

108 FERC ¶ 61,327
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Dominion Cove Point LNG, LP

Docket No. RP03-564-002

ORDER ACCEPTING AND SUSPENDING
NEGOTIATED RATE AGREEMENT SUBJECT TO CONDITIONS

(Issued September 30, 2004)

1. On August 31, 2004, Dominion Cove Point, LNG, LP (Cove Point) filed a negotiated rate agreement with Statoil Natural Gas, LLC (Statoil). Cove Point requests an effective date of September 1, 2004. The Commission accepts and suspends the negotiated rate agreement to become effective on September 1, 2004, subject to refund, conditions and further review. This order benefits customers because it will ensure that the proposed negotiated rate agreement complies with the Commission negotiated rate policy.

Details of Cove Point's Filing

2. Cove Point states that the proposed negotiated rate agreement amends Statoil's October 9, 2002 Rate Schedule LTD-1 service agreement¹ by modifying the applicable reservation rates. Cove Point also states that Statoil has agreed to pay higher reservation rates to reflect additional costs related to Cove Point's reactivation of its liquefied natural gas (LNG) import terminal. As part of the negotiated rate agreement, Cove Point states that it agreed to certain limitations on its ability to seek to recover additional terminal reactivation costs from Statoil in a future general rate case filing. The negotiated rate agreement will have a primary term of five years. According to Cove Point, the negotiated rate agreement does not modify any terms of service other than the reservation rates applicable to Statoil. Cove Point states that the negotiated rate agreement provides

¹ This agreement was originally executed between Cove Point and El Paso Merchant Energy, L.P., and subsequently acquired by Statoil on December 3, 2002 through a capacity release and assignment. See note 1 at *Cove Point*, 102 FERC ¶ 61,227 (2003).

Statoil with a Right of First Refusal (ROFR) for its LTD-1 service quantities which is “substantially identical to FERC’s regulatory ROFR regardless of the approval of the negotiated rate for recovery of the existing reactivation costs.”²

3. The Commission has approved various Settlements between Cove Point and its customers which, among other things, established the rates for the reactivation of its LNG facility, the associated costs for the construction and the reactivation, construction of a fifth storage tank, and the rates under a cost of service methodology for new firm and interruptible tanker discharge services under Rate Schedules LTD-1 and LTD-2.³ Statoil or its predecessor was a party to the various Settlement Agreements establishing Rate Schedule LTD-1 service. The proposed negotiated rate agreement contains an interim initial maximum reservation rate of \$8.0500 per Dth that would be in effect September 1, 2004 to December 31, 2004 prior to the fifth LNG storage tank being placed into service.⁴ If the fifth tank is placed into service prior to December 31, 2004, then the maximum reservation rate would be \$8.8071 per Dth. Further, after December 31, 2004, but prior to the fifth storage tank being placed into service, the maximum reservation rate would be \$7.0180 per Dth. Additionally after December 31, 2004, and after the fifth storage tank is placed into service, the maximum reservation rate will be \$7.7701 per Dth. The negotiated rate agreement did not provide receipt and delivery points nor the volumes associated with the negotiated rate agreement. Cove Point has initiated a pre-filing process in Docket No. PF04-15-000 to propose construction of a sixth storage tank.

Notice, Interventions and Protests

4. Notice of Cove Point’s filing was issued on September 3, 2004 with interventions, comments or protests due on or before September 13, 2004,⁵ as provided in section 154.210 of the Commission’s regulations. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2004)), all timely motions to intervene are granted and any motions to intervene out of time are granted as of the date of this order. Shell NA LNG, LLC (Shell) filed comments on the filing and BP Energy Company (BP Energy) (collectively Protesters) protested the filing.

² Dominion Cove Point, Negotiated Rate Agreement, paragraph 6.

³ *Cove Point*, 97 FERC ¶ 61,043 (2001); *order granting and denying reh’g in part, granting and denying clarification*, 97 FERC ¶ 61,276 (2001); *order denying reh’g and granting and denying clarification*, 98 FERC ¶ 61,270 (2002); and *order approving uncontested amendment to settlement and settlement*, 102 FEC ¶ 61,227 (2003).

⁴ The 5th storage tank is currently under construction but has yet to be placed into service.

⁵ 69 Fed. Reg. 54722 (2004).

5. On September 17, 2004 and September 20, 2004, respectively, Cove Point and Statoil filed motions for leave to answer and an answer to the comments and protests of Shell and BP Energy, respectively. On September 22, 2004, Shell filed a reply to the answers of Cove Point and Statoil. While the Commission's Rules of Practice and Procedure, (18 C.F.R. § 385.213(a)(2) (2004)), generally prohibit answers to protests, the Commission will accept Cove Point, Statoil, and Shell's answers to provide a better understanding of the issues in this proceeding.

Discussion

6. The Commission accepts and suspends the filing to be effective September 1, 2004, subject to the conditions discussed below.

I. Requiring additional information to evaluate the application

A. Protests

7. The Protesters contend that Cove Point should be required to file additional information in order to evaluate the negotiated rate service agreement. Specifically, the Protesters request that Cove Point be required to file various agreements including: LTD-1 Service Agreement dated October 9, 2002; Letter of Intent (LOI) dated January 27, 2004 with Statoil, as modified by letter dated January 29, 2004; and definitive agreements related to the expansion of the LNG terminal dated June 15, 2004. The Protesters argue that without this information, the Commission is unable to determine whether the negotiated rate agreement is consistent with the Commission's regulations and therefore the negotiated rate agreement should be rejected. The Protesters further contend this information is necessary to ensure that Cove Point is not engaging in any unjust, unreasonable, unduly discriminatory, or preferential practice in violation of the Natural Gas Act. Shell asserts that Cove Point is apparently intending to argue that the *Hackberry*⁶ approach applies for the expansion capacity and that the Commission has yet to authorize the use of the *Hackberry* approach for the expansion of Cove Point's existing LNG terminal. Shell contends that the Commission should not prematurely review one aspect of a complex and integrated arrangement on the basis of inadequate and incomplete submissions to the Commission by Cove Point.

⁶ *Hackberry LNG Terminal, L.L.C.*, 101 FERC ¶ 61,294 (2002), finding that a different form of regulation which permits the LNG facility to operate under rates, terms, and conditions which are mutually agreed to by the parties will better serve the public interest than the traditional open-access approach that the Commission has applied previously to LNG import facilities.

B. Cove Point's Answer

8. Cove Point contends that the Statoil negotiated rate agreement is entirely self-contained and its implementation is not dependent or contingent upon any other agreements. Cove Point further contends that it did not seek to adopt any terms affecting Statoil's service under Rate Schedule LTD-1 other than those fully disclosed in the Statoil negotiated rate agreement. Cove Point argues that the June 15, 2004 negotiated rate agreement, which supersedes the January 27, 2004 LOI, is related to the expansion of Cove Point's LNG facility, does not affect the Statoil negotiated rate agreement filed in the instant proceeding, and that concerns with the expansion service should be addressed in the pre-filing process underway in Docket No. PF04-15-000. Furthermore, Cove Point contends that the January 27, 2004 LOI agreement is highly confidential and commercially sensitive and that disclosure to anyone, especially to Shell and BP Energy (who are competitors both of Statoil as LNG importers and of Cove Point as potential developers of import terminals), would be extremely prejudicial to Cove Point and Statoil.

C. Commission Ruling

9. In order to evaluate the proposed negotiated rate proposal, the Commission and parties must be able to review and understand any agreements that are relevant to an analysis of the justness and reasonableness of the negotiated rate agreement. Accordingly, Cove Point is required to file the LTD-1 Service Agreement dated October 9, 2002. Cove Point is also directed to explain and provide the volumes and receipt and delivery points of LTD-1 service for Statoil, which is required by the Commission's negotiated rate requirements.⁷ Further, Cove Point should explain the service that will be provided for Statoil from its fifth storage tank and explain how the proposed service is consistent with the various Settlements addressing assignment of capacity and service on Cove Point's system. Cove Point should also explain its reference in item 5 of the negotiated rate agreement which refers to the "New" rates contemplated in the LOI. This information will provide a greater understanding of the negotiated rate proposal to determine whether the proposal is just and reasonable.

10. In addition, in order for the Commission to determine whether the LOI dated January 27, 2004 with Statoil, as modified by letter dated January 29, 2004 and the definitive agreements related to the expansion of the LNG terminal dated June 15, 2004 are relevant to an analysis of the negotiated rate agreement, Cove Point must file these agreements with the Commission. Cove Point may request privileged treatment of these agreements pursuant to section 388.112 of the Commission's regulations.

⁷ *Columbia Gas Transmission Corporation*, 97 FERC ¶ 61,221 at 62,002 (2001).

II. Does Cove Point have authority to include a Right of First Refusal (ROFR) provision in the negotiated rate agreement?

A. Protests

11. Shell argues that since Cove Point does not have a ROFR provision in its tariff that is applicable to negotiated rate agreements, Statoil should not be entitled to a ROFR in the proposed negotiated rate agreement and its inclusion in the agreement constitutes an impermissible negotiation of terms and conditions of service in violation of Commission policy and Cove Point's FERC Tariff. Shell contends that since Cove Point's tariff specifies that a ROFR is available only to a shipper who is "receiving firm service at the maximum applicable rate,"⁸ and that a negotiated rate cannot be deemed a maximum rate,⁹ Statoil can not receive a ROFR provision under the proposed negotiated rate agreement.

B. Cove Point's Answer

12. Cove Point contends that it does have tariff authority to provide a contractual ROFR and that section 4(i) of its General Terms & Conditions provides that "Service Agreement shall be subject to pregranted abandonment unless otherwise specified therein."¹⁰ Cove Point states that if the Commission deems this provision to be insufficiently clear, it is willing to add to its tariff a provision that Cove Point may grant a ROFR for firm service agreements not covered by section 4(g) (which generally established the "regulatory ROFR") on a not unduly discriminatory basis. Cove Point indicates that it would add another blank in its *pro forma* service agreement for a ROFR were the Commission to find that necessary.

C. Commission Ruling

13. The Commission finds that Cove Point should revise its tariff to provide that it may offer a ROFR provision on a not unduly discriminatory basis to firm customers not eligible for the ROFR provided in section 4(g) of Cove Point's General Terms and

⁸ See Original Sheet No. 214, section 4(g) to Cove Point's FERC Gas Tariff, Original Volume No. 1.

⁹ See First Revised Sheet No. 283, section 29.4 to Cove Point's FERG Gas Tariff, Original Volume No. 1.

¹⁰ See Original Sheet No. 215 to Cove Point's FERC Gas Tariff, Original Volume No. 1.

conditions.¹¹ Cove Point's tariff does not now explicitly permit it to negotiate such a contractual ROFR provision. Accordingly, the Commission will accept Cove Point's negotiated rate proposal contingent upon Cove Point amending its tariff to make a contractual ROFR available to shippers on a not unduly discriminatory basis. Further, Cove Point, consistent with its offer to add a blank in its *pro forma* service agreement, is directed to revise its *pro forma* service agreement to include a ROFR clause.

III. Does the proposed negotiated rate adversely affect the rates of other Rate Schedule LTD-1 shippers?

A. Protests

14. Shell contends that as a result of various Settlements, the Rate Schedule LTD-1 Shippers and Cove Point have agreed on a set of rates which have been amended and how those rates may again change.¹² Shell further contends that prior to the instant negotiated rate arrangement between Cove Point and Statoil, none of the LTD-1 Shippers, or for that matter any Cove Point Shipper, had received negotiated rate service from Cove Point. Shell argues that while the LTD-1 Shippers and Cove Point previously agreed jointly on the LTD-1 rates, Cove Point has now submitted to the Commission a revised set of LTD-1 rates without receiving the input, let alone the agreement, of any LTD-1 Shipper except for Statoil, and that the agreement suggests that the rate agreed to by Statoil might be the rate applicable to all the LTD-1 Shippers. Shell asserts, as a LTD-1 shipper, it has not agreed to pay this proposed negotiated rate, or any rate other than those agreed to in the various Settlements, and it objects to any presumption that it should pay this rate, or that Cove Point's derivation of the rate is proper or correct. BP Energy contends that disclosure of cost data to Statoil on the reactivation costs will cause it competitive harm, and that any negotiated rate discussion involves an exchange of data and BP Energy would demand no less for itself under such circumstances.

B. Cove Point's Answer

15. Cove Point contends that Shell and BP Energy's rate will not be adversely affected by the Statoil negotiated rate agreement. Cove Point states that the rates for Rate Schedule LTD-1 services were established by a Settlement approved by the Commission in Docket No. CP01-76¹³ and that the negotiated rate agreement does not purport to

¹¹ See *Georgia Strait Crossing Pipeline LP (Georgia Strait)*, 100 FERC ¶61,280 at 62,192-93 (2002).-

¹² *Cove Point*, 97 FERC ¶ 61,043 (2001) and 102 FEC ¶ 61,227 (2003).

¹³ *Id.* at 4.

change the recourse rates that apply to BP Energy and Shell in this proceeding. Therefore, neither BP Energy or Shell will be adversely affected by Cove Point's agreement with Statoil.

C. Commission Ruling

16. The Settlements govern the reactivation of the Cove Point LNG facility AND construction of the fifth storage tank, and the associated cost of service rates remain in effect and are not altered by the proposed service. The rates set forth in the Settlements apply to all LTD-1 shippers and remain in effect except for Statoil. This proposal is a negotiated rate transaction between Cove Point and Statoil to revise the rates for service on the reactivation of Cove Point's LNG facility, including the fifth tank. Cove Point is placed on notice that, consistent with the Commission's policy on negotiated rates, it is at risk for any underrecovery of its costs associated with its negotiated rate service for Statoil.¹⁴ Such a provision should insure that the existing Rate Schedule LTD-1 shippers will not incur any additional costs attributable to the proposed negotiated rate agreement for Statoil.

IV. Should the request for waiver of the 30-day filing requirement be denied?

A. Protests

17. BP Energy argues that Cove Point's filing failed to meet the minimum notice obligation by requesting a waiver filing the application one day before the proposed transportation service (Cove Point filed on August 31 to commence transportation service on September 1, 2004).¹⁵ BP Energy contends that Cove Point did not identify a good cause sufficient to support granting waiver of the full 30-day notice requirement. BP Energy asserts that Cove Point voluntarily chose to delay its filing of the negotiated rate agreement for approximately 10 weeks after it was executed and further contends that the terms of the negotiated rate agreement permit Cove Point to file the negotiated rate agreement without waiting until the last possible hour. BP Energy asserts that the Commission should deny Cove Point's request for waiver of section 154.207 of the Commission's regulations.

¹⁴ *NorAm Gas Transmission Co.*, 77 FERC ¶ 61,011 at 61,036 (1996)

¹⁵ Section 154.207 of the Commission's regulations requires the tariff changes to be filed 30 to 60 days before the proposed effective date.

B. Cove Point's Answer

18. Cove Point asserts that the Commission readily grants waivers of its 30-day notice requirement for negotiated rate agreements,¹⁶ and that the Commission has routinely accepted negotiated rate agreements on a single day notice.¹⁷ Cove Point further asserts that its tariff explicitly provides for the filing of negotiated rate agreements one day prior to effectiveness, and that BP Energy's opposition to waiver of the 30-day notice requirement is without merit.

C. Commission Ruling

19. The Commission, consistent with its negotiated rate policy statement and numerous Commission orders, will grant Cove Point's request for waiver of the 30-day filing requirement in section 154.207 of the Commission's regulations and permit Cove Point's negotiated rate proposal to go into effect September 1, 2004, as proposed subject to refund, conditions, and further review. However, the Commission notes that the Statoil negotiated rate agreement is dated June 14, 2004, but Cove Point waited over 10 weeks to submit the proposal, filing the proposal just one day before the start of proposed negotiated rate transportation service. Cove Point certainly had adequate time to file this proposal within the filing requirements of the section 154.207 regulations. In the future, Cove Point should make every effort to comply with the filing requirements, particularly when it has executed the negotiated rate agreement well in advance of the requested start of the transportation service.

¹⁶ *Statement of Policy on Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Service of Natural Gas Pipelines*, 74 FERC ¶ 61,076 at 61,241-42 (1996); *order granting clarification*, 74 FERC ¶ 61,194 (1996); *order denying requests for reh'g and clarification*, 75 FERC ¶ 61,024 (1996); *order denying reh'g*, 75 FERC ¶ 61,066 (1996); *appeals denied sub. nom., Burlington Resources Oil & Gas Co., et al. v. FERC*, Nos. 96-1160 *et al.*, 1998 U.S. App. LEXIS 20697 (D.C. Cir. July 20, 1998).

¹⁷ *See e.g., Iroquois Gas Transmission System, LP*, 108 FERC ¶ 61,191 (2004); *ANR Pipeline Co.*, 107 FERC ¶ 61,241 (2004); *Centerpoint Energy Gas Transmission Co.*, 107 FERC ¶ 61,088 (2004); *Gulfstream Natural Gas System LLC*, 105 FERC ¶ 61,380 (2003); *Williston Basin Interstate Pipeline Co.*, 105 FERC ¶ 61,256 (2003).

Suspension

20. Based on a review of the filing, the Commission finds that the proposed negotiated rate agreement has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, the Commission shall accept the negotiated rate agreement for filing, and suspend its effectiveness for the period set forth below, subject to the conditions set forth in this order.

21. The Commission's policy regarding rate suspensions is that rate filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or that it may be inconsistent with other statutory standards.¹⁸ It is recognized, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results.¹⁹ Such circumstances exist here where the pipeline is filing a negotiated rate agreement which lacks certain information and requires various changes. Accordingly, in this case, the Commission will exercise its discretion to suspend the rates for a shorter period and permit the negotiated rate agreement and the associated rates to take effect on September 1, 2004, subject to refund and subject to the conditions set forth in the body of this order.

The Commission orders:

(A) The proposed negotiated rate agreement is accepted and suspended, effective September 1, 2004, subject to refund, conditions and further review, as discussed above.

(B) Cove Point must file the above-requested information within 20 days of the issuance of this order.

¹⁸ See *Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980) (five-month suspension).

¹⁹ See *Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (one-day suspension).

(C) Cove Point is required to revise its tariff and *pro forma* service agreement to offer a contractual ROFR provision on a not unduly discriminatory basis.

(D) Cove Point's request for waiver of the 30-day notice requirement is granted.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.