



**United States  
Department of Justice**

---

**REPORT OF  
THE ATTORNEY GENERAL  
TO THE PRESIDENT OF  
THE UNITED STATES**

---

**PURSUANT TO SECTION 6 OF THE**

**ALASKA  
NATURAL GAS  
TRANSPORTATION  
ACT OF 1976**

---

REPORT OF THE ATTORNEY GENERAL  
TO THE PRESIDENT

REPORT

OF THE

ATTORNEY GENERAL

TO THE

PRESIDENT

Pursuant to Section 6

Of The

Alaska Natural Gas Transportation Act of 1976

July, 1977

REPORT OF THE ATTORNEY GENERAL  
TO THE PRESIDENT

---

This Report is submitted to the President pursuant to Section 6 of the Alaska Natural Gas Transportation Act of 1976. Section 6 of the Act directs that any Federal officer or agency may submit written comments to the President with respect to the recommendation and report of the Federal Power Commission and alternative methods for transportation of Alaska natural gas for delivery to the contiguous states. \*/ This Report is principally concerned with item (6) -- the impact upon competition of the respective proposed transportation systems.

The Department of Justice has done an extensive analysis of this subject in the Report of the Attorney General submitted to the Congress pursuant to Section 19 of the Act. Rather than repeat what already has been said therein, we are appending a copy of our Report to Congress. We believe that the contents of that Report fully set forth the antitrust implications of the various proposed projects.

The remainder of this Report will summarize briefly the areas of agreement or disagreement with the Federal Power Commission's competitive analysis in its Recommendation to the

---

\*/ Attorney General Bell did not participate in the preparation of this Report due to conflict of interest considerations. Responsibility for this Report was delegated by Mr. Bell to Deputy Attorney General Flaherty.

President. Also, in accordance with Section 6(c) we discuss the question of waiver of law.

I. IMPACT ON COMPETITION: SUMMARY OF RECOMMENDATIONS OF THE FEDERAL POWER COMMISSION AND THE DEPARTMENT OF JUSTICE

The Federal Power Commission concludes generally that the certification of any one of the proposed systems will not have a significant impact upon competition among pipelines. The Department has reached the same overall conclusion.

The Commission has encouraged the participation of producers of substantial amounts of gas in the pipeline joint venture in order to contribute their significant financial resources to aid in the financing of the pipeline. The Department disagrees. We have recommended in the Report to Congress that an ownership interest, or participation in any form in the transportation system, by producers of significant amounts of natural gas, or their subsidiaries or affiliates, should be prohibited. The license to be issued to the selected system should contain a condition which prevents participation in any manner by such gas producers.

The Federal Power Commission has stated that it is strongly in favor of widespread distribution of Alaskan natural gas in order to limit reliance on Alaskan gas, to create incentives for participation in displacement arrangements and to provide easier private financing. The Department has stated that if, because of continued wellhead price regulation, market forces are not

permitted to operate to allocate gas in the most efficient manner, then the possibility of a regulatory allocation mechanism should be examined if widespread distribution of Alaskan natural gas is believed to be in the national interest.

The Commission is of the view that Section 13(a) imposes common carrier obligations upon the selected transportation system. The Commission indicates that this is a procompetitive result but may impact adversely upon the ability of the system to secure private financing. The Department disagrees. Section 13(a) of the Act provides for equal access to the gas transportation system based upon ownership or lack thereof. But it is unclear whether this provision was intended to create common carrier status for the transportation system. It is our view that common carrier status for all facilities constructed or utilized as an integral part of the system carrying gas to the lower 48 states is desirable and Section 13(a) should be clarified to unambiguously create such status. Additionally, we do not view Section 13(a) to be an impediment to private financing. Moreover, to ensure the equal access provided for by Section 13(a), Congress should consider legislation to grant the Commission, or its successor agency, the authority to order prorationing of pipeline capacity among shippers when gas is available in excess of pipeline capacity.

The Federal Power Commission approves of displacement arrangements as the most efficient mechanism for distribution of

the Alaskan gas. The Commission, however, is fearful that such arrangements could create the potential for collusive market conduct. Thus the Commission would permit only those practices which are indispensable to the successful operation of the displacement procedure. The Department agrees that the efforts to work out displacement schemes may produce collusive behavior. We have recommended that if a system requiring displacement of gas is authorized, Government agencies should monitor any meetings of the transmission companies concerning reallocation. The plans for the meetings and the displacement programs resulting from the meetings should be subject to scrutiny and approval by Government agencies.

The Commission indicates that as a result of the implementation of an all-events, cost-of-service tariff, the producers may be able to exercise market power over the shippers if the producers know that whatever price they charge will be passed on to the consumer. The Department, on the other hand, is concerned that the proposed pipeline capacities be evaluated carefully since the potential for adoption of an all-events cost-of-service tariff has diminished the incentives of the proponents to properly determine and propose the most efficient pipeline size.

The Commission indicates that the contracting process for the purchase of Alaskan gas has not been competitive. Among the elements the Commission points to as indicative of the noncompetitive nature of this process is the existence of side

arrangements. The Commission has concluded that in the absence of full-fledged price competition, the producers have used side arrangements as a means of favoring companies which can provide other benefits. The use of a widespread distribution scheme may reduce the likelihood of such restrictive side arrangements. The Department's view is somewhat different. To minimize the distortion of Commission regulation from side arrangements for various forms of compensation collateral to sales contracts for Alaskan gas, such arrangements should be disclosed and subjected to Commission scrutiny. As long as there is wellhead price regulation, the Commission, or its successor agency, should examine carefully each Alaskan gas purchase contract and disapprove or condition each such contract that it finds not in the public interest. In addition to the recommendations in the Report to Congress, we note further that the Commission should assess the impact of such arrangements in various producing fields because of the widespread existence of "favored-nation" clauses. Price increases which at first may appear innocuous, may have a greater impact throughout the field due to price increases in other contracts with such clauses.

In summary, while the Department agrees with the Commission's overall conclusion that certification of any of the proposed transportation systems will not have any significant impact upon competition, we have indicated our differences with other conclusions. We urge the President to consider each of these matters carefully

and to append to any license the conditions we have suggested in our Congressional Report and which have been reiterated in this Report.

## II. WAIVERS OF LAW

Section 6(c) of the Act directs each Federal officer or agency to report to the President actions to be taken by such officer or agency necessary or related to the construction and initial operation of the approved transportation system and to include recommendations with respect to any provision of law to be waived upon recommendation by the President to the Congress. It is the Department's view that no action must be taken by the Attorney General under section 9(a) of the Act -- action which is necessary or related to the construction and initial operation of the approved transportation system. Furthermore, it is the Department's view that none of the antitrust laws should be waived by the President.

Section 14 of the Act states

Nothing in the Act, and no action taken hereunder, shall imply or effect an amendment to, or exemption from any provision of the antitrust laws.

It is plain from this provision that Congress did not mean for the antitrust laws to be waived in any manner and intended that they remain in full force and effect.

Many of the competitive effects indicated in the accompanying Report are prospective in nature. Thus, their full impact



may not be known until the transportation system is built and operating. In light of this situation, it is the Department's view that none of the antitrust laws should be waived. The transportation system and its owners ought to be subjected to the full panoply of the antitrust laws and their possible enforcement should any violations of these laws appear in the future.

### III. CONCLUSION

I conclude that antitrust considerations do not militate against selection of any of the three proposed projects as the transportation system for moving Alaskan natural gas to the lower 48 states; nor do competitive considerations point to selection of one of the three projects in preference of the other two. The problems we have identified in this Report and our Report to Congress may impact on any selected project and, therefore, do not make one project seem more desirable than the others.

We have proposed several conditions which ought to be appended to a license issued to any of the proposed transportation systems. These recommendations are in the Report to Congress appended to this Report and are summarized in the Conclusion of the appended Report.

Respectfully submitted,

  
PETER F. FLAHERTY  
Deputy Attorney General