127 FERC ¶ 61,154
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

ConocoPhillips Alaska Natural Gas Corporation and Marathon Oil Company — Docket No. CP09-34-001

ORDER ON REHEARING AND CLARIFYING PRIOR ORDER

(Issued May 21, 2009)

1. On January 15, 2009, the Commission issued an order[1] clarifying that the existing liquefied natural gas (LNG) terminal and storage facility at Kenai, Alaska, jointly owned by ConocoPhillips Alaska Natural Gas Corporation (ConocoPhillips) and Marathon Oil Company (Marathon),[2] is subject to the same reporting and inspection requirements that apply to other LNG terminal facilities. ConocoPhillips and Marathon seek rehearing and clarification, contending that it is inappropriate for the Kenai facility to: (1) adhere to today's standards for construction and operation; rather, it should be "grandfathered," i.e., held to the applicable standards in place at the time the facility was constructed and placed in service; (2) submit semi-annual reports; and (3) be subject to an annual charge. For the reasons discussed below, we clarify that (1) we do not expect Kenai's existing facilities to conform to contemporary standards; (2) ConocoPhillips and

[1] *Phillips Petroleum Company and Marathon Oil Company*, 126 FERC ¶ 61,037 (2009) (January 2009 Order).

[2] The terminal and storage facility is owned by the Kenai LNG Corporation, in which ConocoPhillips holds a 70 percent ownership interest and Marathon holds a 30 percent ownership interest. Kenai was approved in 1967, 37 FPC 777 (1967) and construction was completed in 1969.

Marathon must submit the same reports for Kenai that are submitted for other LNG terminals; and (3) the Kenai facilities will not be subject to an annual charge.

Request for Rehearing and Clarification

2. ConocoPhillips and Marathon maintain the Commission failed to engage in reasoned decision making, in accordance with the Administrative Procedure Act (APA), by imposing reporting requirements on Kenai without providing a justification for doing so, but for its observation that the public interest requires that Kenai adhere to the same reporting requirements that are applied to every other LNG terminal. The parties view this action as inconsistent with NGA section 3(a), which only permits the Commission to issue a supplemental order "after opportunity for hearing, and for good cause shown." The parties stress that the Commission acted sua sponte, without notice and an opportunity for hearing, and did not identify any incident, complaint, or concern that would support altering its longstanding, hands-off approach to Kenai. ConocoPhillips and Marathon note that Kenai has operated since 1969 without reporting to the Commission, and emphasize that Kenai exports gas, in contrast to the other LNG terminals which only import gas; further, unlike Kenai, many of the other terminals were recently constructed or have substantially modified their facilities in the past few years.

3. Ordering Paragraph (A) of the January 2009 Order states that "ConocoPhillips and Marathon must file with the Commission the information identified in Resource Report 11, Reliability and Safety, and Resource Report 13, Engineering and Design Material." ConocoPhillips and Marathon note that Resource Report 11 specifies it "is required for applications for new or recommissioned LNG facilities"[3] and Resource Report 13 specifies it "is required for construction of new liquefied natural gas (LNG) facilities, or the recommissioning of existing LNG facilities."[4] The parties argue that these provisions are inapplicable to Kenai, since Kenai does not qualify as a new or recommissioned LNG facility.

4. If the Resource Reports are deemed applicable to Kenai, ConocoPhillips and Marathon contend there is no legal basis for compelling them to submit certain items of information specified in the reports. In particular, the parties point to the Resource Report 13 requirement to demonstrate compliance with 49 C.F.R.

[3] 18 C.F.R. § 380.12(m) (2008).

[4] 18 C.F.R. § 380.12(o) (2008).

Part 193 and the National Fire Protection Association 59A LNG Standards,[5] and assert that the Department of Transportation (DOT), which oversees compliance with these provisions, has "grandfathered" LNG terminals in service before 2001, thus exempting Kenai, since it went into service in 1969, from compliance with these requirements. ConocoPhillips and Marathon add that the Resource Report 13 requirement to provide seismic information for facilities that would be located in zone 2, 3, or 4 of the Uniform Building Code Seismic Map of the United States[6] does not apply to Kenai.

5. ConocoPhillips and Marathon note the January 2009 Order's statement that "the Kenai facilities will be subject to a cryogenic design and technical review of the facility's design, operation, and maintenance,"[7] and ask the Commission to clarify that this statement does not indicate that Kenai will be expected to comply with current safety standards. The parties point out that the safety standards contained in 49 C.F.R. Part 193 were not adopted until 1980, more than a dozen years after Kenai went into operation, and stress the DOT determination that facilities constructed before March 31, 2000, are not subject to current siting, design, installation, or construction standards.[8] The parties observe that in the past, the Commission has not imposed new construction standards on previously-permitted existing LNG terminal facilities that sought recommissioning authorization.[9]

6. ConocoPhillips and Marathon believe there is no need to submit page 520 of FERC Form No. 2 describing gas volumes, as directed in the January 2009 Order, because the page 520 data serves as the basis for the Commission's annual

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[5] 18 C.F.R. § 380.12(o)(14) (2008).

[6] 18 C.F.R. § 380.12(o)(15) (2008).

[7] 126 FERC ¶ 61,037 at P 5.

[8] *See* 49 C.F.R. § 193.2005(a). (2008).

[9] *Citing Cove Point LNG Limited Partnership*, 97 FERC ¶ 61,043, *order on reh'g and clarification,* 97 FERC ¶ 61,276 (2001), *order on reh'g and clarification,* 98 FERC ¶ 61,270 (2002); *Southern LNG, Inc.*, 103 FERC ¶ 61,029 (2003); and *Trunkline Gas Company, LLC*, 108 FERC ¶ 61,251 (2004), *order amending certificate*, 110 FERC ¶ 61,131 (2005).

charge calculation,[10] and "the Commission's orders establishing the Annual Charge regulations categorically and specifically exempted the Kenai Terminal from Annual Charges."[11] ConocoPhillips and Marathon add that the Commission did not identify any changed circumstances that would warrant imposing an annual charge and did not explain why such a charge should apply to Kenai's export-only activities. The parties cite the Commission's position in *Hackberry LNG Terminal L.L.C (Hackberry),*[12] as codified in NGA section 3(e)(3)(B), to argue that because the Commission has "asserted no jurisdiction over the sale and transportation service provided by a new LNG receiving terminal" since 2003, and because Kenai is similar to new LNG terminals (i.e., it is a proprietary facility not subject to Commission rate or service regulation), Kenai "should be treated no differently from these new terminals;" therefore, "[c]onsistent with the Commission's exemption of *Hackberry* LNG import terminals from the Annual Charge, the Commission must exempt the Kenai Terminal from the Annual Charge as well."[13]

<u>Commission Response</u>

7. ConocoPhillips and Marathon maintain that because there has been no change in the status of Kenai's facilities or operations, there is no cause for any change in the status of the Commission's regulatory oversight. We acknowledge that there has been no change to Kenai, and stress that our January 2009 Order does not indicate that Kenai is not in compliance with all applicable federal safety standards.[14] However, over the last several years, prompted in part by the Energy

[10] *See Annual Charges Under the Omnibus Budget Reconciliation Act of 1986*, Order No. 472, FERC Stats. & Regs. ¶ 30,746 (1987); *clarified*, Order No. 472-A, FERC Stats. & Regs. ¶ 30,750; *reh'g granted in part and denied in part*, Order No. 472-B, FERC Stats. & Regs ¶ 30,767 (1987), *reh'g granted and clarification*, Order No. 472-C, 42 FERC ¶ 61,013 (1988). The January 2009 Order inadvertently referred to this annual charge and the annual charge adjustment.

[11] ConocoPhillips' and Marathon's Request for Clarification at 8.

[12] 101 FERC ¶ 61,294 (2002), *order issuing certificates and granting reh'g, Cameron LNG, LLC*, 104 FERC ¶ 61,269 (2003).

[13] ConocoPhillips' and Marathon's Request for Clarification at 21-22.

[14] *See* 49 C.F.R. Part 193 (2008).

Policy Act of 2005 (EPAct 2005),[15] we have had cause to review our regulation of LNG terminals, particularly as it relates to safety and security issues. In view of these revisions to our statutory obligations, we found it appropriate, as discussed in our January 2009 Order, to bring Kenai in line with the regulatory regime that we apply to every other LNG terminal.

8. Currently, the Commission directs LNG terminal operators to submit semi-annual reports on their facilities' operations and report significant incidents within 24 hours. In addition, Commission staff periodically inspects LNG terminal facilities. These actions enable the Commission to verify that each LNG terminal is functioning in a safe and secure manner. Our January 2009 Order informed ConocoPhillips and Marathon that in the future the Kenai facility will be subject to routine reporting and inspection procedures, including a technical design review. The order does not mandate any change to Kenai's current facilities or operations. Instead, the January 2009 Order clarified how we intend to exercise our regulatory jurisdiction over Kenai going forward. ConocoPhillips and Marathon had the opportunity to comment on the regulatory revisions that will be applied to Kenai in their request for rehearing and clarification, and we address the parties' concerns herein. Given this, we do not believe the parties have been deprived of notice and the opportunity to comment via this paper hearing proceeding.

9. We acknowledge that the aspects of the Kenai facility that relate to siting, design, and construction are "grandfathered." However, as a result of technical review or inspections, Commission staff may make recommendations to ensure the continued reliability, operability, safety, and security of the facility. In the event ConocoPhillips and Marathon subsequently seek to modify or expand Kenai, we will apply the standards that are then in effect to that future modification or expansion.

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[15] Pub. L. 109–58, 42 U.S.C. § 15801 (2005). EPAct 2005 clarified the Commission's NGA section 3 jurisdiction by adding section 3(e)(1), which declares that "[t]he Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal." EPAct 2005 added NGA section 2(11) defining "LNG terminal" to include "all natural gas facilities located onshore . . . that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is . . . exported to a foreign country from the United States . . . but does not include . . . any pipeline or storage facility subject to the jurisdiction of the Commission under section 7."

10. ConocoPhillips and Marathon maintain that they should be exempt from submitting Resource Reports 11 and 13, because the reports state they are to apply to new and recommissioned facilities, a description that does not take in Kenai, as it is an existing facility. The introductory section of Resource Reports 11 and 13 only specify new and recommissioned facilities because reports are presumably already on file for existing facilities. The description is not intended to exempt an existing facility from the reporting requirements when that facility has yet to comply with these requirements. Thus, when an existing LNG facility that has been exempt from our jurisdiction becomes subject to our jurisdiction, we require that the information contained in Resource Reports 11 and 13 be submitted for that existing facility.[16] Kenai is in the position of a new, recommissioned, or newly-jurisdictional facility in that we do not have the resource report information on file. This information is necessary for the technical and cryogenic design review of the facility operation and maintenance; accordingly, we require that such information be submitted for the Kenai facility.

11. ConocoPhillips and Marathon contend that not all of the information specified in the resource reports is relevant to an existing facility such as Kenai. We concur. However, the parties do not present a compendium itemizing the data they deem inapplicable, and we do not believe it would be productive to proceed through each paragraph of each resource report to determine whether the described information is relevant to Kenai. Instead, we urge ConocoPhillips and Marathon to submit the specified information, and if the parties believe certain information is not relevant or required, they should provide their rationale for excluding that information with the report. We will review the submitted report, as well as any accompanying explanatory material, and determine whether additional material is needed.

12. Companies subject to the Commission’s jurisdiction under the NGA are assessed an annual charge to offset the administrative costs incurred in enforcing the NGA. ConocoPhillips and Marathon maintain Kenai should be exempt from this assessment. In the regulations implementing the annual charge, the Commission describes the split in NGA section 3 authority, whereby Department

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[16] January 2009 Order, 126 FERC ¶ 61,037 at P 5, n.7, *citing UGI LNG, Inc.*, 119 FERC ¶ 61,056 (2007); *Hopkinton LNG Corp.,* 81 FERC ¶ 61,291 (1997), and *Total Peaking Services*, 81 FERC ¶ 61,246 (1997) as examples of existing nonjurisdictional LNG peak-shaving facilities, which upon becoming subject to the Commission’s jurisdiction, were required to submit detailed information regarding their facilities.

of Energy (DOE) approval is required to import or export gas, and Commission approval is required to site, construct, and operate facilities to be used to import or export gas. Noting this, in Order No. 472 the Commission stated that "[b]ecause of this joint authority for section 3 filings and the fact that import authority can be authorized" by DOE "without the necessity for a filing with the Commission, the Commission will not assess annual charges against companies which fall under the Commission's jurisdiction solely due to section 3 of the NGA and the filing requirements of Part 153 of the Commission's regulations."[17]

13. The parties sought rehearing of that order because Phillips Petroleum Company (the predecessor to ConocoPhillips) and Marathon were designated as gas importers exempt from annual charges; on rehearing, the Commission clarified that the two companies were in fact gas exporters, but still exempt from annual charges.[18]

14. In view of this previous action by the Commission, we will revise the January 2009 Order and declare that ConocoPhillips and Marathon will not at this time be subject to an annual charge with respect to volumes moving through the Kenai facility.[19] That said, we will continue to require ConocoPhillips and Marathon to submit page 520 of FERC Form No. 2, since the submission of this information will enable us to better monitor Kenai's operations.[20] We clarify that

[17] FERC Stats. & Regs. ¶ 30,746 at 30,625, n.160.

[18] Order No. 472-B, FERC Stats. & Regs. ¶ 30,767 at 30,829.

[19] ConocoPhillips and Marathon cite the lighter-handed regulatory approach first adopted in *Hackberry* as a reason to forego an annual charge. We have previously rejected this argument, *see, e.g., Freeport-McMoRan Energy LLC*, 117 FERC ¶ 61,116 (2006), and we do so here. Annual charges reflect costs attributable to meeting the Commission's regulatory mandates. Thus, to the extent the Commission oversees the siting, construction, maintenance, and operation of LNG terminal facilities, it is appropriate that these facilities' sponsors contribute to the cost of the Commission's regulatory oversight.

[20] In Order No. 472, we observed that an LNG importer subject to the Commission's jurisdiction under NGA section 3 "files with the Commission a Form No. 14 indicating the total LNG volumes transported," and because the Commission "has sufficient volumetric data with which to assess annual charges" with respect to these importers, "it will include this type of company among the groups to be assessed annual charges." FERC Stats. & Regs. ¶ 30,746 at 30,625. Because companies are no longer required to file Form No. 14, Annual Report for

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because Form No. 2 is filed annually, although the January 2009 Order states that page 520 of this form is to be submitted as part of the semi-annual operational report, if it proves impractical to track volumetric data semi-annually, the page 520 data need only be updated on an annual basis.

The Commission orders:

The January 2009 order is clarified, and rehearing is granted and denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Importers and Exporters of Natural Gas, the Commission no longer has access to accurate information on the volumes of LNG being imported to or exported from LNG terminals.