application, provides assurance that it will be competitive and that no gas will be imported that is not needed. Moreover, the importer, National, is the only end user and will be a party to each freely negotiated sale. The import will provide National with flexibility in meeting its supply requirements at its Great Lakes Steel facility, including peak period deliverability needs. The establishment of alternative means for obtaining gas supplies via the new pipeline, in addition to service available from MichCon and Panhandle, enhances the diversity of suppliers of natural gas who are able to serve National's Great Lakes Steel facility. It is noted that the only opposition to the import comes from the current supplier, MichCon, who is in competition for the market to be served.

After taking into consideration all of the information in the record of this proceeding, I find that granting National blanket authority to import up to a maximum of 50 Bcf of Canadian natural gas over a two-year term is not inconsistent with the public interest and that the authorization requested should be granted. Consistent with our recent treatment of similar blanket applications, a total volume amount for the two-year period will be authorized with no daily or annual restrictions. This will increase the flexibility of spot-market importers to provide gas supplies to meet customer demand.

ORDER

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

A. National Steel Corporation (National) is authorized to import up to 50 Bcf of Canadian natural gas over a two-year period beginning on the date of the first delivery for use at National's Great Lakes Steel facility located at Ecorse and River Rouge, Michigan.

B. National shall notify the Economic Regulatory Administration (ERA) in writing of the date of the first delivery of natural gas imported under Ordering Paragraph A above within two weeks after the date of such delivery.

C. The request by Michigan Consolidated Gas Company for a trial-type hearing is denied.

D. With respect to the imports authorized by this Order, National 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 of the imports in MMcf and the average purchase and sales price per MMBtu at the international border. The report shall also provide the details of each transaction, including the names of the seller(s) and purchaser(s), estimated or actual duration of the agreement(s), transporter(s), points of entry, market(s) served, and, if applicable, the per unit (MMBtu) demand/commodity charge breakdown of the contract price, any special contract price adjustment clauses, and any take-or-pay or make-up provisions.

E. The motions to intervene as set forth in this Opinion and Order are hereby granted, provided that participation of the intervenors shall be limited to matters specifically set forth in their motions to intervene and not herein specifically denied, and that the admission of such intervenors shall not be construed as recognition that they might be aggrieved because of any order issued in these proceedings.

Issued in Washington, D.C., on July 11, 1988.

--Footnotes--

1/ 53 FR 4061, February 11, 1988.

2/ 15 U.S.C. Sec. 717b.

3/ 49 FR 6684, February 22, 1984.

4/ See e.g., Victoria Gas Corporation, 1 ERA Para. 70,739 (November 30, 1987); Texas Gas Marketing, Inc., 1 ERA Para. 70,740 (December 11, 1987); Associated Natural Gas, Inc., 1 ERA Para. 70,741 (December 11, 1987); JDS Energy Corporation, 1 ERA Para. 70,753 (January 28, 1988); Unicorp Energy, Inc., 1 ERA Para. 70,754 (January 28, 1988). Bishop Pipeline Corporation, Inc., 1 ERA Para. 70,759 (February 24, 1988); and Entrade Corporation, 1 ERA Para. 70,761 (March 3, 1988).

5/ See Panhandle Eastern Pipeline Company, FERC Opinion No. 275-A, 40 FERC Para. 61,220 (1987), rehearing denied, FERC Opinion No. 275-B, 42 FERC Para. 61,076 (1987).

6/ See DOE Delegation Order No. 0204-112 and Executive Order Nos. 10405 and 12038. A presidential permit was issued by the FERC on June 10, 1988, approving the application by National to construct and operate the proposed pipeline facilities on the international border between the U.S. and Canada. National Steel Corporation, FERC Docket No. CP88-80-000. Approval of the point of entry is not pending before the FERC in National Steel Corporation, FERC Docket No. CP88-79-000.

7/ Panhandle Eastern Pipeline Company, FERC Opinion No. 275-A, 40 FERC Para. 61,220 (1987); rehearing denied, FERC Opinion No. 275-B, 42 FERC Para. 61,076 at Para. 61,349 affirming in relevant part Initial Decision, 38 FERC Para. 63,009 at 65,036, 65-042-44 (1987), as cited in Answer of National Steel Corporation filed in this docket on March 29, 1988, at 2. The U.S. District Court, Western District of Michigan, Southern Division, in a decision issued June 16, 1988, upheld the FERC's jurisdiction over the bypass of MichCon's gas system issue and the preemption of state jurisdiction over that issue. National Steel Corporation and Panhandle Eastern Pipeline Company v. William E. Long et al., No. L87-30 CA5; Michigan Consolidated Gas Company and State of Michigan et al. v. Panhandle Eastern Pipeline Company, No. L87-46 CA5.

8/ 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; and 52 FR 47662, December 15, 1987).

9/ Environmental Assessment, National Steel Corporation, FERC Docket No. 88-79-000, March 7, 1988.