

126 FERC ¶ 61,238
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Dominion Cove Point, LNG, LP	Docket Nos. CP05-130-000, 001, 002, 003, and 005 CP05-132-000, 001, 002, and 004 CP05-395-000, 001, and 004
Dominion Transmission, Inc.	CP05-131-000, 001, 002 and 004

ORDER DENYING STAY

(Issued March 19, 2009)

1. On February 13, 2009, Washington Gas Light Company (WGL) filed a motion, pursuant to Rule 212 of the Commission's Rules of Practice and Procedure,¹ requesting that the Commission stay, pending completion of the judicial review process, the effectiveness of the Commission's order on remand issued in this proceeding on October 7, 2008 (Remand Order),² and order on rehearing and clarification issued on January 15, 2009 (Rehearing Order).³ Alternatively, WGL requests that the Commission immediately modify these orders to impose a condition capping physical deliveries of vaporized liquefied natural gas (LNG) at 30,000 dekatherms per day (Dth/d), on average, at the interconnect between the Cove Point Pipeline and Columbia Gas Transmission, L.L.C. (Columbia Gas) at Loudoun, Virginia (Columbia-Loudoun), in lieu of the 530,000

¹ 18 C.F.R. § 385.212 (2008).

² *Dominion Cove Point, LNG, LP*, 125 FERC ¶ 61,018 (2008).

³ *Dominion Cove Point, LNG, LP*, 126 FERC ¶ 61,036 (2009).

Dth/d cap imposed in the Remand and Rehearing Orders. For reasons discussed below, we deny WGL's requests

I. Background

2. On June 16, 2006, the Commission issued an order (June 16, 2006 Order)⁴ granting Dominion Cove Point LNG, LP (Cove Point LNG) and Dominion Transmission, Inc. (Dominion) authorization to construct and operate facilities which comprise the Cove Point Expansion Project. This project includes the expansion of Cove Point LNG's existing import terminal (Docket No. CP05-130-000, 001 and 002) and pipeline (Docket No. CP05-132-000 and 001) and Dominion's construction of new downstream pipeline and storage facilities (CP05-131-000 and 001). As proposed and approved, the Cove Point Expansion Project is designed to: (a) expand the existing Cove Point LNG Terminal to increase the volumes of LNG that can be imported, stored, regasified, and delivered; (b) expand the capacity of the Cove Point Pipeline; and (c) construct new downstream pipeline and storage facilities to provide enhanced access to firm natural gas storage capabilities and to additional natural gas markets throughout the northeastern United States.

3. The June 16, 2006 Order addressed WGL's contention that an unusually high number of gas leaks on a portion of its system that receives primarily regasified LNG from the Cove Point LNG Terminal is attributable to the "dry" regasified LNG's effects on the seals in its pipeline couplings. The Commission concluded in the June 16, 2006 Order that other factors, namely the application of hot tar to the seals as a means of corrosion control, the increase in operating pressures on WGL's system, and colder temperatures were primarily responsible for the leaks of which WGL complains.

4. On January 4, 2007, the Commission issued an order on rehearing (January 4, 2007 Order)⁵ restating its belief that hot tar, temperature, and pressure played a more prominent role leading to the increase in leak rates than did the introduction of "dry" regasified LNG. The January 4, 2007 Order concluded that since the projected in-service date for Cove Point LNG's expansion facilities is not until the fall of 2008, there was time for WGL to complete any needed corrective measures to repair or replace defective couplings on its system.

5. On July 28, 2008, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *Washington Gas Light Company v. FERC (WGL v. FERC)*,⁶

⁴ *Dominion Cove Point LNG, LP*, 115 FERC ¶ 61,337 (2006).

⁵ *Dominion Cove Point LNG, LP*, 118 FERC ¶ 61,007 (2007).

⁶ 532 F.3d 928 (D.C. Cir. 2008).

vacating the orders approving the Cove Point Expansion Project and remanding the case so that the Commission could more fully address whether the expansion project can go forward without causing unsafe leakage on WGL's system. The court affirmed the validity of our finding that the existing leaks that WGL complained of are due primarily to the condition of WGL's pipeline couplings, not the introduction of regasified Cove Point LNG into the WGL system. However, with regard to the post-expansion leakage, the court found that our conclusion that WGL could repair its system in a timely fashion was not supported by the record evidence. Therefore, the court vacated the orders "to the extent they approve the Expansion" and remanded the case so that the Commission "can more fully address whether the Expansion can go forward without causing unsafe leakage."

6. The Remand Order reissued authorizations for Cove Point LNG's and Dominion's construction of all facilities that comprise the Cove Point Expansion Project. In addition, the Commission reissued authorizations for the operation of all project facilities, except that the operation of the expanded LNG import terminal facilities was specifically conditioned upon deliveries by Cove Point LNG through its Cove Point Pipeline to an interconnection with Columbia Gas at Columbia-Loudoun not exceeding 530,000 Dth/d, which is the level of pre-existing firm delivery rights at that point.

7. The Commission concluded in the Remand and Rehearing Orders that limiting deliveries at Columbia-Loudoun to no more than 530,000 Dth/d, the level of firm primary delivery rights under the pre-expansion order authorizing reactivation of the Cove Point import facilities,⁷ would allow timely completion of project construction, while at the same time ensuring that no additional volumes of LNG associated with the expansion project are delivered to WGL's system, thus ameliorating concerns that the safety of WGL's system could be negatively impacted by the proposed expansion's increased deliveries of regasified LNG.⁸ The Commission concluded that this solution complied fully with the court's mandate in *WGL v. FERC*.

⁷ Cove Point LNG was initially authorized in 1972 to construct and operate the Cove Point LNG Terminal and the Cove Point Pipeline as part of a project to import LNG from Algeria and transport natural gas to United States markets. Shipments of LNG to the Cove Point LNG Terminal began in March 1978, were interrupted in April 1980, and ceased in December 1980. In 2001, the Commission authorized Cove Point LNG to construct new facilities and to reactivate and operate existing facilities to recommence LNG imports at the terminal. *See Cove Point Limited Partnership*, 97 FERC ¶ 61,043 (2001), *order granting and denying rehearing in part, granting and denying clarification*, 97 FERC ¶ 61,276 (2001), *order denying rehearing and granting and denying clarification*, 98 FERC ¶ 61,270 (2002).

⁸ Remand Order, 125 FERC ¶ 61,018 at P 3.

8. The Rehearing Order, among other things, denied WGL's request to reduce the 530,000 Dth/d delivery limitation at Columbia-Loudoun to 31,000 Dth/d.⁹ In response to WGL's assertion that the Commission has the authority under sections 7 and 16 of the Natural Gas Act (NGA), and its own blanket certificate rules, to establish a cap at 31,000 Dth/d in order to insure public safety, the Commission stated that the expansion proceedings were not the appropriate forum to seek modification of the terms and conditions of service authorized under previously issued certificates or otherwise contest pre-existing conditions.¹⁰

II. WGL's Motion for Stay

9. WGL claims, in support of its motion for stay of the effectiveness of the Remand and Rehearing Orders, that as a result of several changes soon to occur, increased amounts of low C5+¹¹ vaporized LNG will begin flowing through Columbia-Loudoun beginning this spring. WGL states that this increase in low C5+ vaporized LNG will result in increased gas leakage and potentially unsafe conditions to densely populated portions of WGL's service area. Specifically, WGL asserts that as a result of expected changes in the world LNG market, it anticipates that within the next few months there will be an increase in deliveries of LNG to Cove Point.

10. WGL maintains that by authorizing the expansion, the Remand and Rehearing Orders will permit more vaporized LNG to flow on the Cove Point Pipeline. WGL further contends that due to lower gas flows associated with the spring shoulder season, there will be less domestic gas flowing on Columbia Gas' system to blend with the regasified LNG once the regasified LNG is delivered to Columbia-Loudoun. WGL asserts that this will result in more low C5+ LNG flowing to WGL's Rockville and Dranesville gate stations beyond Columbia-Loudoun. Therefore, asserts WGL, expedited action to stay the effect of the Remand and Rehearing Orders is required to maintain the status quo and prevent imminent irreparable harm to WGL as a result of a potentially unmanageable level of unsafe leakage. WGL alternatively requests that the Commission immediately modify these orders to impose an average 30,000 Dth/d cap on deliveries of

⁹ As noted, WGL now requests in its motion for stay that deliveries be limited to 30,000 Dth/d.

¹⁰ Rehearing Order, 126 FERC ¶ 61,036 at P 68-69.

¹¹ The hydrocarbon gases that can be found in natural gas are: methane (C1), ethane (C2), propane (C3), butanes (C4), pentanes (C5), hexanes (C6), heptanes (C7), octanes (C8) and nonanes plus (C9+). In this proceeding heavy hydrocarbons, or HHC, refers to the hydrocarbon components of the gas stream that are pentanes (C5) and heavier, or C5+.

regasified LNG at Columbia-Loudoun. WGL states that based on historical experience, 30,000 Dth/d is the level that WGL is confident it can manage safely.

III. Answers To WGL's Motion for Stay

11. On February 23, 2009, the Maryland Office of People's Counsel (Peoples Counsel) filed an answer in support of WGL's motion for stay, and alternative request for modification of the delivery restriction. Columbia Gas, BP Energy Company (BP Energy), Statoil Natural Gas LLC (Statoil), Shell NA LNG (Shell LNG) filed answers opposing WGL's motion and Cove Point LNG and Dominion filed a joint answer opposing WGL's motion.¹²

12. People's Counsel contends that the court mandated the Commission to resolve the unsafe leakage issue posed not only by the expansion of volumes exported above existing levels, but also by the operation of the Cove Point facility under its earlier reactivation authorization. According to People's Counsel, the Commission has the authority to act in this proceeding to resolve the unsafe leakage problem on WGL's system, whether or not the leakage is associated with any additional expansion volumes of LNG. People's Counsel suggests that the Commission's failure to solve WGL's unsafe leakage problem creates an unacceptable regulatory gap.

13. Columbia Gas, Shell LNG, and BP Energy oppose WGL's motion and, in particular, WGL's request for a reduction in the currently certificated level of 530,000 Dth/d at Columbia-Loudoun. They contend that the imposition of such a reduction would amount to the grant of a third-party request for abandonment of facilities and services on Columbia Gas' system, directly and indirectly affecting Columbia Gas and the services it currently provides to its customers, including BP Energy. Columbia Gas and BP Energy assert that the Commission correctly concluded in the Rehearing Order that the Columbia-Loudoun restriction WGL seeks is beyond the scope of the Commission's authority to require in this proceeding, as well as beyond the scope of the matter before the court in *WGL v FERC*.

14. In addition to claiming that WGL has failed to present any facts justifying the granting of a stay, Statoil and Cove Point LNG and Dominion stress that WGL failed to demonstrate that a stay of the Remand and Rehearing Orders is justified, since staying the effectiveness of those orders would not change the fact that under current pre-expansion conditions WGL could receive up to 530,000 Dth/d of regasified LNG at the Columbia-Loudoun interconnect. They maintain that the operation of the Cove Point Expansion, as authorized and conditioned by the Commission, will not result in an increase in the

¹² By notice issued February 15, 2009, the time for filing answers to WGL's motion was shortened to February 23, 2009.

amount of regasified LNG that can be delivered to Columbia-Loudoun, nor is there an increased likelihood that more regasified LNG will be delivered to Columbia-Loudoun than would have been delivered under the pre-expansion authorizations. Cove Point LNG and Dominion also assert that since WGL has failed to establish that it will suffer irreparable harm absent a stay, the Commission need not consider whether to exercise its equitable powers to impose a further cap on deliveries at Columbia-Loudoun.

IV. Discussion

15. In its consideration of motions for a stay, the Commission has applied the standards set forth in section 705 of the Administrative Procedure Act,¹³ and has granted a stay “[w]hen ... justice so requires.”¹⁴ An administrative agency may properly stay its own orders when it has ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.¹⁵

16. In deciding whether justice requires a stay, we generally consider several factors, which include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.¹⁶ Our general policy is to refrain from granting stays in order to assure definiteness and finality in Commission proceedings.¹⁷

¹³ 5 U.S.C. § 705 (2006).

¹⁴ See, e.g., *Clifton Power Corp.*, 58 FERC ¶ 61,094 (1992); *United Gas Pipe Line Co.*, 42 FERC ¶ 61,388 (1988); *Trinity River Authority of Texas*, 41 FERC ¶ 61,300 (1987); *City of Centralia, Washington*, 41 FERC ¶ 61,028 (1987).

¹⁵ *City of Tacoma, Washington*, 87 FERC ¶ 61,197, at 61,773 (1999). This test resembles the balancing test followed by the United States Court of Appeals for the D.C. Circuit in *Washington Metropolitan Area Transit Comm’n v. Holiday Tours*, 559 F.2d 841, 844-45 (D.C. Cir. 1977), and its progeny, addressing stay requests.

¹⁶ See, e.g., *CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at 61,631 (1991), *aff’d sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir.), *cert denied*, 510 U.S. 990 (1993); *NE Hub Partners, L.P.*, 85 FERC ¶ 61,105 (1998); *Boston Edison Co.*, 81 FERC ¶ 61,102 (1997).

¹⁷ *Id.* See also, *Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217 (2000).

If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.¹⁸

17. As described above, WGL's assertion that immediate action is needed to prevent its system from exposure to increased volumes of low C5+ vaporized LNG, resulting in increased gas leakage and potentially unsafe conditions in densely populated portions of WGL's service area, is premised on three claims. WGL's first assertion, that there may be increased deliveries of LNG to Cove Point within the next few months due to expected changes in the world LNG market, is by its own terms speculative. WGL's second claim, i.e., that lower domestic gas flows during the spring shoulder season will result in more unblended LNG being delivered to Columbia-Loudoun, is no more certain or quantified. WGL estimates that as a result of the first two factors, it would experience an additional 5,000 gas leaks per year in the areas served by its Rockville and Dranesville gate stations.

18. In *Wisconsin Gas Co. v. FERC*,¹⁹ the court developed several principles to determine if the requirement of irreparable harm has been met for a judicial stay, among which is that "the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time.'"²⁰ We are not persuaded that WGL has established with sufficient certainty that there will be any increase in deliveries of low C5+ regasified LNG at Columbia-Loudoun, much less how significant any increase might be. Thus, WGL's request fails to demonstrate irreparable injury absent stay.

19. Moreover, even if these two events were certain to occur, a stay of the Remand and Rehearing Orders would do nothing to impact the likelihood that WGL's at-risk system may be exposed to volumes of regasified LNG above historical levels. WGL's third assertion, that the Remand and Rehearing Orders authorizing the Cove Point Expansion will permit more vaporized LNG to flow on the Cove Point Pipeline, has no bearing on the key concerns raised by WGL in its motion for stay, i.e., the alleged impacts on WGL's system behind its Dranesville and Rockville gate stations of increased deliveries of regasified LNG at the Columbia-Loudoun interconnect.

20. As the Remand and Rehearing Orders make clear, by limiting deliveries at Columbia-Loudoun to no more than 530,000 Dth/d, the level of existing firm primary delivery rights under the pre-expansion reactivation order, the Commission ensured that no additional volumes of LNG associated with the expansion project will be delivered to

¹⁸ *Id.*

¹⁹ 758 F.2d 669 (D.C. Cir. 1985).

²⁰ *Id.* at 674.

WGL's system at that point. In other words, the 530,000 Dth/d limitation in the Remand and Rehearing Orders preserves the very status quo WGL would hope to achieve by staying their effectiveness. Staying the effectiveness of the Remand and Rehearing Orders would have no effect whatsoever on any threat to WGL of increased unsafe leakage or consequential harm due to increased exposure to low C5+ regasified LNG. For the reasons discussed above, WGL's request for stay is denied.

21. In the Rehearing Order, we considered WGL's request to lower the cap on deliveries of regasified LNG at Columbia-Loudoun to levels below those already authorized in previous proceedings and explained in detail why we would not do so. Specifically, we found that reducing the cap at Columbia-Loudoun to 31,000 Dth/d would substantially reduce the primary firm delivery rights of all shippers, including Shell LNG and BP Energy, who hold primary rights at Columbia-Loudoun under contracts that supported the certificate issued in the reactivation proceeding. In addition, we found that the lower cap would have an adverse impact on Columbia Gas, which is obligated under existing firm transportation agreements to receive a maximum of 97,414 Dth/d at Columbia-Loudoun and to make Columbia-Loudoun available to other customers as well.

22. Furthermore, we concluded that these service obligations are wholly outside the scope of the facilities and services approved in the orders vacated by the court in *WGL v. FERC* or reauthorized in the Remand Order, and that the Commission's conditioning authority under either NGA section 3 or 7(e) did not extend to issues not properly before us.²¹ We stated that NGA section 16 does not give us authority beyond that given under the substantive provisions of the act;²² hence, if we could not impose such a condition under our section 3 or section 7 authority, we could not fall back on our authority under section 16, which allows us to issue such orders as are necessary and appropriate in administering our jurisdictional responsibilities under the NGA. We concluded that there was nothing in the court's decision in *WGL v. FERC* to suggest that the court vacated any authorizations beyond those pertaining to the Cove Point Expansion Project because the pre-expansion certificate was not before the court, and it was not vacated or otherwise within the scope of the mandate.

²¹ See *Northern Natural Gas Co. v. FERC*, 827 F.2d 779, 792-93 (D.C. Cir. 1987); *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1129-33 (D.C. Cir. 1979). (Although, in both cases, the court was discussing the Commission's section 7 conditioning power, there is no basis for reading into section 3 the intent to give the Commission any expanded conditioning authority such that it could revise services authorized in other proceedings.)

²² See *Mobil Oil Corp. v. F.P.C.*, 483 F.2d 1238, 1257 (D.C. Cir. 1973).

23. We reaffirm our reasoning for not lowering the cap on deliveries of regasified LNG at Columbia-Loudoun to levels below those already authorized. Even if we did have the authority to act in this proceeding to alter the authorizations granted in a different section 7 proceeding, we would not do so because granting WGL's requested alternative relief would substantially harm Columbia Gas and its customers and the existing Cove Point LNG shippers, as well as the public interest considerations upon which those authorizations were based.

24. In response to People's Counsel's argument that the Commission's failure to grant a stay would create a regulatory gap in matters of pipeline safety, we note that there are highly detailed and technical construction, operation, and other safety regulations and standards to which pipelines are subject pursuant to their regulation by the Department of Transportation (DOT) and specifically, the Pipeline and Hazardous Materials and Safety Administration (PHMSA). PHMSA is the primary federal regulatory agency responsible for ensuring that pipelines are safe, reliable, and environmentally sound. From the federal level, PHMSA oversees the development and implementation of regulations concerning pipeline construction, maintenance, and operation, and it shares these responsibilities with state regulatory partners.²³

25. As explained in a Memorandum of Understanding between the DOT and the Commission, the DOT exercises authority to promulgate and enforce safety regulations and standards for the transportation of natural gas and that such authority extends to "the design, installation, construction, initial inspection, initial testing, operation, and maintenance of facilities used in the transportation of natural gas."²⁴ For non-interstate pipeline facilities, DOT has delegated to the appropriate state agencies the authority to prescribe safety standards and enforce compliance with such safety standards over jurisdictional gas and hazardous liquid facilities.

²³ PHMSA was created under the Norman Y. Mineta Research and Special Programs Improvement Act of 2004 (P.L. 108-426) which was signed into law by President George W. Bush on November 20, 2004. "The creation of PHMSA provides the [DOT] a modal administration focused solely on its pipeline and hazardous materials transportation programs. Through PHMSA, the [DOT] develops and enforces regulations for the safe, reliable, and environmentally sound operation of the nation's 2.3 million mile pipeline transportation system and the nearly 1 million daily shipments of hazardous materials by land, sea, and air." <http://phmsa.dot.gov/about/agency>.

²⁴ Memorandum of Understanding between the DOT and the Commission Regarding Natural Gas Transportation Facilities at p. 1. 58 Fed. Reg. 7684 (Jan. 15, 1993). The Memorandum acknowledges the DOT's exclusive authority to promulgate safety standards for facilities used in the transportation of natural gas.

26. WGL's distribution pipeline system provides natural gas service to a market area which extends into three state regulated jurisdictions: Maryland, Virginia, and Washington, D.C. For WGL, three state agencies oversee the safety issues relating to operating and maintaining its pipeline distribution system: Public Service Commission of the District of Columbia, Maryland Public Service Commission, and Virginia State Corporation Commission.²⁵ These three state agencies share regulatory responsibility with DOT to prescribe and enforce compliance with safety standards for jurisdictional gas companies, such as WGL. Thus, we see no regulatory gap in matters of pipeline safety.

The Commission orders:

WGL's motion for stay and alternative request for a 30,000 Dth/d cap on deliveries of regasified LNG to Columbia-Loudoun are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁵<http://www.washgas.com/pages/TariffsandRateSchedules>