128 FERC ¶ 61,240
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Statoil Natural Gas LLC — Docket No. RP09-820-000
and
La Société Nationale pour la Recherche, la Production,
le Transport, la Transformation et la
Commercialisation des Hydrocarbures s.p.a.

ORDER ON PETITION FOR WAIVER

(Issued September 14, 2009)

1. On July 8, 2009, Statoil Natural Gas LLC (Statoil) and La Société Nationale pour la Recherche, la Production, le Transport, la Transformation, et la Commercialisation des Hydrocarbures s.p.a. (Sonatrach) (jointly the Petitioners) filed a petition for an expedited grant of a waiver of the Commission's prohibition on tying and related capacity release bidding requirements (Joint Petition), in order to permit them to link an agreement to purchase and sell liquefied natural gas (LNG) with a prearranged pipeline capacity release agreement.[1] Alternatively, Petitioners requested that the Commission confirm that the Petitioners can enter into the LNG purchase and sale agreement and a separate, unconditioned prearranged capacity release, without the need to seek a waiver of the Commission's tying prohibition and related capacity release bidding requirements. Petitioners also request that the Commission waive the requirement that the capacity release be posted for bidding, to the extent necessary. The Commission grants the requested waiver and denies as moot Petitioners' alternative request as described more fully below.

Background

2. Petitioners' request relates to certain of Dominion Cove Point LNG, LP's (Cove Point) LNG and natural gas pipeline facilities. Cove Point operates an LNG terminal and storage tanks in Lusby, Maryland. It also operates a pipeline that extends approximately

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[1] Petitioners request that the Commission act on the requested waiver as soon as practicable but no later than September 30, 2009.

88 miles from the LNG facility to interconnections with several interstate pipelines in Loudon County, Virginia. At its LNG facilities, Cove Point provides an LNG tanker discharging (LTD) service that consists of the receipt of LNG from ocean-going tankers, the temporary storage of LNG, and the vaporization of LNG and delivery of natural gas to Cove Point's pipeline. Cove Point also provides firm peaking service (Rate Schedules FPS-1, FPS-2, and FPS-3) at its LNG facilities during the winter months. Cove Point provides firm and interruptible transportation service on its pipeline under Rate Schedules FTS and ITS and an off-peak transportation service under Rate Schedule OTS.

3. In 2006 the Commission approved the Cove Point Expansion Project, which included the installation of two additional LNG storage tanks at the terminal facility and the construction by Cove Point and Dominion Transmission, Inc. of new downstream pipeline and appurtenant storage facilities. The expansion LNG facilities, which were approved under section 3 of the Natural Gas Act (NGA), were placed into service in January 2009 and increased the terminal's storage capacity to 14.6 billion cubic feet and its peak send-out capacity to 1.8 million dekatherms (Dth) per day. As the Commission noted in Order No. 712-A, facilities approved pursuant to section 7 of the NGA provide Part 284 open access service and are subject to the Commission's capacity release rules. Facilities approved pursuant to NGA section 3 are not open access, as permitted by the Commission's *Hackberry* policy.[2] Thus, Cove Point provides open access service at its original LNG storage facilities but the new LNG storage facilities are not subject to the Commission's open access rules.

4. According to the Joint Petition, Statoil holds 250,000 Dth per day of NGA section 7 terminal capacity at the Cove Point LNG receiving facility and an equivalent 250,000 Dth per day of firm capacity on the Cove Point pipeline pursuant to rate schedule FTS.[3] Additionally, Statoil holds 83,000 Dth per day of incremental send-out service at the Cove Point terminal and 83,000 Dth per day of off-peak transportation service under rate schedule OTS on the Cove Point pipeline. Petitioners state that both of these services were approved pursuant to section 4 of the NGA.[4] Statoil also states that it is the Cove

[2] *See* Order No. 712-A, FERC Stats & Regs. ¶ 31,284 (2008) (citing *Hackberry LNG Terminal, L.L.C.*, 101 FERC ¶ 61,294 (2002)(*Hackberry*).

[3] The Petitioners state that Cove Point has reviewed the Joint Petition and has authorized the Petitioners to state that the pipeline does not oppose any of the requested waivers.

[4] *Dominion Cove Point LNG, LP*, 118 FERC ¶ 61,023 (2007); *Dominion Cove Point LNG, LP*, Docket Nos. RP06-417-004 and RP07-36-002, Letter Order (dated Sep. 17, 2007).

Point expansion shipper,[5] and that as part of the Cove Point expansion, Statoil holds 800,000 Dth per day of NGA section 3 terminal capacity and an equivalent amount of firm transportation capacity on the Cove Point pipeline. Statoil further states that it contracted with Dominion Transmission, Inc. to expand its storage and pipeline facilities to accommodate an additional 700,000 Dth per day of supply and to expand its storage facilities to accommodate 100,000 Dth per day of storage.

5. Petitioners state that Sonatrach is the Algerian State owned and organized petroleum company that is involved in ongoing efforts to establish a U.S. holding company and two separately staffed companies, one for the marketing of natural gas (Sonatrach Marketing) and the other for importation of LNG and perhaps LPG. Petitioners state that pending necessary authorizations, Sonatrach Marketing will hold the pipeline capacity to be employed by Sonatrach in its U.S. natural gas marketing business. Sonatrach is requesting that Sonatrach Marketing have access to downstream markets via a prearranged capacity release on the expanded portion of the Cove Point pipeline, which is directly connected to the Cove Point terminal. Sonatrach states that its willingness to bring LNG to Cove Point is conditioned on its ability to gain reliable access to Statoil's expansion capacity on the Cove Point pipeline in order to assure an economically feasible investment in its U.S. gas marketing activities. Sonatrach asserts that Sonatrach Marketing hopes to be commercially operational by the first quarter of 2010 and by then enabled to bring deliveries under agreements to market the regasified LNG imported through Cove Point for at least a portion of the upcoming winter season. Sonatrach states that in order to meet that in-service date, approval and authority to conclude the LNG Purchase and Sale Agreement and Prearranged Capacity Release need to occur by the end of the summer of 2009.

6. Petitioners state that the transaction for which they seek waiver involves two agreements: an LNG Purchase and Sale Agreement and a Prearranged Capacity Release of Statoil's capacity on the Cove Point pipeline.

7. According to the Petitioners, the LNG Purchase and Sale Agreement is a commodity contract and does not involve the release or assignment of any capacity at the Cove Point terminal or any downstream pipeline. Petitioners state that the LNG Purchase and Sale Agreement is a fifteen-year agreement that provides that Sonatrach will sell LNG to Statoil at the point of interconnection between the LNG vessel that docks at the Cove Point pier and the inlet of the Cove Point terminal at the rate of up to two LNG cargoes per month not to exceed twenty-four cargoes per year. Petitioners further state that Statoil will take title to the LNG at the inlet of the Cove Point terminal and, using its

[5] *Dominion Cove Point LNG, LP*, 115 FERC ¶ 61,337 (2006); *order on reh'g*, 118 FERC ¶ 61,007 (2007); *order on remand*, 125 FERC ¶ 61,018 (2008); *order on reh'g on remand*, 126 FERC ¶ 61,036 (2009).

non-open access NGA section 3 Cove Point expansion terminal capacity, will store and regasify the LNG. Statoil will then sell and deliver title and possession of up to 200,000 Dth per day of regasified LNG to Sonatrach Marketing at the interconnection of the outlet of Cove Point terminal and the inlet of the Cove Point pipeline. Petitioners state that the Statoil-Sonatrach transaction does not involve Statoil's open access NGA section 7 Cove Point terminal capacity and that because the transaction involves Statoil's NGA section 3 terminal capacity, the parties have freely negotiated the transaction price for the buy/sell arrangement.[6]

8. Petitioners state that the Prearranged Capacity Release is a fifteen-year agreement that is conditioned on the Petitioners entering into the LNG Purchase and Sale Agreement. Petitioners state that Statoil and Sonatrach will enter into the Prearranged Capacity Release at the time that the Petitioners enter into the LNG Purchase and Sale Agreement and Sonatrach will assign the Prearranged Capacity Release to its soon-to-be-organized affiliate, Sonatrach Marketing. After the Prearranged Capacity Release is assigned to Sonatrach Marketing, Statoil will release 200,000 Dth per day of Cove Point pipeline expansion capacity to Sonatrach Marketing. Petitioners state that the Prearranged Capacity Release is for the maximum tariff rate that is published in the Cove Point tariff for the pipeline expansion capacity and the release to Sonatrach will be posted on Cove Point's electronic bulletin board. According to the Petition, the agreement provides that Statoil will be able to recall the capacity if the LNG Purchase and Sale Agreement terminates or if Sonatrach fails to make payments to Cove Point for the capacity, pursuant to the terms of Cove Point's tariff. The agreement further provides that Sonatrach will be able to terminate the Prearranged Capacity Release if the LNG Purchase and Sale Agreement terminates. Petitioners state that only Cove Point pipeline expansion capacity is being released.[7]

Petitioners' Arguments

9. Petitioners make numerous arguments to support their waiver request, including arguments based on the operational characteristics of the Cove Point LNG storage and regasification facilities and the Cove Point expansion terminal and pipeline capacity,[8] a claim that Petitioners' concerns would not be adequately addressed by use of a supply asset management arrangement,[9] and contentions that the Sonatrach-Statoil transaction

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[6] *See* Joint Petition at 5-6.

[7] *Id*. at 6-7.

[8] *Id*. at 12-13.

[9] *Id*. at 13-14.

will have no impact on open access competition but will enhance overall competition.[10] Petitioners also state that they are unaware of any adverse impact that their arrangement will have on any of the existing terminal capacity holders or any of the existing pipeline capacity holders,[11] and aver that the capacity at issue will be awarded to Sonatrach in a non-discriminatory and transparent manner.[12] Petitioners also assert that the proposed Statoil-Sonatrach transaction will provide significant benefits in terms of meeting critical supply needs.[13]

10. Petitioners claim that one of the benefits of granting the requested waiver is that the pipeline capacity will be placed in the hands of the party that values it the most - namely, the supplier that wants to move product to the consuming markets (Sonatrach) - consistent with Commission policy.[14] Petitioners state that Commission policy assumes generally that capacity will be in the hands of the party that values it the most if the pipeline capacity is released to a party that is willing to pay the maximum tariff rate for a "long-term" (greater than one year) agreement in order to have access to the released capacity. They state that the Prearranged Capacity Release requires that the pipeline capacity be released at the maximum rate for the Cove Point pipeline expansion capacity for a period of fifteen years and thus is consistent with the Commission's policies. Petitioners assert that the Statoil-Sonatrach transaction is conditioned on Sonatrach being able to have reliable access to the Cove Point pipeline expansion send-out capacity that will allow it to move regasified LNG to delivery points that will interconnect with other interstate pipelines that serve downstream markets.[15]

11. Finally, Petitioners request that should the Commission decline to grant the requested waiver, alternatively the Commission confirm its existing capacity release rules allow Statoil and Sonatrach to enter into the LNG Purchase and Sale Agreement as well as an untied Prearranged Capacity Release without seeking prior authorization from the

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[10] *Id*. at 17-20.

[11] *Id*. at 20-21.

[12] *Id*. at 21-23.

[13] *Id*. at 14-16.

[14] *Id*. at 15-16.

[15] Petitioners assert that the importance of this access is highlighted by the fact that the Cove Point pipeline expansion capacity is significantly more expensive than the non-expansion firm transportation capacity on the Cove Point pipeline.

Commission. Petitioners state that, although the LNG Purchase and Sale Agreement would contain a bilateral termination right if Sonatrach is unable to obtain send-out pipeline capacity downstream of the terminal from some unspecified source, the Prearranged Capacity Release would no longer be conditioned on the effectiveness of the LNG Purchase and Sale Agreement. Petitioners state that the only termination and recall rights related to the Prearranged Capacity Release would be for non-payment by Sonatrach. Petitioners state that they understand that this type of transaction is consistent with the Commission's capacity release rules and does not raise questions of prohibited capacity tying because the capacity release does not contain an extraneous condition (i.e., it is not conditioned upon the parties entering into the LNG Purchase and Sale Agreement). In this case Sonatrach would control whether it receives the downstream send-out capacity and there would be no impermissible tie.

Public Notice, Comments and Interventions

12. Public notice of the Petitioners' filing was issued on July 9, 2009, providing for interventions, comments, and protests to be filed by July 20, 2009. On July 21, 2009, ExxonMobil Gas & Power Marketing Company, A Division of Exxon Mobil Corporation (ExxonMobil), filed a motion for leave to intervene out-of-time and comments in support of the Petition. ExxonMobil states that LNG importers require capacity in the import terminal and the send-out pipeline to avoid having LNG stranded at the terminal. Accordingly, ExxonMobil asserts that granting the requested waiver will enhance the ability of LNG importers to access U.S. markets, which should increase competition and expand potential supply sources.

13. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2009)), all timely filed motions to intervene and any motions to intervene out-of-time filed 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.

Discussion

14. In Order No. 712-A, the Commission explained that with regard to LNG terminals providing open access service, where both the LNG terminal and the directly connected interstate pipeline facilities are subject to the Commission's Part 284 open access regulations, a holder of capacity in the LNG terminal has the right to release both its terminal capacity and its capacity on the downstream pipeline pursuant to the Commission's capacity release program. Further, existing Commission policy permits releasing shippers to tie releases of upstream and downstream capacity, and require the

replacement shipper to take a release of the aggregated contracts on both pipelines.[16] Thus, existing policy permits the holder of capacity in an open access LNG terminal to require a replacement shipper to take a release of both its terminal capacity and its pipeline capacity

15. However, the Commission pointed out that, because non-open access LNG terminals are not subject to the Commission's open access policies, any releases or assignments of terminal capacity would not be made pursuant to the capacity release rules. Thus, there is no Commission process to ensure that the transaction would be transparent and non-discriminatory. Recognizing that there were a myriad of ways to structure transfers of terminal capacity, including through a buy/sell agreement similar to the one at issue here, and that we lacked sufficient information to determine the benefits of such a transaction or the potential effect on competition, we declined to grant a blanket exemption from tying and bidding in the context of a non-open access LNG terminal.[17] However, the Commission stated that it remained open to considering individual waiver requests for such transactions on a case-by-case basis if presented in a fully justified proposal. Petitioners have filed just such a request.

16. The Commission finds that, in this case, the Petitioners have presented sufficient information about their transaction to justify granting their request for a waiver of the tying prohibition. It appears from the information provided by the Petitioners that granting the requested waiver will not have an adverse effect on open access competition. No party has protested the request or claimed that it would be harmed by the transaction. Moreover, no entity filed to state that it has an interest in obtaining the relevant pipeline capacity. The Petitioners voluntarily agree to the terms of the transaction, including the link between the purchase and sale agreement and the capacity release agreement. In fact, the replacement shipper Sonatrach required reliable access to downstream capacity as a condition for entering into the Purchase and Sale agreement with Statoil and bringing LNG to Cove Point.

17. Further, one of the primary purposes for the implementation of the prohibition on tying releases to extraneous conditions was to ensure that releasing shippers did not place unreasonable restriction on the use of the capacity or require replacement shippers to purchase gas only from the releasing shipper. Those concerns are not at issue here. There is nothing in the Joint Petition to indicate that there are any restrictions on how Sonatrach uses the Cove Point pipeline capacity. It appears that Sonatrach may transport gas other than its own LNG from the terminal, it may purchase domestic gas and transport it on the Cove Point pipeline and between the pipeline's interconnects with

[16] Order No. 712-A, FERC Stats & Regs. ¶ 31,284 at P 45.

[17] *Id*. P 46.

other pipelines, and it may re-release the capacity when it is not using it. Nor does it appear that Sonatrach is required to purchase gas from Statoil, other than under the terms of the Purchase and Sale Agreement.

18. It also appears that the proposed Statoil-Sonatrach transaction will provide significant benefits in terms of bringing new supplies to the United States. In order for Sonatrach to bring LNG to the United States and to store and market that LNG, it requires both capacity in the LNG terminal and on the Cove Point pipeline. The proposed Statoil-Sonatrach transaction enables it to accomplish those goals. The Cove Point pipeline is the only way to transport gas out of the terminal. Moreover, as explained in the Joint Petition, pipeline capacity from an LNG terminal may have limited or no value absent access to related LNG import terminal facilities or supplies because often (as is the case here) the pipeline directly connected to the LNG terminal has no market of its own. Thus, LNG importers require capacity in the import terminal and the send-out pipeline to avoid having LNG stranded at the terminal. By granting the Petitioners' requested waiver, we will enhance the ability of LNG importers to access U.S. markets, which should in turn increase competition and expand potential supply sources.

19. Petitioners also request that "to the extent necessary" we waive the requirement that the capacity release be posted for bidding. As made clear in the Joint Petition, the pre-arranged capacity release by Statoil to Sonatrach is at the Cove Point pipeline's maximum recourse rate and is for a term of more than one year.[18] Long term capacity releases at the maximum rate are not subject to the Commission's capacity release bidding requirements[19] and thus no waiver of those bidding requirements is necessary here.

20. Accordingly, for the reasons stated above, the Commission grants waiver of its prohibition against tying to permit the direct link of the referenced agreements as requested by the Petitioners. Based on this action granting Petitioners' waiver request, the alternative request is denied as moot.

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[18] The fact that the release at issue is at the maximum rate distinguishes this case from the Commission's recent order in *North Baja Pipeline, LLC*, 128 FERC ¶ 61,082 (2009), where we denied a waiver of the Commission's capacity release bidding requirements for a temporary release at less than the pipeline's maximum recourse rate.

[19] *See* 18 C.F.R. § 284.(8)(h)(1)(iii)(2009).

<u>The Commission orders</u>:

(A) Petitioners' request for waiver is granted as discussed in the body of the order.

(B) Petitioners' alternative request is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.