

168 FERC ¶ 61,098
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

BP Energy Company,
Equinor Natural Gas LLC
(F/K/A Statoil Natural Gas LLC),
and Shell NA LNG LLC

Docket No. RP19-389-001

v.

Dominion Energy Cove Point LNG, LP

ORDER DENYING REQUEST FOR REHEARING

(Issued August 20, 2019)

1. On April 19, 2019, BP Energy Company, Equinor Natural Gas LLC (Statoil),¹ and Shell NA LNG LLC (collectively, Complainants) filed a request for rehearing of the Commission's March 21, 2019 order.² The Complaint Order denied Complainants' allegations that Dominion Energy Cove Point LNG, LP (Cove Point) is assessing an improper fuel charge to the Complainants. As discussed below, the Commission denies Complainants' rehearing request.

I. December 4, 2018 Complaint

2. According to the December 4, 2018 complaint, Complainants receive liquefied natural gas (LNG) tanker and terminal service authorized under section 7 of the Natural

¹ Statoil Natural Gas LLC changed its name to Equinor Natural Gas LLC in May 2018. Because the events discussed in this complaint occurred almost entirely before May 2018, we refer to the company as Statoil in this order.

² *BP Energy Company, Equinor Natural Gas LLC (FKA Statoil Natural Gas LLC) v. Dominion Energy Cove Point LNG, LP*, 166 FERC ¶ 61,195 (2019) (Complaint Order).

Gas Act (NGA)³ at Cove Point's LNG import terminal facilities (LNG Import Facilities). Complainants stated that Cove Point previously provided discharging and terminal service at the LNG Import Facilities to Statoil in connection with expansion facilities constructed and operated pursuant to NGA section 3,⁴ and as part of a terminal expansion by Cove Point in 2004.⁵ Complainants argued that because these facilities are used to provide both NGA section 3 and section 7 services, NGA section 3(e)(4)⁶ protects Complainants from subsidization of Cove Point's terminal expansion, degradation of service as a result of the terminal expansion, and undue discrimination as to their terms or conditions of service as a result of the terminal expansion. Complainants asserted that despite these protections, Cove Point has recently raised the fuel assessment on Complainants and that the increases are due to the addition of fuel related to the terminal expansion. Complainants argued this re-allocation of costs associated with the 2004 expansion resulted in the LNG Import Facility section 7 customers (LTD-1 Shippers) subsidizing the terminal expansion. Complainants asserted that the addition of fuel associated with the expansion to their fuel assessments violates the NGA and Cove Point's tariff.

3. In the Complaint Order, the Commission found that the tariff language on file at the time of the dispute that was relied on by Complainants was ambiguous, but that the best reading of the Cove Point tariff was that under the circumstances the fuel charge assessed to the Complainants was appropriate.⁷ Further, with respect to the NGA section 3(e)(4) claim, the Commission considered previous disputes between

³ 15 U.S.C. § 717f (2012).

⁴ 15 U.S.C. § 717b (2012).

⁵ *Dominion Cove Point, LNG, LP*, 115 FERC ¶ 61,337 (2006), *order on reh'g*, 118 FERC ¶ 61,007 (2007), *vacated and remanded sub nom. Washington Gas Light Co. v. FERC*, 532 F.3d 928 (D.C. Cir. 2008), *order on remand*, 125 FERC ¶ 61,018 (2008), *order on reh'g and clarification*, 126 FERC ¶ 61,036 (2009), *petition for review denied sub nom. Washington Gas Light Co. v. FERC*, 603 F.3d 55 (D.C. Cir. 2010).

⁶ 15 U.S.C. § 717b(e)(4) (2012) (“An order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers, degradation of service to existing customers, or undue discrimination against existing customers as to their terms or conditions of service at the facility, as all of those terms are defined by the Commission.”).

⁷ Complaint Order, 166 FERC ¶ 61,195 at PP 27-32.

Cove Point and the Complainants,⁸ and found that NGA section 3(e)(4) did not apply to a situation where “the proximate cause of Cove Point imposing the disputed fuel costs is not the existence of the 2004 [t]erminal [e]xpansion, but rather the contract termination that led to a lack of 2004 [t]erminal [e]xpansion customers.”⁹ Thus, the Commission concluded that the “cancellation of a contract by a 2004 [t]erminal [e]xpansion customer, which placed the burden of fuel costs on a smaller subset of customers, [did] not create a new claim under NGA section 3(e)(4).”¹⁰

II. Request for Rehearing

4. On rehearing, Complainants argue that the Complaint Order contradicted prior Commission orders requiring protection of NGA section 7 customers from bearing costs associated with the construction and operation of NGA section 3 expansion facilities terminal expansion.¹¹ They further argue that the Commission improperly relied on variable-cost-tracker case law that should apply only to section 7 facilities and not to mixed-use NGA section 3 and section 7 import facilities such as Cove Point’s terminal’s import facilities.¹² They argue that in accepting Cove Point’s interpretation of the ambiguous tariff language, the Commission improperly failed to account for the fact that the terminal expansion should not be subject to cost-of-service rate regulation.¹³ They argue that the Commission erred in its interpretation of NGA section 3(e)(4) and that the precedent that the Commission relied on in reaching its interpretation is distinguishable.¹⁴

III. Determination

5. For the reasons discussed in the Complaint Order and below, we deny Complainants’ request for rehearing, and conclude that the Commission correctly found that Cove Point properly assessed the disputed fuel charge to the Complainants. As noted

⁸ *Id.* PP 33-35 (citing *Dominion Cove Point LNG, LP*, 164 FERC ¶ 61,107 (2018 Order)).

⁹ *Id.* P 35.

¹⁰ *Id.*

¹¹ Request for Rehearing at 3-4.

¹² *Id.*

¹³ *Id.* at 11.

¹⁴ *Id.* at 3-4.

in the Complaint Order,¹⁵ the Commission finds the tariff to be ambiguous and Cove Point's interpretation the most persuasive.

6. On rehearing, Complainants do not dispute the Commission's finding that the tariff is ambiguous, but question the Commission's interpretation of the ambiguous language. In the Complaint Order, the Commission construed the tariff language¹⁶ in light of the tariff as a whole, the history of the tariff, and the Commission's precedent concerning variable cost trackers.¹⁷ On rehearing, Complainants claim that the Commission should have relied upon other sources which, they assert, support their preferred interpretation. Specifically, Complainants contend that any ambiguity in the tariff language can be resolved in light of Commission precedent concerning the Cove Point facilities, the statutory language, and prior settlements between the parties.¹⁸ While these sources indicate that 2004 expansion customers would bear costs associated with the expansion, they do not speak to the situation where no terminal expansion customers exist.¹⁹ Accordingly, these provisions do not assist in resolving the ambiguity in the tariff, and the Commission appropriately relied on the tariff itself – the rate on file – in determining whether Cove Point is reasonably implementing the cost responsibility provisions.²⁰

¹⁵ Complaint Order, 166 FERC ¶ 61,195 at PP 27-35.

¹⁶ On rehearing, Complainants offer no alternative reading of the tariff language that the Commission found determinative in the Complaint Order. *See* Complaint Order, 166 FERC ¶ 61,195 at PP 30-32.

¹⁷ *Id.*

¹⁸ Request for Rehearing at 8-10 (citing 15 U.S.C. § 717b(e)(4) (2012); *Dominion Cove Point LNG, LP*, 115 FERC ¶ 61,337, at PP 108-109 (2006); *Dominion Cove Point LNG, LP*, Docket No. CP05-130, Notice of Terms of Settlement of Matters Related to the Cove Point Expansion Proceedings (May 27, 2005) (Notice of Settlement Terms)).

¹⁹ Complainants state that when the tariff provisions were negotiated all of the Terminal Expansion capacity was under contract and the parties did not anticipate a potential change in that circumstance, and maintain that “had this been a consideration at the time, the LTD-1 Shippers would have sought protections to clarify that Cove Point would be responsible for any fuel costs associated with operating the 2004 Terminal Expansion facilities just as they did in [] 2012 and 2017.” Request for rehearing at 7.

²⁰ Complaint Order, 166 FERC ¶ 61,195 at P 32 (“Accordingly, during the time period in dispute, Cove Point properly charged the rate on file.”).

7. Specifically as to the Commission's reliance on its longstanding variable cost tracker precedent, we find no merit to Complainants' argument that this precedent applies only to NGA section 7 facilities and not to mixed-use section 3 and section 7 import facilities such as Cove Point's terminal's import facilities.²¹ Complainants argue that for section 3 terminal facilities "the facility operator and its private contract customers allocate financial benefits and burdens through the use of unregulated contracts that may not use cost-of-service ratemaking principles" and, thus, need not adopt standard variable cost tracker principles.²² This argument ignores the fact that in the General Terms and Conditions (GT&C) of Cove Point's tariff, section 30(a)(2) provides that section 3 Firm Service would be treated as equivalent to LTD-1 service for purposes of retainage and, thus, the variable cost tracker principles for tracker mechanisms properly apply. Therefore, we do not agree with Complainants' claim that resolving this dispute requires the Commission to review unregulated contracts. Regardless, the parties employed an ambiguous variable cost tracker, and it is neither unreasonable nor unexpected that the Commission would apply its existing policy and precedent to those ambiguous terms.

8. Complainants' arguments concerning NGA section 3(e)(4) are also unpersuasive. Complainants contend that NGA section 3(e)(4) requires the Commission to interpret the tariff cost responsibility provisions as barring Cove Point from assessing fuel costs associated with the terminal expansion to LTD-1 Shippers.²³ As explained in the Complaint Order, where the tariff language can reasonably be read as authorizing Cove Point to assess LTD-1 Shippers the relevant fuel costs, it would be unjust and unreasonable, under NGA sections 4²⁴ and 5,²⁵ for the Commission to interpret the variable cost tracker as disallowing Cove Point from assessing to shippers costs required to safely operate a facility on which they rely.²⁶ Indeed, Complainants state that the terminal expansion was "constructed to serve Cove Point's NGA [s]ection 3 shipper and

²¹ Request for Rehearing at 11-13.

²² *Id.* at 11.

²³ *Id.* at 8, 13.

²⁴ 15 U.S.C. § 717c (2012).

²⁵ 15 U.S.C. § 717d (2012).

²⁶ Complaint Order, 166 FERC ¶ 61,195 at P 32.

not its NGA [s]ection 7 customers,”²⁷ but do not dispute that they are making use of the facility.²⁸

9. Further, Complainants contend that the Commission improperly interpreted NGA section 3(e)(4) because the precedent the Commission relied on, the 2018 Order, involved “factually unrelated circumstances and did not relate to the fuel retainage.”²⁹ Given that the 2018 Order and the instant case involve the same parties, same facility, same statutory section, and several of the same underlying details, the Commission appropriately applied the same interpretation of section 3(e)(4) in the instant case, rather than invoking a new interpretation of section 3(e)(4), as Complainants request.

10. The Commission finds the 2018 Order instructive and the Complainants’ distinctions between the cases do not persuade us that we should alter the Commission’s conclusion that NGA section 3(e)(4) does not create a new claim where the proximate cause of the injury was a “contract termination that led to a lack of 2004 [t]erminal [e]xpansion customers.”³⁰ Accordingly, we affirm our decision to deny the Complaint.

²⁷ Request for Rehearing at 13.

²⁸ See, e.g., *Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277, 1285 (D.C. Cir. 2007) (stating that the cost causation principle requires costs “to be allocated to those who cause the costs to be incurred and reap the resulting benefit”). Here, LTD-1 Shippers benefit from the fuel costs through the operation of the facilities. The tracker mechanism at issue was designed to make Cove Point whole for fuel used in operation of the facilities. *Dominion Cove Point LNG, LP*, 106 FERC ¶ 61,339, at PP 15, 17 (2004) (“Cove Point’s tariff specifies that the retainage percentage is calculated based on Dominion Cove Point’s estimate of operating requirements for the succeeding 12-month period as adjusted for quantities retained either over or under actual quantities required by Dominion Cove Point during the preceding 12-month period.”). Further, it is fair to attribute the benefits of operating the facilities to the remaining shippers in the absence of terminal expansion customers. The parties, including LTD-1 Shippers, expressly chose to allocate fuel costs for operating the facilities based on shipper activity rather than attempting to specifically attribute fuel costs to existing or expansion facilities. See GT&C section 30 (acknowledging that fuel costs were to be treated equivalently between LTD-1 Shippers and terminal expansion customers) and Notice of Settlement Terms (LTD-1 Shippers agreeing to revise GT&C section 30).

²⁹ Request for Rehearing at 14 (citing 2018 Order, 164 FERC ¶ 61,107 at P 3).

³⁰ Complaint Order, 166 FERC ¶ 61,195 at P 35.

The Commission orders:

The Complainants' request for rehearing is denied, as discussed in the body of this order.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.