

Cited as "1 ERA Para. 70,811"

National Steel Corporation (ERA Docket No. 87-63-NG), September 9, 1988.

DOE/ERA Opinion and Order No. 251-A

Order Denying Rehearing

I. Background

On July 11, 1988, the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) issued DOE/ERA Opinion and Order No. 251 (Order 251),^{1/} in ERA Docket No. 87-63-NG, granting National Steel Corporation (National) blanket authority to import up to 50 Bcf of Canadian natural gas over a two-year period beginning on the date of first delivery for use at National's Great Lakes Steel facility located at Ecorse and River Rouge, Michigan.

A motion to intervene by Michigan Consolidated Gas Company (MichCon) ^{2/} opposed the application. MichCon contended that the price of the imported gas was not competitive with available domestic supplies and that the only savings occurring to National from the proposed import would be from the avoidance of the fixed costs of using MichCon's pipeline system by bypassing that system with National's new proposed pipeline. MichCon also contended that the import gas was not needed because National had access to domestic supplies through MichCon to meet all of its gas needs and because the authorization requested far exceeded National's stated annual requirements for its Great Lakes Steel facility. MichCon requested a trial-type hearing to resolve the issues of competitiveness and need for the proposed import, arguing that there were material issues of fact to be resolved, such as whether the proposed import would result in subsidization of National's gas costs by producers and consumers and whether competitiveness of the proposed import could be based on a significant reallocation of costs to other consumers.

Order 251 found the proposed import to be competitive and needed, denied MichCon's request for a trial-type hearing, and approved National's request for a blanket authorization to import up to 50 Bcf of natural gas over a two-year term. MichCon filed a request for rehearing of Order 251 on August 10, 1988.

In support of its application for rehearing, MichCon argues that the ERA erred in concluding that the proposed arrangement would be competitive and that the imported gas is needed, and in denying MichCon's request for a

trial-type hearing on the issues of competitiveness and need. MichCon contends that the ERA's findings and conclusions on these issues are not supported by substantial evidence nor by adequate analysis.

II. Decision

MichCon's rehearing request reargues the issues of competitiveness and need addressed in Order 251, but presents no information in its request for rehearing that would compel the ERA to reconsider its decision.

A. The Proposed Import is Competitive

MichCon argues that National's proposed import arrangement is different from other blanket imports authorized by the ERA because it constitutes not just a supplemental or alternative gas supply but a custom-tailored arrangement for a "separate, alternative structure for transportation and delivery of gas," made possible by the steel company's geographic proximity to the international border. In light of this difference, MichCon contends that ERA's analysis is deficient in basing its finding of competitiveness on the fact that the proposed import would provide National with another gas supply choice. MichCon states that there is a pervasive uncertainty as to what the ERA contemplates by its use of the terms 'competitiveness,' 'competition,' etc. in its application of the DOE guidelines to the present facts." 3/ The ERA must, MichCon argues, consider the impact of the proposed import on MichCon and its customers.

The ERA determined in Order 251 that the import arrangement proposed by National, including construction of the pipeline necessary to transport the gas, was not inconsistent with the public interest. This decision was based primarily on consideration of whether the import, as proposed, would be competitive, that is, whether National would be importing gas under terms that would be market responsive over the life of the agreement. This policy approach, upheld now by two U.S. appellate courts,4/ is the one clearly expressed and intended by the Secretary's import guidelines, and we find MichCon's "uncertainty" unjustified.

The policy presumes that buyers and sellers, if free from unnecessary governmental interference, will negotiate competitive arrangements. The import arrangement here offers an alternative gas supply that was sought out and freely negotiated by National, acting on the basis of its perception of its own needs. We believe that National's negotiated alternative is competitive and will provide National with secure, competitively-priced gas. Furthermore, the short-term, blanket structure that National proposes for implementing the

import enhances the flexibility and competitiveness of the arrangement. National's proposal does not require it to purchase the gas if the gas is not competitive with alternative sources of supply, and this decision, since National and not ratepayers will pay all the costs associated with this arrangement, necessarily will subsume consideration of the cost of constructing the pipeline facilities.

National has been a long-term and the largest gas customer of MichCon and this import proposal represents a bypass of the distributor's system. While MichCon is understandably concerned about protecting its markets, the DOE's policy is to promote, not to limit, competition. MichCon would have the ERA deny National the opportunity to take advantage of its geographic location in obtaining competitive alternative gas supplies because of the possibility other customers might have to pay a greater portion of the system's fixed costs. This result, if applied consistently, would freeze by government fiat the status of every customer on the system and clearly frustrate operation of the free market. MichCon's argument about cost shifting, a rate matter partly within MichCon's control and in this case within the jurisdiction of the Michigan Public Service Commission, does not rebut National's showing of competitiveness or otherwise demonstrate that this import is inconsistent with the public interest. We note that while increasing competition may result in loss of some options, it also opens up other opportunities for MichCon, such as transporting gas for others or brokering the pipeline capacity no longer needed to serve National's needs.

With respect to MichCon's request that the ERA grant rehearing of Order 251 "to identify the factors that must be demonstrated to rebut the presumption" of competitiveness that the ERA attaches to blanket import arrangements, the ERA points out that before rehearing is granted, it is incumbent upon the party seeking to rebut the presumption to first identify factors which the rehearing would illuminate. To grant rehearing in the hope that some yet unidentified factor will emerge to rebut the presumption of competitiveness would generate an unwarranted fishing expedition and shift the burden of proof which the presumption places on the party opposing the application.

The ERA points out, as it did in Order 251, that to the extent MichCon has specific questions or issues regarding the construction and operation of the proposed pipeline facilities, approval of these facilities is a matter pending at the Federal Energy Regulatory Commission (FERC) and MichCon should direct its concerns to that body. The ERA notes that the Canadian National Energy Board has approved construction of the Canadian end of the proposed pipeline and that the FERC has issued a Presidential permit authorizing

construction and operation of the proposed pipeline facilities on the international border between the U.S. and Canada.^{5/}

B. The Proposed Import is Needed

MichCon's contention that the ERA's finding of need for the imported gas lacks reasoned analysis is based on MichCon's view that 50 Bcf of natural gas is not required to operate National's steelmaking facility over a two-year period. The ERA observes, however, that if the imported gas is not competitive or if it is not required for National's steelmaking facility, National is under no obligation to import the gas. The authorization granted by Order 251 does not impose a requirement that a certain amount of gas must be imported. Nor does the proposed underlying short-term import arrangement. National simply has the flexibility to import up to 50 Bcf of natural gas over a two-year period to meet present and future requirements of its steelmaking facility.

C. MichCon's Request for a Trial-Type Hearing was Properly Denied

MichCon contends that the ERA erred in not granting a trial-type hearing on the issues of competitiveness and need for the proposed import, alleging that there are material issues of fact to be resolved.

MichCon argues that the ERA must consider the impact of National's import on MichCon's pipeline system, including whether the avoidance of fixed costs of transmission and distribution is an acceptable means of attaining a competitive price for natural gas. We have reexamined MichCon's arguments in support of this alleged error and, conclude, as we did in Order 251, that MichCon's concerns relate not to disputed issues of material fact but rather reflect MichCon's different perspective on the policy framework within which ERA should address the issues of competitiveness and need for the gas. MichCon has failed to demonstrate that further illumination of such questions would be materially aided by a trial-type hearing or that such a hearing is necessary to ensure the adequacy of the record or the fairness of this proceeding.

D. Conclusion

The ERA has determined that MichCon's application for rehearing presents no information that would merit reconsideration of our findings and conclusions in Order 251. Accordingly, this order denies MichCon's request for rehearing.

ORDER

For the reasons set forth above, pursuant to Section 3 and 19 of the Natural Gas Act, it is ordered that:

The application for rehearing of DOE/ERA Opinion and Order No. 251 filed by the Michigan Consolidated Gas Company is hereby denied.

Issued in Washington, D.C. on September 9, 1988.

--Footnotes--

1/ National Steel Corporation, 1 ERA Para. 70,786.

2/ MichCon is a local distribution company providing transmission, storage and local distribution of natural gas to customers within the state of Michigan. MichCon has been providing natural gas service to National for over 50 years.

3/ Application for Rehearing of Michigan Consolidated Gas Company, August 10, 1988, at 5.

4/ Panhandle Producers and Royalty Owners Association v. ERA, 847 F.2d 1168 (5th Cir. 1988); Panhandle Producers and Royalty Owners Association v. REA, 822 F.2d 1105 (D.C. Cir. 1987).

5/ The FERC issued the Presidential permit on June 10, 1988, FERC Docket No. CP88-80-000. Approval of construction of the proposed pipeline by the FERC under Section 3 of the Natural Gas Act is pending before the FERC in National Steel Corporation, FERC Docket No. CP88-79-000. As a part of its review of the National Steel pipeline the FERC prepared an Environmental Assessment (EA) of the project to comply with the requirements of the National Environmental Policy Act of 1969. The ERA independently reviewed that EA and concluded that the National Steel facility did not constitute a major Federal action significantly affecting the quality of the human environment and prepared a Finding of No Significant Impact to that effect.