

Cited as "1 FE Para. 70,208"

Midland Cogeneration Venture Limited Partnership (ERA Docket No. 88-39-NG), March 31, 1989.

DOE/FE Opinion and Order No. 305

Order Granting a Short-Term Authorization to Import Natural Gas from Canada and Granting Interventions; Conditional Order Granting a Long-Term Authorization to Import Natural Gas from Canada

### I. Background

On January 5, 1988, Midland Cogeneration Venture Limited Partnership (Midland) filed an application with the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) pursuant to Section 3 of the Natural Gas Act and DOE Delegation Order No. 0204-111,1/ for authorization to import from four Canadian suppliers up to an aggregate daily contract quantity of 55,000 Mcf per day of Canadian natural gas over a 15-year term beginning on the date of initial firm deliveries in 1990. Midland also requests authorization to import up to 51,500 Mcf per day on an interruptible basis beginning in 1989 and ending in 1990 on the date of initial firm deliveries. The interruptible deliveries of gas would be used for testing a new cogeneration facility to be constructed in Midland County, Michigan, by conversion of a portion of the idled Midland nuclear plant. Firm deliveries of gas would be used to fuel commercial operation of the new facility after construction has been completed.

The Midland facility will sell electric power to Consumers Power Company (Consumers) and steam and electric power to Dow Chemical U.S.A.'s Michigan Division (Dow). If Midland is unable to take all of the imported gas contracted for due to conditions of force majeure or due to any cause which renders Midland unable to use all of the imported gas, Midland requests authority to assign its import authorization to third party purchasers within the U.S. Midland is a limited partnership which was formed by CMS Energy Corporation to acquire and convert a portion of the idled Midland nuclear project owed by Consumers into a 1370 megawatt (MW) cogeneration facility.

Under the import proposal set forth in its application, Midland would import Canadian gas pursuant to natural gas purchase agreements with the following four Canadian suppliers under which natural gas would be supplied to Midland from the date of first firm deliveries: (1) from Norcen Energy Resources Limited, up to 6500 Mcf per day through November 1, 1994, and thereafter up to 10,000 Mcf per day over a term of 12 years, or through November 1, 2001, whichever is earlier; (2) from Shell Canada Limited, up to 15,000 Mcf per day for 15 years or such earlier date as may be required by

U.S. or Canadian regulatory authorities; (3) Canterra Energy Ltd., up to 15,000 Mcf per day through December 31, 2004; and (4) from TransCanada PipeLines Limited (TransCanada), up to 15,000 Mcf per day for 15 years, or such earlier date as may be required by U.S. or Canadian regulatory authorities.

Under each of the four gas purchase agreements, the respective Canadian suppliers will have the gas transported in Canada to the point of import near Emerson, Manitoba, via the pipeline systems of Northwestern Utilities Limited (Northwestern), NOVA Corporation of Alberta (NOVA) and TransCanada. Transportation of the gas from the international border to Midland will be through the pipeline systems of Great Lakes Transmission Corporation (Great Lakes), Consumers, and Michigan Gas Storage Company (Michigan). While no new U.S. facilities will be required for the interruptible gas service to begin in 1989, Midland believes that the looping of approximately 83.2 miles of 36-inch pipeline facilities of Great Lakes will be required for firm gas service commencing in 1990. In addition, Midland will construct approximately 25 miles of 26-inch pipeline between its proposed new cogeneration plant and a new point of interconnection with the facilities of Michigan, located in Isabella County, Michigan.

Construction of the new cogeneration facility is expected to be completed by 1990 at which time initial firm operations of the plant are scheduled to begin. Full operation of the plant as a 1370-MW cogeneration facility is scheduled for 1996. When completed, the cogeneration facility will be operated by Midland as a "qualified facility" under Section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>2/</sup> The imported gas would satisfy a portion of the long term natural gas supply requirements needed to operate the cogeneration facility.

Under the natural gas purchase agreements, Midland is obligated to take a minimum annual quantity of natural gas equal to 75 percent of the total of the maximum daily quantities for the contract year but may make up any deficiency incurred in a particular contract year during the immediately succeeding contract year. If, because of conditions of force majeure, or other cause, Midland is unable to use its total firm contract supply, the natural gas purchase agreements permit Midland to assign its contract supply rights to third party purchasers within the U.S. in order to mitigate the impact of the situation upon Midland and its Canadian suppliers. Midland may also be excused from meeting its minimum annual quantity requirement if unable to take the gas because of conditions of force majeure or because of nonperformance by the gas suppliers.

According to the applicant, each natural gas purchase agreement provides for a market-responsive pricing mechanism under which the commodity price for the imported gas is indexed to track Consumers' monthly energy charges

associated with the fixed and variable expenses of producing electric power. This is accomplished by use of a monthly reference price computed by multiplying \$1.95 (U.S.) per MMBtu by a fraction consisting of the monthly fixed and variable expenses of producing electric power for the last month of the previous calendar quarter in the numerator and 2.29 cents per kilowatt hour (U.S.) in the denominator. Midland asserts that by indexing the price of the imported gas to reflect any changes in the net fuel equivalent of the avoided cost rate generated power, the price formula will ensure that the imported gas is a competitively-priced component of Midland's cost for generated power and will result in a commodity price for the gas as of July, 1988, ranging from \$1.54 per MMBtu under the TransCanada purchase agreement at a load factor of over 85 percent to \$1.64 per MMBtu under the Norcen agreement.

Further, under the gas purchase agreements, the demand charge portion of the two-part rate consists of the monthly demand charges of Northwestern, NOVA and TransCanada for transportation of the gas in Canada. The applicant contends that the Canadian demand charges are comparable to the typical payment required to cover the cost of upstream transportation of domestic natural gas.

Midland asserts that need for the gas is shown not only by its marketability but also by the requirement for gas to operate the new cogeneration facility in order to supply power under its firm, long-term power supply contracts with Consumers and Dow. Midland asserts that security of supply is shown by the proximity of Midland's proposed cogeneration facility to the Canadian border and by contractual provisions in the gas purchase contracts under which the respective Canadian suppliers are committed to the reliability of the gas supply through a "Corporate Warranty." Under the warranty provisions, if the respective Canadian suppliers fail to deliver at least 90 percent of the daily contract quantity requested, Midland has the option to reduce monthly demand quantities without penalty with corresponding reductions in or indemnification for monthly demand charges that Midland would otherwise incur with respect to the delivery shortfall. The gas purchase contracts also provide for the respective Canadian suppliers to reimburse Midland for any additional costs incurred in obtaining alternate gas supplies to replace any delivery shortfall.

The ERA issued a notice of the application on August 30, 1988, inviting protests, motions to intervene, notices of intervention, and comments to be filed by October 11, 1988.<sup>3/</sup> Motions to intervene without comment or request for additional procedures were filed by Michigan Consolidated Gas Company, ANR Pipeline Company, and TransCanada. TransCanada's motion was filed one day late. The DOE has determined that TransCanada's filing one day out of time will not adversely affect any party. Accordingly, this order grants intervention to all movants.

## II. Decision

### A. Section 3 Considerations

The application of Midland has been evaluated to determine if the proposed import arrangement meets the public interest requirements of Section 3 of the NGA. Under Section 3, an import must be authorized unless there is a finding that it "will not be consistent with the public interest." 4/ The DOE is guided by its natural gas import policy guidelines,5/ under which the competitiveness of an import in the markets served is the primary consideration in meeting the public interest test. The DOE also considers, particularly in long-term arrangements such as this, need for and the security of the imported supply.

The DOE has determined that Midland's proposed import arrangement is consistent with its natural gas policy guidelines. The competitiveness of the imported gas is assured by a pricing mechanism in Midland's gas purchase contracts under which the commodity price for the imported gas will reflect any changes in the net fuel equivalent of the avoided cost rate for generated power. The applicant asserts that under this mechanism the price of imported gas would automatically reflect changes in the prices of available alternative fuels in the market area and would insure that the gas was marketable by Midland as part of its fuel costs for generated power. Further, the applicant asserts that the demand charges for transportation of the imported gas are comparable to demand charges for upstream transportation of domestic gas. No party has questioned these assertions.

In return for firm supplies, the gas purchase contracts obligate Midland to take a minimum annual quantity of natural gas equal to 75 percent of the maximum daily quantities. The impact of this obligation on the competitiveness of the proposed import is minimized by the following factors: (1) Midland may make up any deficiency incurred in a particular contract year during the immediately succeeding contract year; (2) if Midland is unable to use its total firm contract supply for any reason, Midland may have the gas sold to third party purchasers within the U.S.; and (3) if Midland does not meet its minimum annual take obligation because of conditions of force majeure or failure of the suppliers to deliver the gas, Midland may be relieved from its minimum take obligations to the extent of the impact of such mitigating factors. Therefore, the DOE concludes that the proposed import should remain market-responsive over the term of the authorization requested.

Further, Midland has demonstrated that the gas is needed. Under the policy guidelines, imported gas that is shown to be competitive is presumed to be needed. This presumption is uncontested in this proceeding and is supported by the fact that the new proposed cogeneration facility will create new demand for gas when it commences operations.

There is no dispute with respect to the security of the Canadian supply of natural gas nor of the ability of any of the gas suppliers to supply the gas to Midland. Reliability of the Canadian sources of gas is further supported, as Midland notes, by the proximity of the proposed cogeneration facility to the Canadian border and by the contractual warranty obligations of the suppliers under which they must deliver at least 90 percent of the daily contract quantities requested or suffer the penalty of having to reimburse Midland for any additional costs incurred in obtaining alternate supplies of gas to replace the delivery shortfall. Accordingly, the DOE finds that this import will not lead to any undue dependence on an unreliable source of supply nor otherwise compromise the energy security of the nation over the term of the proposed import.

Finally, Midland intends to consume the gas imported under this arrangement at a cogeneration project which has been certified by the FERC as a "qualifying facility" in accordance with PURPA.<sup>6/</sup> Congress, in enacting PURPA, intended to encourage the development and operation of cogeneration facilities as a matter of national energy policy. This import arrangement provides for a competitive long-term gas supply commitment which the applicant states is necessary to operate the cogeneration facility, and thus is in accord with the PURPA policy.

Midland also requests that it be granted authority to assign the import authorization to third party purchasers within the U.S. in the event that Midland is unable to use or receive its full firm contract quantities of gas due to conditions of force majeure or due to any cause which renders it unable to use its total firm contract supply of gas. Under Section 590.405 of the DOE's administrative procedures, import authorizations are not transferable or assignable unless specifically authorized by the DOE. Requests for transfer or assignment of an import authorization to unknown third parties are not granted since the DOE could not effectively administer Section 3 of the NGA without knowing who is responsible for complying with the reporting requirements and other terms of the authorization. Midland's request is therefore denied. This denial does not preclude Midland from requesting a short-term authorization to import part of its annual contract quantities for sale to third party purchasers or from requesting transfer or assignment of the import authorization at a later time to a specifically identified third party.

## B. Environmental Determination

The National Environmental Policy Act of 1969 (NEPA) <sup>7/</sup> requires federal agencies to give appropriate consideration to the environmental effect of their proposed actions.<sup>8/</sup> With respect to Midland's request for authority to import up to 55,000 Mcf per day of natural gas on a firm basis beginning in 1990, the issuance of several major permits and authorizations are required before Midland's proposed project may proceed; among them is the DOE

authorization under Section 3 of the NGA to import gas from Canada to be used at the cogeneration facility and the FERC authorization under Section 7 of the NGA for Great Lakes to upgrade its existing pipeline facilities to transport the natural gas proposed to fuel the cogeneration facility. The FERC has the lead in preparing the environmental analysis required to assess the impacts of constructing and operating Great Lakes' new pipeline facilities. When the appropriate environmental documentation is completed by the FERC, we will independently review the analysis and take the appropriate action to complete the DOE's NEPA responsibilities. The approval of the request to import natural gas for firm deliveries beginning in 1990 is therefore conditioned on completion of the environmental review of those facilities. At that time we will reconsider this conditional order and issue a final opinion and order.

This conditional order indicates to the parties the DOE's determination at this time on all but the environmental issue in this proceeding. However, all parties are advised that the issues addressed herein regarding the import of natural gas will be reexamined at the time of the DOE's review of the FERC NEPA analysis. The results of that reexamination will be reflected in the final opinion and order.

### C. Conclusion

After taking into consideration all the information in the record of this proceeding, I find that granting Midland authority to import up to 51,500 Mcf per day of Canadian natural gas on an interruptible basis beginning in 1989 and ending in 1990 is not inconsistent with the public interest. I also find that granting Midland conditional authority to import up to 55,000 Mcf per day of Canadian natural gas over a 15-year period beginning on the date of initial firm delivery is not inconsistent with the public interest.

### ORDER

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

A. Midland Cogeneration Venture Limited Partnership (Midland) is authorized to import up to 51,500 Mcf per day of Canadian natural gas on an interruptible basis beginning in 1989 and ending in 1990, in accordance with the arrangement proposed in the application in this proceeding as discussed in this Opinion and Order.

B. Subject to the condition in Ordering Paragraph C, Midland is authorized to import up to an aggregate daily contract quantity of 55,000 Mcf of Canadian natural gas over a 15-year period beginning on the date of initial firm delivery in accordance with the arrangement proposed in the application in this proceeding as discussed in this Opinion and Order.

C. The authorization in Ordering Paragraph B is conditioned upon entry of a final opinion and order after review by the Department of Energy (DOE) of the environmental documentation being prepared by the Federal Energy Regulatory Commission and the completion by the DOE of its National Environmental Policy Act responsibilities.

D. Midland's request for authorization to transfer or assign the authorization granted in this Order to unidentified third party purchasers is denied.

E. Midland shall notify the Office of Fuels Programs, Fossil Energy, Room 3F-056, FE-50, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585, in writing of the date of initial interruptible delivery of natural gas imported under Ordering Paragraph A and of the date of initial firm delivery of natural gas imported under Ordering Paragraph B herein within two weeks after deliveries begin.

F. With respect to the imports authorized by this Opinion and Order, Midland shall file with the Office of Fuels Programs within 30 days following each calendar quarter, quarterly reports showing, by month, and by contract, the total volume of natural gas imports in Mcf and the average purchase price per MMBtu at the international border. The monthly pricing information shall include a demand/commodity charge breakdown on a monthly and per unit (MMBtu) basis.

G. The motions to intervene, as set forth in this Opinion and Order, are hereby granted, provided that participation of such 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.

H. The authorization granted in Ordering Paragraph B is subject to the condition stated in Ordering Paragraph C, the resolution of which may result in further conditions imposed in subsequent proceedings in this case. Midland and intervenors in this proceeding shall be bound by any Opinion and Order issued in such subsequent proceedings.

Issued in Washington, D.C., on March 31, 1989.

--Footnotes--

1/ On January 6, 1989, the authority to regulate natural gas imports and exports was transferred from the ERA to the Assistant Secretary for Fossil Energy. DOE Delegation Order No. 0204-127 specifies the transferred functions (54 FR 11436, March 20, 1989).

2/ 16 U.S.C. 824a-3. The cogeneration facility was certified by the Federal Energy Regulatory Commission (FERC) as a qualified facility under PURPA, March 12, 1987 (FERC Docket No. QF-237), based on a filing by CMS Midland, Inc., acting as agent for Midland. Consumers, also acting as agent for Midland, filed with the ERA a Certificate of Compliance pursuant to the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 96-620 (November 9, 1978), as amended by Pub. L. 97-35 (August 13, 1981), as amended by Pub. L. 100-42 (May 22, 1987). See Notice of Certification, 52 FR 41762, October 30, 1987.

3/ 53 FR 34811, September 8, 1988.

4/ 15 U.S.C. Sec. 717b.

5/ 49 FR 6684, February 22, 1984.

6/ See supra note 1.

7/ 42 U.S.C. 4321, et seq.

8/ NEPA compliance with respect to Midland's request for authority to import natural gas on an interruptible basis using existing facilities has been addressed previously (54 FR 8797, March 2, 1989).