

129 FERC ¶ 61,073
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Dominion Cove Point LNG, LP

Docket No. RP09-1076-000

ORDER ACCEPTING TARIFF SHEETS

(Issued October 28, 2009)

1. On September 28, 2009, Dominion Cove Point LNG, LP (Cove Point) filed tariff sheets¹ reflecting a non-conforming service agreement with Statoil Natural Gas LLC (Statoil) and proposing to establish a new General Terms and Conditions (GT&C) Section 33 – Non-Conforming Service Agreements for listing of Commission-approved non-conforming service agreements. As discussed below, the Commission finds the proposed tariff sheets to be just and reasonable and accepts them to be effective October 29, 2009, as proposed.

I. Background and Details of Filing

2. Cove Point owns and operates the Cove Point LNG Terminal in Lusby, Calvert County, Maryland and the Cove Point Pipeline facilities that extend approximately 88 miles from the LNG terminal to interconnections with Transcontinental Gas Pipe Line Corporation in Fairfax County, Virginia and with Columbia Gas Transmission Corporation and Dominion Transmission, Inc. in Loudon County, Virginia. Cove Point provides firm and interruptible open access LNG terminalling services under Rate

¹ Ninth Revised Sheet No. 200, Sheet No. 287, Original Sheet No. 288, Sheet Nos. 289-399 and First Revised Sheet No. 553 to FERC Gas Tariff, Original Volume No. 1.

Schedules LTD-1² and LTD-2, respectively. It also provides firm and interruptible open access transportation services under Rate Schedules FTS and ITS.³

3. Cove Point recently expanded both its LNG terminal and its pipeline facilities.⁴ Statoil is the only shipper which contracted to receive service on the expansion. As part of the expansion, Cove Point constructed two additional LNG storage tanks, which it uses to provide Statoil LNG terminalling service on a “proprietary,” non-open access basis, with deregulated rates, in reliance on the Commission’s policy announced in *Hackberry LNG, Inc.*⁵ In addition, Cove Point provides Statoil open access transportation service on the pipeline expansion facilities under its existing Rate Schedule FTS pursuant to a negotiated rate agreement.

4. On February 23, 2009, Cove Point filed with the Commission its negotiated rate agreement with Statoil for transportation service on the expansion, and the corresponding tariff sheet in Docket No. RP03-564-004. In that filing, Cove Point stated that the Statoil service agreement conformed in all material respects with its *pro forma* Form of Service Agreement. On March 12, 2009, the Commission accepted the agreement and tariff sheet.⁶

² The LTD-1 Shippers consist of Statoil, Shell NA LNG, LCC (Shell), and BP Energy Company (BP).

³ Cove Point also provides 10-day, 5-day and 3-day firm peaking services under Rate Schedules FPS-1, FPS-2, and FPS-3, respectively.

⁴ The Cove Point Expansion was authorized by the Commission in a series of orders reported at *Dominion Cove Point LNG, LP, et al.*, 115 FERC ¶ 61,337 (2006), *reh’g*, 118 FERC ¶ 61,007 (2007), *aff’d in part, vacated in part sub nom., Washington Gas Light Co. v. FERC*, 532 F.3d 928 (D.C. Cir. 2008), *on remand*, 125 FERC ¶ 61,018 (2008), *reh’g*, 126 FERC ¶ 61,036 (2009), *stay denied*, 126 FERC ¶ 61,238 (2009), *appeal pending*.

⁵ *Hackberry LNG, Inc.*, 101 FERC ¶ 61,294 (2002). In *Hackberry*, the Commission announced a new policy for the regulation of LNG import terminals under section 3 of the NGA. Promulgated in recognition of the need to adopt a more light-handed approach to the regulation of LNG import terminals, the Commission decided not to impose traditional regulation on LNG import facilities, such as rates, tariffs, open-access requirements or other terms and conditions of service.

⁶ *Dominion Cove Point LNG, LP*, Docket No. RP03-564-004 (March 12, 2009) (unpublished letter order). On March 16, 2009, the order was modified when the Commission issued an errata. *Dominion Cove Point LNG, LP*, Docket No. RP03-564-

(continued...)

5. In its instant filing, Cove Point states that it has reviewed all its existing service agreements for terms that may be considered material deviations from its *pro forma* Form of Service Agreement. Cove Point states it now believes that the negotiated rate agreement with Statoil for firm transportation service on the expansion, filed last February, may include material deviations. Cove Point states that, although the service agreement itself fully conformed with the *pro forma* Form of Service Agreement, certain provisions in the Precedent Agreement that led to the service agreement survive in the executed service agreement and, therefore, the service agreement, as appended by the surviving precedent agreement provisions, may be non-conforming. Specifically, Cove Point states that it has submitted a new Appendix B to Statoil's service agreement to reflect the surviving terms and provisions from the Precedent Agreement and to conform to Commission policies. Cove Point states that the following provisions of the Cove Point Precedent Agreement with Statoil were incorporated into the service agreement:

a) Section VII.D. provides that Cove Point may recalculate the negotiated rate based on actual costs and Statoil may audit the costs and rate calculation;

b) Section VII.E. provides that Cove Point may adjust the negotiated rate if Cove Point incurs future capital costs to comply with unanticipated orders by the Commission or other governmental authorities and sets forth a dispute resolution mechanism;

c) Section VII.F. provides that Cove Point may make a future adjustment to the negotiated rate if Cove Point collects damages or other payments from a contractor related to the construction of the project arising from the contractor's error, omission, or breach of a related contract;

d) Section VII.G. provides that if a governmental authority prohibits transportation of LNG to the United States, the Chesapeake Bay, or Cove Point Terminal, Statoil would pay a rate equal to the 100 percent load factor equivalent of the otherwise applicable rate during the period of the prohibition. If the prohibition persists longer than 5 years and either party terminates its separate agreement for LNG terminal import service, either party may terminate the service agreement;

e) Section VIII requires that Statoil guarantee the performance, obligations, and liabilities of Statoil to Cove Point under the service agreement up to a negotiated amount of \$78 million, decreasing by \$3.9 million each year;

f) Section X limits each party's aggregate liability to the other for damages to a liability cap of \$78 million, decreasing by \$3.8 million each year;

g) Section XV.F. requires the parties, upon written request by either party, engage in good faith negotiations to ensure that the original commercial intent of the parties is reserved in the event a term of the service agreement is modified by law.

Cove Point states that the first four provisions listed above relate only to potential future changes in Statoil's negotiated rate, and thus those provisions do not affect other shippers. Cove Point states that it agreed to the last three listed provisions concerning liability limitations and modifications caused by law in recognition of the size, scope, and economic impact of the expansion project. Cove Point states that it would be willing to negotiate these types of provisions with other shippers if they are similarly situated to Statoil as the sole customer of a major expansion.

II. Public Notice and Comments

6. Public notice of the filing was issued on October 2, 2009. Interventions and protests were due on or before October 13, 2009 as provided in section 154.210 of the Commission's regulations. Pursuant to Rule 214,⁷ 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. A joint protest was filed by Shell and BP. On October 15, 2009, BP withdrew its participation in the joint protest. On October 19, 2009, Cove Point and Statoil each filed answers to the joint protest. Rule 213(a)(2)⁸ of the Commission's Rules of Practice and Procedure prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Cove Point's and Statoil's answers because they have provided information that assisted us in our decision-making process.

7. Shell states that the deviations from the FTS *pro forma* Form of Service Agreement contain potential problems that may grant Statoil an advantage over other shippers. Generally, Shell asserts that the terms and conditions agreed upon between Cove Point and Statoil are unique and "clearly confer valuable, material benefits upon Statoil" as a Rate Schedule FTS Shipper.⁹ Shell states that section VII. G. addressing a future prohibition on LNG deliveries effectively provides Statoil with an early termination right for its firm transportation service agreement.¹⁰ Shell also asks that the

⁷ 18 C.F.R. § 385.214 (2009).

⁸ 18 C.F.R. § 385.213(a)(2) (2009).

⁹ Shell Protest at 3.

¹⁰ *Id.* at 2.

Commission reject Cove Point's description of a shipper that would be "similarly situated" to Statoil as too narrow, and that the Commission make clear in its order that Cove Point is permanently at risk for recovery of the costs associated with Statoil's or any other negotiated rate agreement.

8. In response to Shell's concerns, Cove Point and Statoil answer that section 5(b)(2) of the GT&C of Cove Point's tariff explicitly authorizes early termination provisions like the one in Appendix B of the Statoil service agreement. Statoil argues that the early termination provision is not prohibited because Cove Point stated in its filing that it would provide the same early termination right to any similarly situated shipper and therefore is exercising its authority in a not unduly discriminatory manner.

9. In addition, Cove Point responds to Shell's concerns regarding Cove Point's definition of "similarly situated" by stating that it did not intend to define the meaning of "similarly situated" and that whether another shipper would be similarly situated with Statoil would depend on all the relevant facts and circumstances. Cove Point further asserts that Shell is not similarly situated to Statoil because Statoil is a foundation shipper and Shell is not. Statoil notes its unique position as the foundation shipper, for which it pays a higher rate, has taken significant additional volumes, and is subject to more robust credit obligations. Finally, Cove Point responds that Shell's concern that Cove Point should bear the risk for the costs associated with Statoil's or any other negotiated rate agreement is speculative and premature.

III. Discussion

10. Section 154.1(d) of the Commission's regulations requires a pipeline to file a contract which materially deviates from the pipeline's form of service agreement.¹¹ In *Columbia Gas Transmission Corporation*, issued on November 21, 2001,¹² the Commission clarified that a material deviation is any provision in a service agreement that (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff; and (2) affects the substantive rights of the parties.¹³ However, not all material deviations are impermissible. If the Commission finds that such deviation does

¹¹ 18 C.F.R. § 154.1(d) (2009).

¹² *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221 (2001) (*Columbia*).

¹³ In *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 27 (2003), the Commission stated "[s]ince there would appear to be no reason for the parties to use language different from that in the form of service agreement other than to affect the substantive right of the parties, this effectively means that all language that is different from the form of service agreement should be filed with the Commission."

not constitute a substantial risk of undue discrimination, the Commission may permit the deviation.¹⁴ Therefore, there are two general categories of material deviations: (1) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers; and (2) provisions the Commission can permit without a substantial risk of undue discrimination. The Commission has stated that deviations may be allowable if the customer is not “receiving a different quality of service than that provided to other customers under the pipeline’s tariff or that affect the quality of service received by others.”¹⁵

11. Consistent with *Columbia*, we find that all of the provisions in Appendix B except section VII.G., the early termination provision, deviate materially from Cove Point’s *pro forma* Service Agreement. These provisions go beyond merely filling in a blank space in the *pro forma* Form of Service Agreement and may affect the substantive rights of the parties. However, we find that while these provisions are material deviations, they address unique circumstances concerning the foundation shippers and commencement of service on the Cove Point Expansion Project and accordingly do not present a substantial risk of undue discrimination. The material deviations relate either to the creditworthiness requirements Statoil must satisfy as a foundation shipper¹⁶ or to the rates that it will pay for service on the expansion. The Commission has held that it is not unduly discriminatory for pipelines to offer special rate provisions to foundation shippers, such as Statoil.¹⁷ In addition, none of these provisions affect the quality of service to be

¹⁴ *Columbia* at 62,004.

¹⁵ *Id.* at 62,003.

¹⁶ With regard to the creditworthiness provision set forth in section VIII of Appendix B, the Commission permits different creditworthiness provisions for foundation shippers on expansion projects. *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, FERC Stats & Regs. ¶ 31,191 at P 17-18 (2005). See *Egan Hub Storage, LLC*, 127 FERC 61,002 at P 5 (2009).

¹⁷ The Commission has found “as a general matter, that rate differentials between foundation shippers that sign up for service early and shippers that sign up for service later are not unduly discriminatory, since the later shippers are not similarly situated to the foundation shippers.” *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, 71 FR 36276 at P 98 (June 26, 2006); FERC Stats. & Regs. ¶ 32,606 (2006); 115 FERC ¶ 61,338 (2006).

received by Statoil or any other shipper.¹⁸ Therefore, in accordance with *Columbia*, the material deviations are permissible.¹⁹

12. In addition, we find that section VII.G., the early termination provision, does not materially deviate from Cove Point's *pro forma* Form of Service Agreement. Section 5(b)(2) of the GT&C of Cove Point's tariff, incorporated by reference into the *pro forma* Form of Service Agreement, expressly permits early termination provisions like the one in Appendix B by providing that Cove Point "may agree, on a not unduly discriminatory basis, with a Buyer to: (i) the termination of an existing service agreement prior to its expiration date contingent upon negotiated conditions...or (iii) an option for the Buyer to terminate a service agreement prior to the end of the term upon specified events related to the availability or termination of related contractual rights with Operator or with another upstream or downstream service provider."²⁰ The Commission accepted that tariff provision in 2007.²¹ Because the early termination provision in Appendix B is authorized by Cove Point's tariff, the Commission has previously approved this provision for inclusion in Cove Point's tariff. Therefore, the early termination provision is not a material deviation from the *pro forma* Form of Service Agreement.

13. Given our findings above the Commission accepts the proposed tariff sheet reflecting the non-conforming service agreement with Statoil.

¹⁸ In other proceedings, the Commission has found non-conforming provisions necessary to reflect the unique circumstances involved in the construction of pipeline projects. See *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089, at P 82 (2008); *Rockies Express Pipeline LLC*, 116 FERC 61,272, at P 78 (2006).

¹⁹ Shell's reliance on *Tennessee Gas Pipeline Co.*, 97 FERC ¶ 61,225 (2001), in claiming that the early termination provision presents potential for undue discrimination, is misplaced given that in *Tennessee*, the Commission found that early termination provisions present too much potential for undue discrimination unless they are offered in the pipeline's tariff pursuant to generally applicable conditions. The Commission directed that Tennessee either remove the provision from its agreement or to file to place it in the tariff so that it would be generally applicable to all customers. In the instant case, the Commission faces a situation where it has previously found that Cove Point's inclusion of such an early termination provision in its tariff is just and reasonable and therefore the provision does not present potential for undue discrimination.

²⁰ Cove Point Answer at 4.

²¹ *Dominion Cove Point LNG, LP*, 119 FERC ¶ 61,208 (2007). See also *Dominion Cove Point LNG, LP*, Docket No. RP07-429-001 (Aug. 30, 2007) (unpublished letter order accepting Cove Point's compliance filing).

14. In addition, Shell expresses concern that Cove Point's description of a shipper that it would consider "similarly situated" to Statoil is too limited, and it requests that the Commission redefine Cove Point's definition of a similarly situated shipper that would be able to negotiate the same type of provisions that Cove Point agreed to with Statoil. In the Commission's view any shipper that believes it is similarly situated to Statoil may approach Cove Point to negotiate any of the subject terms. If the party believes that it is improperly denied treatment as a similarly situated party, the party may request that the Commission make a determination on the issue.

15. Finally, Shell requests that the Commission clarify that Cove Point is permanently at risk for recovery of the costs associated with Statoil's or any other negotiated rate agreement. Under Commission policy, a pipeline cannot recover costs associated with service to a shipper under a negotiated rate agreement from the pipeline's other shippers.²² The Commission also finds that Cove Point stated in its certificate proceeding that Cove Point and Statoil assumed the economic risk and costs associated with the Cove Point LNG Terminal Expansion.²³

The Commission orders:

Cove Point's proposed tariff sheets listed in footnote no. 1 are accepted effective October 29, 2009, as requested.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²² See e.g., *Northern Natural Gas Co.*, 105 FERC ¶ 61,299 at P 4 (2003).

²³ See *Dominion Cove Point LNG, LP, et al.*, 115 FERC ¶ 61,337, at P 13 (2006), *reh'g* 118 FERC ¶ 61,007 (2007).