

119 FERC ¶ 61,110
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Dominion Cove Point LNG, LP

Docket No. RP06-417-003

ORDER ON CLARIFICATION AND REHEARING

(Issued May 2, 2007)

1. This order addresses the request of Washington Gas Light Company (Washington Gas) for clarification, or if the Commission does not grant clarification, rehearing of the Commission's December 6, 2006 Order in this proceeding.¹ This order grants Washington Gas's request for clarification to the extent set forth below and, to the extent not granted, denies rehearing.

Background

2. Dominion Cove Point LNG, LP (Cove Point) owns and operates a liquefied natural gas (LNG) facility in Lusby, Calvert County, Maryland, and pipeline facilities that extend approximately 88 miles from the LNG terminal to interconnections with other pipelines. In a June 30, 2006 filing in this docket, Cove Point proposed to increase certain rates, and to make minor reductions in other rates at the LNG facility. Cove Point stated that it was not proposing any service or tariff changes in the filing. Washington Gas and others protested the filing, and Washington Gas also requested that any hearing established on that filing should include gas quality, interchangeability tariff issues. In a July 31, 2006 Order the Commission accepted and suspended and set for hearing Cove Point's June 30, 2006 filing.² The July 31, 2006 Order rejected Washington Gas' request to set gas quality and interchangeability tariff issues for hearing in this proceeding.

¹ *Dominion Cove Point LNG, LP*, 117 FERC ¶ 61,273 (2006) (December 6, 2006 Order).

² *Dominion Cove Point LNG, LP*, 116 FERC ¶ 61,110 (2006) (July 31, 2006 Order).

3. On August 30, 2006, Washington Gas requested clarification of the July 31, 2006 Order. In the request Washington Gas stated that, although the Commission stated in the July 31, 2006 Order that it declined to permit Washington Gas to litigate gas quality and interchangeability issues in this proceeding because Washington Gas had raised the issues in other Cove Point proceedings, it was not clear to Washington Gas exactly where Washington Gas could raise the issue of Cove Point's gas quality and interchangeability tariff provisions.

4. The December 6, 2006 Order granted clarification, stating that Washington Gas and other parties could challenge Cove Point's existing gas quality and interchangeability tariff provisions by filing a complaint pursuant to section 5 of the NGA. The order added that the Commission was confirming that modification of Cove Point's gas quality and interchangeability tariff provisions was not at issue in this proceeding, nor could that issue be raised in Cove Point's LNG Expansion Proceeding in Docket No. CP05-130, *et al.*, referred to in the July 31, 2006 Order. The Commission explained that the statement in the July 31, 2006 Order, that the Commission had addressed in Cove Point's LNG Expansion proceeding issues similar to what Washington Gas had sought to set for hearing in the instant proceeding, was intended to refer only to safety and mitigation issues Washington Gas raised in the LNG Expansion proceeding. The Commission explained that those issues related to the introduction of additional quantities of regasified LNG into Washington Gas's system, and not to whether Cove Point's gas quality and interchangeability tariff provisions should be modified. Of relevance to Washington Gas' instant request, the Commission stated:

We grant the requested clarification to the extent that we clarify that Washington Gas or other parties may seek to challenge Cove Point's existing gas quality tariff provisions at any time by filing a complaint pursuant to section 5 of the NGA specifying and supporting in what manner those provisions are not just and reasonable and proposing fully-supported replacement just and reasonable provisions.³

5. In the instant request, Washington Gas asks that the Commission clarify that by making the statement that a party seeking to challenge Cove Point's existing gas quality and interchangeability provisions would need to propose "fully-supported replacement just and reasonable provisions" (1) the December 6, 2006 Order did not require Washington Gas or other parties to bear any greater burden of proof or of coming forward with evidence than that imposed on other proponents of changes to pipeline gas

³ 117 FERC ¶ 61,273 at P 10.

quality provisions, and (2) the December 6, 2006 Order does not require Washington Gas or other parties to propose fully supported replacement just and reasonable tariff provisions as a pre-requisite to the Commission considering whether any existing tariff provisions are unjust, unreasonable or otherwise unlawful. Washington Gas observes that NGA section 5 provides the Commission shall determine “the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.” Washington Gas asserts that, under the Commission’s regulations, while a complainant has to show that the existing provisions it seeks to change are not just and reasonable, a complainant does not have “the burden of developing a just and reasonable alternative.” Rather, it argues, under the Commission’s regulations, specifically section 385.206(b)(7),⁴ the complainant must state the “specific relief or remedy requested...and the basis for that relief.” Washington Gas asserts that, whereas the Commission has a duty to take action to remedy the existing unlawful practice, it has not required parties to come forward with fully supported just and reasonable replacement provisions.

6. Washington Gas also argues that “fully-supported” could not have meant that a complaint must be supported by all parties in that proceeding. In the rehearing portion of its request, Washington Gas adds that, because the issues are complicated and fact-based, and replacement provisions would need to be arrived at with the input of the pipeline and all affected parties, it would be unreasonable, arbitrary, and capricious to require such a showing as a prerequisite to challenging any existing Cove Point gas quality and interchangeability tariff provision.

Discussion

7. The Commission did not intend to subject a complainant seeking changes to Cove Point’s existing tariff’s gas quality and interchangeability provisions to any greater burden than any other complainant under section 5 of the NGA and, to that extent, grants clarification. The Commission’s statement in the July 31, 2006 Order that Washington Gas refers to merely was intended to set forth the applicable rule as to an NGA section 5 proceeding, in contrast to a section 4 NGA proceeding. In a section 4 proceeding, initiated by the pipeline, the pipeline is required to establish that the new rates or tariff provisions that it is proposing are just and reasonable. In contrast, a complaint, which is not initiated not by the pipeline but by the complainant, seeks to initiate a proceeding under NGA section 5 proceeding, and in such proceeding “the Commission imposes rates of its own creation or at the behest of a third party.”⁵ However, in a section 5 complaint

⁴ 18 C.F.R. § 385.206(b)(7) (2006).

⁵ *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993).

proceeding, it is not enough that the Commission finds the existing provision to be unjust and unreasonable; the “section requires FERC to bear the burden of proof that its proffered rate is just and reasonable....”⁶

8. Accordingly, in a section 5 proceeding where the complainant seeks a Commission-imposed change in an existing tariff provision, the burden is on the party seeking the change to first show that the existing provision is no longer just and reasonable, and then it must show what replacement provision would be just and reasonable because the Commission cannot reject the existing provision without a just and reasonable replacement.⁷ The December 6, 2006 Order merely intended to state the ultimate burden in any section 5 proceeding initiated by a complaint challenging Cove Point’s existing gas quality and interchangeability tariff provisions, and not what must appear in the complaint. A complainant has the initial burden to provide a sufficient basis in its complaint to get the Commission to exercise its discretion to initiate a section 5 investigation into Cove Point’s existing tariff provisions. We agree, however, that the complainant need not necessarily specify in the complaint what the exact replacement provisions are or include the full support for such replacement tariff provisions in its complaint if the determination of what the replacement provisions should be requires further fact-finding and input from the pipeline and parties through the litigation process. In the end, however, to replace the existing tariff provisions, the burden is on those seeking the change to establish that the existing tariff provisions are unjust and unreasonable and that the specific replacement provisions are just and reasonable based on the record established in the proceeding. Finally, we clarify that “fully supported” only refers to the evidence required to impose the change in a section 5 complaint proceeding, not that all parties must support the proposed change.

⁶ *Id.*

⁷ *Id.* at 1579.

The Commission orders:

Washington Gas's request for clarification is granted to the extent discussed in the body of this order and, to the extent the requested clarification is not granted, rehearing is denied.

By the Commission.

(S E A L)

Philis J. Posey,
Deputy Secretary.