UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Freeport-McMoRan Energy LLC — Docket Nos. CP04-68-001, CP04-69-001

ORDER DENYING REHEARING

(Issued October 26, 2006)

1. Freeport-McMoRan Energy, LLC (Freeport-McMoRan) filed a request for rehearing of an order issued on May 18, 2006, authorizing Freeport-McMoRan under section 7 of the Natural Gas Act (NGA) to construct and operate a 5.1-mile, 36-inch diameter pipeline (Coden Pipeline) extending from the high water mark onshore near Coden, Alabama, to an interconnection with three interstate natural gas pipelines at a transportation hub in the vicinity of Coden.[1]

Background and Request for Rehearing

2. In a related proceeding before the United States Department of Transportation, Freeport-McMoRan proposes to reconfigure the existing infrastructure located in Main Pass Block 299, offshore Louisiana, for use as a liquefied natural gas (LNG) terminal to

[1] *Freeport-McMoRan Energy, LLC*, 115 FERC ¶ 61,201 (2006) (May 18 Order). The May 18 Order also issued a blanket certificate under Subpart F of Part 157 of the Commission's regulations which authorizes Freeport-McMoRan to undertake certain eligible construction activities without case-specific authorization from the Commission. That certificate is not relevant to Freeport-McMoRan's rehearing request.

receive deliveries of foreign sources of LNG from ocean-going vessels. That project is known as the Main Pass Energy Hub (MPEH^{TM}) and will consist of docking and off-loading facilities for vessels carrying the LNG, a re-vaporization plant, a natural gas storage facility, and submerged send-out pipelines which will either interconnect with offshore interstate pipelines or with the 5.1-mile onshore Coden pipeline at issue in this proceeding.[2] As explained in the May 18 Order, although there are no physical facilities to mark the interconnection point, the Commission's NGA section 7 jurisdiction over the Coden pipeline begins at the high water mark onshore; hence, Freeport-McMoRan's request for a certificate to construct and operate the Coden pipeline. The Coden pipeline is designed to transport a maximum of 1.5 billion standard cubic feet per day (Bcf/d) of natural gas, which will be of pipeline quality, with a maximum operating pressure of 2,220 psig. Freeport-McMoRan anticipates commencing service on the facilities in December 2007.

3. In the May 18 Order, the Commission authorized Freeport-McMoRan to construct and operate the Coden pipeline and approved its request to waive the open-access requirements of Part 284 with regard to service over the Coden pipeline since Freeport-McMoRan intends to operate all of the facilities associated with the MPEH^{TM} on a proprietary basis.[3] The Commission found that operation of the proposed Coden pipeline on a proprietary or sole use basis would not undermine the Commission's policy encouraging competition in the pipeline industry. Accordingly, the Commission did not require Freeport-McMoRan to establish initial section 7 rates or to file a Part 284 tariff. However, to ensure that the Commission's action does not result in frustration of its pro-competitive policies, we conditioned the certificate to require Freeport-McMoRan to apply for a Part 284 open-access blanket transportation certificate within 30 days of

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[2] Pursuant to the Deepwater Port Act of 1974, as amended, 33 U.S.C. §§ 1501-1524 (2006) (Deepwater Port Act), the Secretary of Transportation has exclusive jurisdiction over the licensing, ownership, construction, and operation of deepwater ports which include offshore LNG terminals. The Secretary of Transportation delegated its responsibility to license deepwater ports to the Maritime Administrator, with the United States Coast Guard (Coast Guard) and the United States Maritime Administration (MARAD) sharing responsibility for the processing of applications for such licenses.

[3] The Deepwater Part Act permits licenses to operate their LNG terminal facilities on a proprietary basis, *i.e.*, licensees do not have to provide open-access services for third-parties.

receiving a *bona fide* request for firm transportation service on its pipeline, if there is capacity available to provide the requested service.

4. Further, while waiving its accounting and reporting regulations as requested by Freeport-McMoRan, the Commission required Freeport-McMoRan to maintain records to identify separately the original cost and future depreciation for the facilities consistent with the Uniform System of Accounts because any future calculation of rates for open-access transportation services would require this cost-of-service accounting information.[4] Additionally, although the Commission generally waived the filing of Form No. 2-A as required in section 260.2 of the Commission's regulations, it nevertheless required Freeport-McMoRan to file page 520 of Form No. 2-A wherein the annual volume of gas transported by a pipeline is stated.[5] The Commission noted that this annual volume is the basis for calculating the Commission's annual charge (AC) and that the waiver of various filing and reporting requirements does not extend to the obligation to pay the AC.[6]

5. In its request for rehearing, Freeport-McMoRan contends that the Commission should waive the AC requirements just as it did for the open-access, accounting and reporting requirements. Freeport-McMoRan maintains that the Commission should apply the same flexible approach on this issue that it has adopted with regard to its regulation of

[4] The Commission also required Freeport-McMoRan to follow any business practices, such as entering into operation balancing agreements, and any applicable North American Energy Standards (NAESB) timelines that are required to enable interconnecting pipelines to comply with the NAESB standards.

[5] Part 260 of the Commission's regulations provides for the filing of various forms and reports by natural gas pipelines. Sections 260.1 and 260.2 provide for the filing of Form No. 2 and Form No. 2-A, respectively. The reference to Form No.2-A in the May 18 Order should have been to Form No. 2, given the level of volumes the Coden pipeline anticipates it will transport.

[6] The AC, described in Part 382, is a fee set each year by the Commission which all of the entities it regulates, except those subject to Part I of the Federal Power Act, must pay to defray the Commission's annual operating expenses that are not recouped through application and/or filing fees. Natural gas companies pay that portion of those expenses attributable to the Commission's regulation of natural gas companies. *See also,* section 154.402 (permitting pipelines to file an ACA to adjust the unit rate paid by customers so the pipelines may recover the AC paid the previous year). We note that the May 18 Order inadvertently referred to the ACA instead of the AC.

LNG projects generally.[7] According to Freeport-McMoRan, applying the AC to the Coden pipeline will increase the cost of importing LNG and serve as a disincentive to such imports. Freeport-McMoRan asserts that the AC for its 5.1-mile onshore pipeline will amount to approximately $675,000 per year.[8] Thus, according to Freeport-McMoRan, the total annual costs for the Coden onshore pipeline, including capital, will increase by more than 20 percent and, over thirty years, the AC costs will exceed the costs of constructing the pipeline.

6. Freeport-McMoRan notes that the Commission's authority to charge the AC is based on the Budget Reconciliation Act of 1986,[9] which, among other things, provides that the charge should be based on methods that are "fair and equitable."[10] It is Freeport-McMoRan's view that since it is authorized to operate on a proprietary basis such that it will not be filing a tariff, rates, tariff and rate changes or filing a rate case, the Commission's regulatory burden associated with Freeport-McMoRan's Coden pipeline will be greatly reduced. Therefore, Freeport-McMoRan postulates that it would be more equitable for the Commission to either waive the AC or significantly reduce it in this case.

Discussion

7. Part 382 of the Commission's regulations addresses the AC which natural gas companies must pay.[11] Section 382.102 provides that the AC will apply to natural gas companies:

> (1) Engaged in natural gas sales for resale or natural gas transportation . . . [that] exceed 200,000 Mcf . . . ; and

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[7] Freeport-McMoRan cites the May 18 Order at 115 FERC ¶ 61,201 at P 23, in which the Commission referred to the flexible approach it articulated regarding the regulation of LNG projects in *Hackberry LNG Terminal L.L.C.*, 101 FERC ¶ 61,294 (2002).

[8] Freeport-McMoRan obtained this figure by converting the expected flow of 365 Bcf per year to 375,950,000 Dth and then multiplying the latter amount by the Commission's 2005 AC of $0.0018.

[9] 41 U.S.C. §7178 (2005).

[10] 41 U.S.C. at 7178(b) (2005).

[11] 18 C.F.R. Part 382 (2006).

(2) Not engaged solely in "first sales" of natural gas as that term is defined in section 2(21) of the Natural Gas Policy Act of 1978; and

(3) To whom the Commission has not issued a Natural Gas Act, section 7(f) declaration; and

(4) Not holding a limited jurisdiction certificate.

Freeport-McMoRan meets each of these requirements when acting as the natural gas company that owns and operates the Coden pipeline and transports gas in interstate commerce over it under NGA section 7, as opposed to the LNG importer for the MPEH™ project. Therefore, the AC regulations apply to Freeport-McMoRan in its natural gas company capacity.

8. In the rulemaking proceeding that promulgated the Part 382 regulations, the Commission considered comments suggesting that various pipelines should be exempt from paying the AC.[12] For example, the Commission declined to create an exemption for pipelines of 25 miles or less, as proposed by one commenter in the rulemaking proceeding, stating that "[t]he length of a pipeline and the relationship between the pipeline and purchaser are irrelevant to the volumetric approach which Congress indicated that the Commission should adopt."[13] The Commission also rejected proposals to modify the formula for calculating the AC to take into consideration various factors such as the differences in size and capital investment of companies and the value of the company's certificated facilities in order to prevent companies that are small or do not impose a significant regulatory burden on the Commission from paying a high AC. The

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[12] *Annual Charges Under the Omnibus Budge Reconciliation Act of 1986*, *Order No. 472*, FERC Stats. & Regs., *Regulation Preambles 1986-1990* ¶ 30,746 (1987); *order clarifying final rule*, FERC Stats. & Regs., *Regulation Preamble 1986-1990* ¶ 30,750; *order granting reh'g in part, denying reh'g in part, and making conforming amendments*, *Order No. 472-B*, FERC Stats. & Regs., *Regulation Preambles 1986-1990* ¶ 30,767; *Order No. 472-C, order granting reh'g and clarifying final rule,* 42 FERC ¶ 61,013 (1988).

[13] *Order No. 472*, FERC Stats. & Regs., *Regulation Preambles 1986-1990* ¶ 30,346 at p. 30,625.

Commission noted that it does not believe that the pipeline-miles and facility-value approach are consistent with the volumetric basis for the AC.[14]

9. The Commission is not persuaded that imposing the AC on a natural gas company that is also an LNG importer will act as a disincentive for companies to enter the LNG import business as Freeport-McMoRan argues. Given the significant costs involved in LNG import projects, the AC paid to the Commission by companies that also transport vaporized gas over NGA section 7 facilities is likely to be small in relationship to the total costs of the project, *i.e.*, for both the terminal facility and the related NGA section 7 pipeline. Further, although the Commission at this time is not requiring Freeport-McMoRan to file a tariff and rates for the transportation of natural gas in interstate commerce that will occur on the Coden pipeline, the Commission has already expended administrative resources associated with the Coden pipeline and will continue to do so in the future.[15] Under these circumstances, Freeport-McMoRan, like other natural gas companies that operate under NGA section 7, should pay the AC.

10. In sum, the Commission considered and rejected in the rulemaking proceeding several of the arguments that Freeport-McMoRan raises, which are based on the size of the pipeline or the regulatory burden that its operation will impose on the Commission, to support a waiver or reduction of the AC. Further, we are not persuaded that imposing the AC on Freeport-McMoRan will deter other companies from entering the LNG import

[14] We note that the Commission held in the rulemaking that LNG importers that were subject to the Commission's jurisdiction solely because of its NGA section 3 authority to regulate the siting and construction of an import facility, did not have to pay the AC. *See Order No. 472, FERC Stats. & Regs., Regulation Preambles 1986-1990* ¶ *30,346* at note 160. However, as explained herein, Freeport-McMoRan, when it is transporting vaporized natural gas onshore through the Coden pipeline, is subject to the Commission's NGA section 7 jurisdiction, not its jurisdiction under NGA section 3. There is no exemption in the Commission's regulations that would permit a natural gas company that is subject to NGA section 7 to avoid payment of the AC simply because the natural gas company also operates an LNG terminal at a deepwater port.

[15] The Commission performed an environmental analysis of the pipeline and otherwise processed the certificate application, and will monitor the construction process and future operation of the pipeline, stand ready to address any complaints that may be filed against the company, and if the company receives a request for open-access service from a third-party, review the proposed tariff and open-access rates which Freeport-McMoRan would be required to file.

business as discussed above. Therefore, the Commission denies Freeport-McMoRan's rehearing request.

11. The Commission notes, however, that there is a waiver procedure in section 382.105 of the Commission's regulations whereby a natural gas company may demonstrate that it does not have the money to pay all or part of the AC assessed against it or, if it does have the money, it will suffer financial distress if it must pay. The Commission's determination here is without prejudice to Freeport-McMoRan's filing a waiver request consistent with section 382.105.

The Commission orders:

Freeport-McMoRan's request for rehearing is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.