166 FERC ¶ 61,195
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
(FKA Statoil Natural Gas LLC),
and Shell NA LNG LLC

Docket No. RP19-389-000

v.

Dominion Energy Cove Point LNG, LP

ORDER ON COMPLAINT

(Issued March 21, 2019)

1. On December 4, 2018 BP Energy Company (BP Energy), Equinor Natural Gas LLC (Statoil),[1] and Shell NA LNG LLC (Shell) (collectively, Complainants) submitted a complaint (Complaint) against Dominion Energy Cove Point LNG, LP (Cove Point) alleging that Cove Point is assessing an improper fuel charge to the Complainants. As discussed below, the Commission denies the Complaint.

I. Complaint

A. Executive Summary

2. Complainants state that they receive liquefied natural gas (LNG) tanker and terminal service authorized under section 7 of the Natural Gas Act (NGA) at Cove Point's LNG import terminal facilities (LNG Import Facilities). Complainants further state that Cove Point previously provided discharging and terminal service at the LNG Import Facilities to Statoil in connection with expansion facilities constructed and

[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.

operated pursuant to NGA section 3, and as part of a terminal expansion by Cove Point in 2004 (2004 Expansion). Complainants state that because these facilities are used to provide both NGA section 3 and section 7 services, NGA section 3(e)(4) protects Complainants from subsidization of Cove Point's 2004 Expansion, from degradation of service as a result of the 2004 Expansion, and from undue discrimination as to their terms or conditions of service as a result of the 2004 Terminal Expansion. Complaints assert 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 2004 Expansion. Complainants argue this re-allocation of costs associated with the 2004 Expansion resulted in the LNG Import Facility section 7 (LTD-1) customers subsidizing the 2004 Expansion. Complainants assert that the addition of 2004 Expansion associated fuel to their fuel assessments violates the NGA and Cove Point's tariff.

B. Background

3. Complainants state that in 2005, Cove Point proposed an expansion of the LNG Import Facilities, which were initially certificated by the Commission in the late 1970s, and of the interconnected Cove Point Pipeline. They further state that Cove Point proposed to construct and operate the 2004 Expansion pursuant to NGA section 3. Complainants state that at the time, existing customers expressed three concerns regarding Cove Point's proposal: (a) avoiding subsidization of the 2004 Expansion by the firm LNG tanker discharging service or LTD-1 Shippers (i.e., the Complainants in the instant proceeding); (b) avoiding the degradation of existing LNG import and regasification service resulting from the construction and operation of the 2004 Terminal Expansion; and (c) avoiding discriminatory treatment between Rate Schedule LTD-1 Shippers and the 2004 Terminal Expansion customer in terms of access to Cove Point's LNG Import Facilities.[2]

4. Complainants state that, in the order authorizing the 2004 Expansion, the Commission stated that Rate Schedule LTD-1 Shippers would not subsidize said Expansion.[3] Complainants state that in 2008 and 2009, Cove Point made a series of filings that resulted in a change to the fuel retention percentages under Rate Schedule LTD-1 and the 2004 Terminal Expansion rates,[4] which eventually led to a revised retainage mechanism that would apply to both Rate Schedule LTD-1 and the 2004

[2] Complaint at 7-8.

[3] *Dominion Cove Point LNG, LP*, 115 FERC ¶ 61,337, at PP 108-109 (2006 Order), *on reh'g*, 118 FERC ¶ 61,007, at PP 117-18 (2007 Rehearing Order).

[4] *Dominion Cove Point LNG, LP*, 125 FERC ¶ 61,227 (2008).

Terminal Expansion shippers.[5] The revised mechanism capped the retainage percentage at three percent for both sets of shippers and stated that under-recoveries in excess of 100,000 dekatherms (Dth) per day during any calendar quarter resulting from the capped retainage would be reimbursed by the LTD-1 Shippers and the 2004 Terminal Expansion shippers. The Complainants state that Rate Schedule LTD-1 Shippers supported the revised mechanism because it was consistent with section 30 of the General Terms and Conditions (GT&C) of Cove Point's tariff and applied proportionally to Rate Schedule LTD-1 and the 2004 Terminal Expansion shippers, and because it did not allocate fuel costs associated with the 2004 Terminal Expansion to Rate Schedule LTD-1.[6]

5. Complainants claim that the Commission reviewed a similar cost allocation issue in Docket No. RP11-2136, where Cove Point filed to address concerns about its ability to keep its LNG terminal facilities, including those associated with the 2004 Terminal Expansion, in a cryogenic state due to reduced LNG import activity at the terminal. The Complainants assert that although that proceeding was consolidated with a general NGA section 4 rate case, the parties agreed that costs associated with cooling the LNG terminal facilities, including those associated with the 2004 Terminal Expansion, should be borne proportionally between the LTD-1 Shippers and the 2004 Terminal Expansion shippers.[7]

6. According to Complainants, in 2016, Cove Point also proposed to amend procedures related to its cooling mechanism and to clarify cost responsibility for cooling quantity purchase costs.[8] The Complainants assert that in that 2016 proceeding the parties agreed that Cove Point should clarify its tariff provisions to limit the Rate Schedule LTD-1 Shippers' maximum annual obligation to provide cooling quantities to 3,532,470 Dth, which Complainants state represents 48.39 percent of the total estimated maximum annual cooling quantities.[9]

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[5] Complaint at 11.

[6] Complaint at 11.

[7] Complaint at 12. The Commission accepted this filing in *Dominion Cove Point LNG, LP*, 140 FERC ¶ 61,013 (2012).

[8] Complainants note that the dispute in the instant docket was a reserved issue in the settlement approved in Cove Point's last rate case. Complaint at n.23 (citing *Dominion Energy Cove Point LNG, LP*, Docket No. RP17-197, Uncontested Stipulation and Agreement of Settlement at 13.04 (filed Aug. 11, 2017)).

[9] Complaint at 13.

C. Current Dispute

7. Complainants allege that on January 1, 2017, Cove Point shifted the fuel cost associated with the 2004 Terminal Expansion to fuel assessments charged to the Complainants. The Complainants assert that on April 11, 2017, Cove Point issued a notice, stating that Cove Point would reallocate responsibility for first quarter 2017 fuel associated with the 2004 Expansion capacity turnback to the LTD-1 Shippers. The Complainants assert that Cove Point subsequently issued quarterly notices on July 10 and October 6, 2017 and January 12, April 9, and May 15, 2018, that increased LTD-1 Shippers' proportion of fuel costs. Complainants contend that these increases resulted from Cove Point's shifting fuel costs from the 2004 Expansion to the LTD-1 Shippers.

8. Complainants state that they objected to the fuel assessments in the quarterly notices through an internal dispute process, arguing that the reallocation of fuel costs set forth in the two notices was the result of Cove Point shifting responsibility for fuel associated with the 2004 Terminal Expansion to the LTD-1 Shippers. Complainants state that, in response, Cove Point argued that its actions were authorized under sections 30 and 1.45.B of its GT&C.

9. On January 26, 2018, Complainants submitted a response to Cove Point asserting that Cove Point's interpretation of the subject tariff provisions was inconsistent with NGA section 3(e)(4), the Commission's orders approving the 2004 Expansion, and Cove Point's tariff. The Complainants claim these provisions place a proportional responsibility on LTD-1 Shippers and the 2004 Expansion shippers for fuel costs, and prevent the re-allocation of 2004 Terminal Expansion fuel costs to LTD-1 Shippers. Complainants state that Cove Point responded on February 26, 2018, reaffirming its method and asserting that its then-effective tariff allowed it to re-allocate 2004 Expansion fuel costs to the LTD-1 Shippers.

10. In the Complaint, Complainants allege that as the contract volumes of the sole 2004 Terminal Expansion customer decreased on January 1, 2017, Cove Point increased the LTD-1 Shippers' proportion of fuel costs. Complainants allege that Cove Point reallocated fuel costs associated with the 2004 Expansion to the LTD-1 Shippers, and placed the entire responsibility for such costs on the LTD-1 Shippers. As such Complainants allege Cove Point required LTD-1 Shippers to subsidize the expansion capacity costs. Complainants allege that as a result of Cove Point's actions, each LTD-1 Shipper has incurred a financial burden in the range of approximately $1,048,398 and $1,444,426.

11. Complainants request that the Commission issue an order finding that Cove Point has impermissibly re-allocated the fuel costs associated with the 2004 Terminal Expansion to the LTD-1 Shippers, and requiring Cove Point to reinstate the tariff mechanisms that were in place at the end of 2016. The Complainants also request that the Commission require Cove Point to return the excess volumes of LNG or, in the

alternative, provide commensurate refunds or restitution, and grant such other and further relief as may be appropriate.

II. Notice and Responsive Pleadings

12. On December 6, 2018, the Commission issued a notice of the Complaint with responses due as provided in Rules 211 and 214 of the Commission's Rules of Practice and Procedure.[10] On December 21, 2018, Cove Point answered the complaint (Cove Point First Answer). On January 7, 2019, Complainants filed an answer in response to the Cove Point First Answer (Complainants' Response). On February 1, 2019, Cove Point filed an answer to the Complainants' Response (Cove Point Second Answer).

13. Pursuant to Rule 214,[11] all timely motions to intervene and any unopposed motions to intervene filed out-of-time before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to an answer unless otherwise ordered by the decisional authority.[12] We accept the additional answers listed above because they provided us information that assisted us in our decision-making process.

A. Cove Point First Answer

14. On December 21, 2018, Cove Point filed an Answer (Cove Point First Answer) to the Complaint. Cove Point states that during the period in dispute, its tariff included a tracker mechanism for the recovery of fuel required for plant operations. Cove Point asserts that pursuant to that mechanism, if the calculated retainage percentage applicable to the Firm Import Shippers (i.e., Shippers under Rate Schedule LTD-1 and the 2004 Terminal Expansion) exceeds a three percent cap, then the tracker mechanism's cap on retainage is applied and the resulting under recovery is to be reimbursed by the Firm Import Shippers based on their contracted quantities. Cove Point asserts that its tariff also contains an exception to this methodology for fuel associated with liquefaction that required liquefaction fuel to be separately identified from all other fuel (i.e., general system fuel) and allocated based on a methodology of defined percentages. Cove Point

[10] *Id*. §§ 385.211, 385.214.

[11] *Id*. § 385.214.

[12] *Id*. § 385.213 (a)(2).

emphasizes that these provisions were approved by the Commission and that it has complied with its tariff obligations.[13]

15. Cove Point states that when the 2004 Terminal Expansion became unsubscribed in 2017, LTD-1 Shippers had to bear a greater percentage of general system fuel requirements (i.e., fuel associated with operations of the terminal facility not attributable to liquefaction), which is consistent with its tariff. Further, Cove Point states that it allocated liquefaction fuel based on the tariff-required fixed percentages. Cove Point emphasizes that the financial impact on Complainants has resulted from the correct application of its tariff provisions.

16. Cove Point asserts that the application of said tariff provisions has not caused the Complainants to bear fuel costs that should be attributed to the 2004 Expansion, and disagrees that Cove Point should have absorbed these costs once the 2004 Expansion capacity was turned back.

17. According to Cove Point there was no cost shift as alleged but rather, the cost tracker functioned as it should have in light of the changing contracted quantities. Further, Cove Point states that the Complainants cannot allege that some portion of its general system fuel requirements is unalterably attributable to the 2004 Expansion. Cove Point emphasizes that simply because a portion of the fuel costs was previously allocated to the 2004 Expansion shippers does not prove that subsequent fuel costs were caused by the 2004 Expansion.

18. Cove Point also points out that even in the event that the Commission found its tariff provisions to be unjust and unreasonable, the language of NGA section 5 allows for only prospective relief and that the Commission cannot order a retroactive change to its tariff or the refunds of prior collections sought by Complainants. Cove Point also highlights that the Complainants did not protest its Annual Fuel Retainage filing in Docket No. RP18-499-000, which detailed how both its general system and liquefaction fuel requirements were allocated during a portion of the period in question.[14] As such, the principles of *res judicata* and collateral estoppel would require that the Commission deny the Complaint.[15]

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[13] Cove Point First Answer at 2.

[14] *Dominion Energy Cove Point LNG, LP*, Docket No. RP18-499 (Mar. 23, 2018) (delegated order).

[15] Cove Point First Answer at 4.

B. Complainants' Response to Cove Point First Answer

19. On January 7, 2019, Complainants submitted a response (Response) to the Cove Point First Answer. In the Response, the Complainants assert that Cove Point avoids the question of whether an LNG terminal operator may construct and operate an expansion of an existing LNG facility to provide LNG import services under NGA section 3, and thereafter require its pre-existing NGA section 7 import customers to pay for the expanded facility's fuel costs once the operator discontinues its NGA section 3 import service. Complainants argue that this is not permissible and that Cove Point's attempt to re-assign the totality of the 2004 Expansion's fuel costs to the LTD-1 Shippers following the turnback of the 2004 Expansion capacity is an unlawful subsidization.

20. Complainants state that they do not challenge Cove Point's fuel tracker mechanism or any other provisions of Cove Point's tariff and that, as such, they do not bear the burden of proving that the current retainage mechanism is unjust and unreasonable. Complainants state that they dispute Cove Point's application of its tariff, which Complainants argue impermissibly imposes fuel costs associated with the 2004 Expansion on the LTD-1 Shippers. Complainants also argue that notwithstanding any particular interpretation of its tariff authority, Cove Point must isolate and separately account for the costs of its NGA section 7 and NGA section 3 services, and may not apply its fuel retainage mechanism in a manner that allocates costs previously attributed to the 2004 Expansion to the LTD-1 Shippers.

21. Complainants further claim that the cost shift Cove Point denies did in fact occur, and that as a result LTD-1 Shippers were required to subsidize the 2004 Expansion. Complainants also dispute Cove Point's argument that Complainants previously acquiesced to Cove Point's application of its fuel retainage provisions, and contend that Cove Point's interpretation of the relevant tariff provisions is incorrect.

C. Cove Point Second Answer

22. On February 1, 2019, Cove Point submitted its Second Answer. Cove Point argues that Complainants misunderstand Cove Point's fuel retainage tariff provisions. Cove Point argues that, in accordance with its tariff and the 2005 settlement,[16] all terminal fuel costs are combined for both LTD-1 and 2004 Expansion shippers, in part to avoid controversy over what fuel costs were caused by which facilities. Cove Point states that this was done to ensure that an equivalent fuel retainage is assessed on the LNG received by Cove Point from all import shippers without regard to their status as either a 2004 Expansion shipper or an LTD-1 Shipper or the fuel related to specific facilities. Cove Point states that the anti-subsidy and anti-undue discrimination

[16] Cove Point Second Answer at 6 & n.11 (citing Complaint Ex. 9, Notice of Settlement).

requirements of NGA section 3 were satisfied by the requirement that the 2004 Expansion shippers be treated as "equivalent" to an LTD-1 Shipper for fuel retainage purposes.

23. Cove Point emphasizes that Complainants agreed to the tariff language adopted in Docket No. RP09-399 that controls the current dispute.[17] Specifically, according to Cove Point, the tariff requires that if the calculated retainage would exceed three percent, a cap of three percent on injections would be applied and, if the resulting shortfall exceeded 100,000 Dth in a calendar quarter, then Firm Import Shippers (LTD-1 Shippers and the 2004 Terminal Expansion shippers being treated equivalently) would reimburse Cove Point for the shortfall based on contracted quantities or MDDQ. Cove Point asserts that Complainants misrepresent this agreed-upon language in their Complaint. Cove Point reiterates in its Second Answer that it properly followed its approved tariff methodology for fuel retainage and that the methodology was fully consistent with NGA section 3.[18]

III. Discussion

A. Procedural Arguments

24. In addition to its substantive arguments, Cove Point argues that the Commission should reject the complaint on procedural grounds, citing the doctrines of *res judicata* and collateral estoppel. Cove Point asserts that the Complainants did not protest its annual fuel retainage filing in Docket No. RP18-499-000, which detailed how its general system and liquefaction fuel requirements were allocated for much of the period in question.[19] We deny Cove Point's argument that the Complaint should be barred as a procedurally unlawful collateral attack on Cove Point's most recent fuel tracker filing. On the contrary, the essential purpose of NGA section 5 is to provide a means to re-evaluate previously accepted tariff language.[20]

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[17] Cove Point Second Answer at 9 (citing *Dominion Energy Cove Point LNG, LP*, 127 FERC ¶ 61,014 (2009)).

[18] Cove Point Second Answer at 8.

[19] *Dominion Energy Cove Point LNG, LP*, Docket No. RP18-499-000 (Mar. 23, 2018) (delegated order).

[20] *KMC Thermo, LLC v. Dominion Energy Cove Point LNG, LP*, 165 FERC ¶ 61,166, at n.51 (2018) (citing *Algonquin Gas Transmission Co.*, 95 FERC ¶ 61,303, at 62,033 (2001)).

25. All parties agree that the Complaint only covers the time period from January 1, 2017 to April 8, 2018. Complainants do not allege any overcharging prior to that date. The parties also agree that on April 9, 2018, new tariff language took effect, and that the Complaint does not cover any events from that day forward.[21]

26. Cove Point argues that NGA section 5 expressly prohibits retroactive relief. NGA section 5(a) authorizes the Commission, upon finding that a rate charged "in connection with any transportation" subject to the Commission's jurisdiction is "unjust, unreasonable, unduly discriminatory or preferential," to fix the just and reasonable rate "to be *thereafter* observed and in force."[22] "Barring evidence of fraud or misrepresentation, our authority under NGA section 5 is limited to prospective relief."[23] However, in the event that a pipeline were to charge a rate that is not on file with the Commission, then under NGA section 4 the pipeline would be liable for charging a rate with "no lawful right to do so. The Commission has, and must have, the power to correct this wrong."[24] Given that the time period in dispute, January 1, 2017 to April 8, 2018, is a locked-in period, the Commission must consider whether Cove Point properly applied the tariff language in effect at that time to determine if Cove Point charged the Complainants the appropriate rate. Finding no absolute procedural bar to considering the Complaint, we turn to Complainant's tariff arguments.

B. Tariff and NGA Section 4(d) Arguments

27. Complainants argue that Cove Point's actions in allocating fuel charges do not correspond to the tariff language in effect at the time, and therefore violate NGA

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[21] Complaint at n.4 ("This Complaint relates, *inter alia*, to the fuel retainage provisions of Cove Point's Tariff that applied from the period January 1, 2017 through April 8, 2018. Cove Point filed revisions … effective … April 9, 2018…. This Complaint does not relate to the revised Tariff provisions.").

[22] 15 U.S.C. § 717d(a) (emphasis added).

[23] *Amoco Prod. Co. v. ANR Pipeline Co.*, 76 FERC ¶ 61,081, at 61,468 (1996). *See also Transcontinental Gas Pipe Line Corp. & Fla. Gas Transmission Co.*, 75 FERC ¶ 61273, at 61,889 (1996).

[24] *Entergy Servs., Inc. Generator Coal.*, 104 FERC ¶ 61,061, at 61,213 (2003) (finding analogous authority in the context of the Federal Power Act) (citing *Towns of Concord, Norwood, and Wellesley Massachusetts v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992); *Niagara Mohawk Power Corp. v. FERC*, 379 F.2d 153, 159 (D.C. Cir. 1967); *Louisiana Public Service Commission v. FERC*, 174 F.3d 218, 224 n.6 (D.C. Cir. 1999)).

section 4(d) and section 154.207 of the Commission's regulations by making a tariff change without prior notice and without prior Commission approval. Section 154.207 of the Commission's regulations states, "All proposed changes in tariffs, contracts, or any parts thereof must be filed with the Commission and posted not less than 30 days nor more than 60 days prior to the proposed effective date thereof, unless a waiver of the time periods is granted by the Commission."[25] Essentially, Complainants argue that Cove Point did not provide the required notice and did not charge the correct rate to Complainants as required by law.

28. In particular, Complainants point to GT&C section 1.45.B and section 30 (a)-(a)(2) as it existed prior to April 9, 2018. During the period in dispute (January 1, 2017 to April 8, 2018), GT&C section 1.45.B (Definitions) stated, in relevant part:

> In the event that the Retainage percentage applicable to Rate Schedule LTD-1 and the 2004 Terminal Expansion Service … exceeds three percent (3.0%), the Retainage percentage for Firm Import Shippers, will be capped at three percent (3.0%) of Buyer's quantities received (Capped 3%). During the period when the Capped 3% is in effect (Cap Period), the difference between the quantities retained and the actual quantities required by Operator is the "Cap Period Under or Over Recovery." … [I]f the cumulative Cap Period Under Recovery is greater than or equal to 100,000 Dth at the end of any calendar quarter, then the Cap Period Under Recovery will be reimbursed by the Firm Import Shippers based upon MDDQ.

During the period in dispute, GT&C sections 30 (a)(1) and (a)(2) stated, in relevant part:

> Operator also provides the firm services identified in this Section 30, pursuant to Commission authorizations issued under Section 3 of the Natural Gas Act ("NGA")("Section 3 Firm Services").…
>
> (1) …This Section 3 Firm Service shall be deemed to pay the otherwise-applicable LTD-1 fuel retainage percentage(s) in order to compute its contribution to LNG terminal fuel retainage.

[25] 18 C.F.R. § 154.207 (2018).

> (2) For purposes of the listed sections in these General Terms, this Section 3 Firm Service shall be treated as equivalent to service under Rate Schedule LTD-1: 1.45 (Retainage)…

29. According to the Complaint, during the period in dispute, no shippers contracted for 2004 Terminal Expansion Service. Complainants argue that Cove Point ignored the rate on file when it charged Complainants (LTD-1 Shippers) the entirety of the Cap Period Under Recovery (as defined above) that exceeded 100,000 Dth. Complainants argue that under the tariff, Cove Point should have stood in for the now-cancelled service, and absorbed that cost itself. Cove Point, by contrast, argues that the cancelled service zeroes out, leaving Rate Schedule LTD-1 Shippers to bear the cost.

30. We find that the disputed tariff language is ambiguous in situations where there are no Section 3 Firm Services being provided to any customers.[26] The tariff terms "2004 Terminal Expansion Service" and "Section 3 Firm Services" are not references to a specific shipper, nor are they a clear reference to Cove Point itself. The tariff does not expressly cover this scenario, and both Complainants' and Cove Point's interpretations are plausible readings of the plain language of the tariff. However, the tariff language does plainly state the proper methodology to use if the retainage percentage applicable to LTD-1 and 2004 Terminal Expansion Service exceeds three percent. In that case, the cap on the retainage percentage applies and any under recovery would be borne by the Firm Import Shippers based on their contracted quantities.

31. We therefore turn to other relevant tariff provisions, and to the history of the Cove Point tariff. Historically, we find that the allocation of fuel use on the Cove Point system has been resolved through numerous, changing means over the years. The 2012 Settlement[27] expired by its own express terms on December 31, 2016. It is telling that the period in dispute in this Complaint begins the next day, as the 2012 Settlement clearly allocated responsibility for fuel charges.[28] The period in dispute is contemporaneous

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[26] We apply the Commission's longstanding principles for tariff language analysis. *Columbia Gas Transmission Corp.*, 27 FERC ¶ 61,089, at 61,166 (1984) (citations omitted).

[27] *See Dominion Cove Point LNG, LP*, 140 FERC ¶ 61,013 (2012) (approving 2012 Settlement).

[28] *See* Cove Point First Answer at 11 (summarizing 2012 Settlement).

with the 2017 Settlement,[29] which by its terms expired when the 2018 Expansion Project came into service. With the 2018 Expansion Project, Cove Point implemented new tariff records that once again clearly allocate fuel charges. The 2017 Settlement, in addition to the above tariff provisions, creates a tariff provision that expressly allocates 51.61 percent of the "Cooling Quantity Purchase Costs for each Firm Import Shipper" to the "2004 Terminal Expansion," and the remainder to the Complainants, who are individually named in the tariff.[30] Again, the issue is that the tariff term "2004 Terminal Expansion" is neither a reference to a specific shipper, nor is it a clear reference to Cove Point itself. Thus the ambiguity regarding cost responsibility, found above in GT&C section 1.45.B and section 30 (a)-(a)(2), persists even when reading both the tariff and 2017 Settlement as a whole.

32. We find Cove Point's interpretation the most persuasive, because Cove Point's interpretation results in a tariff that conforms with the general principles of the Commission's jurisprudence on variable cost trackers. The tariff uses caps to create a complex system. One set of shippers, "applicable to Rate Schedule LTD-1 and the 2004 Terminal Expansion Service," bear the burden for amounts under three percent, any overage goes into an escrow account, and then once the overage exceeds 100,000 Dth, a differently named but overlapping set of shippers, "Firm Import Shippers," bears the burden for the overage. The Commission does not prescribe any particular cap for variable cost recovery mechanisms, and has found a wide range of proposed caps to be just and reasonable.[31] Most importantly, "the bedrock requirement for all variable cost trackers is that they assess shippers no more or less than the cost of service."[32] When a pipeline has no customers on a portion of its system, it does not cease to have operating expenses; the situation can become urgent in the case of an LNG facility, as the under-used facility expends additional energy to maintain cryogenic temperatures.[33] Just as it would be unjust and unreasonable to use a variable cost tracker to charge customers in

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[29] Both Cove Point and the Complainants are parties to the 2017 Settlement. Docket No. RP17-197-000, 2017 Settlement at Appendix A (Aug. 11, 2017); *see also Dominion Cove Point LNG, LP*, 161 FERC ¶ 61,221 (2017) (approving 2017 Settlement).

[30] Tariff Record 40.38, GT&C - Operational LNG Cost Recovery, 1.0.0.

[31] *Dauphin Island Gathering Partners*, 162 FERC ¶ 61,273, at P 12 (2018) (citing *Cost Recovery Mechanisms for Modernization of Natural Gas Facilities*, 151 FERC ¶ 61,047, at P 100 (2015)).

[32] *Dominion Carolina Gas Transmission, LLC*, 157 FERC ¶ 61,070, at P 13 (2016).

[33] *E.g., Dominion Cove Point LNG, LP*, 157 FERC ¶ 61,249, at P 8 (2016).

excess of actual costs, so too it would be unjust and unreasonable for Cove Point to deny the existence of relevant costs, and not pass them through its tracker. Therefore, we conclude that during the time period in dispute, in which no 2004 Terminal Expansion Shippers existed, the best reading of the Cove Point tariff is that the "Retainage percentage applicable to Rate Schedule LTD-1 and the 2004 Terminal Expansion Service" must be borne entirely by LTD-1 Shippers. Accordingly, during the time period in dispute, Cove Point properly charged the rate on file.

C. NGA Section 3(e)(4) Arguments

33. Complainants argue that Cove Point's fuel allocation violates the prohibition on subsidization of expansion capacity costs by NGA section 7 customers, as codified in NGA section 3(e)(4). Complainants also argue that Cove Point's allocation contradicts Cove Point's commitment that no costs of the 2004 Terminal Expansion will be allocated to the LTD-1 shippers.

34. NGA section 3(e)(4) states:

> 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.[34]

The question in this case is whether this clause applies to a situation where the expansion capacity, after a period of successful operation, now has no customers, and if it does apply, whether NGA section 3(e)(4) obliges us to revise or remove the settlement and tariff provisions discussed above.

35. The Commission has applied NGA section 3(e)(4) in the context of previous disputes between Cove Point and the Complainants, and finds that case history relevant to the instant dispute.[35] In the 2018 Order on Rehearing, the proximate cause of Cove Point

[34] 15 U.S.C. § 717b (e)(4).

[35] *Dominion Cove Point LNG, LP*, 164 FERC ¶ 61,107 (2018 Order on Rehearing); *Dominion Cove Point LNG, LP*, 160 FERC ¶ 61,134 (2017 Order on Remand); *Dominion Cove Point LNG, LP*, 127 FERC ¶ 61,258 (2009); *Dominion Cove Point LNG, LP*, 118 FERC ¶ 61,007 (2007); *Dominion Cove Point LNG, LP*, 118 FERC ¶ 61,006 (2007 Rehearing Order); *Dominion Cove Point LNG, LP*,

imposing the disputed fuel costs is not the existence of the 2004 Terminal Expansion, but rather the contract termination that led to a lack of 2004 Terminal Expansion customers.[36] "Early termination of Statoil's NGA section 3 terminal service did not alter any aspect of BP Energy's NGA section 7 service and thus," the Commission ruled that Cove Point "did not violate the section 3(e)(4) protection against undue discrimination."[37] We find that ruling applicable in the instant case. The cancellation of a contract by a 2004 Terminal Expansion customer, which placed the burden of fuel costs on a smaller subset of customers, does not create a new claim under NGA section 3(e)(4). Accordingly, we deny the Complaint under NGA section 3 as well as under the above-discussed arguments.

The Commission orders:

The Complaint is denied.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

115 FERC ¶ 61,337 (2006 Order); *Dominion Cove Point LNG, LP*, 115 FERC ¶ 61,336 (2006); *Dominion Cove Point LNG, LP*, 115 FERC ¶ 61,335 (2006).

[36] 2018 Order on Rehearing, 164 FERC ¶ 61,107 at P 24.

[37] *Id.* P 10.