

134 FERC ¶ 61,171
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Weaver's Cove Energy, LLC

Docket No. CP04-36-007

ORDER DENYING REQUEST FOR REHEARING OR RECONSIDERATION

(Issued March 4, 2011)

1. On October 21, 2010, the Commission issued an order (October 21 Order)¹ denying, in part, and granting, in part, a request for rehearing jointly filed by the City of Fall River, Massachusetts and the Commonwealth of Massachusetts (Massachusetts Intervenors) of an August 26, 2009 letter order issued by the Chief of the LNG Compliance Branch of the Commission's Office of Energy Projects (2009 Letter Order). Weaver's Cove Energy, LLC (Weaver's Cove) filed a timely request for rehearing, or in the alternative, for reconsideration of the October 21 Order.²

2. For the reasons set forth below, we are denying the requests by Weaver's Cove.

Background

3. On July 15, 2005, the Commission authorized, subject to conditions, Weaver's Cove, under section 3 of the Natural Gas Act (NGA), to construct and operate a liquefied natural gas (LNG) terminal in Fall River, Massachusetts (2005 Order).³ The 2005 Order

¹ *Weaver's Cove Energy, LLC*, 133 FERC ¶ 61,054 (2010).

² The Massachusetts Intervenors submitted a motion for leave to answer and an answer to Weaver's Cove's request for rehearing or reconsideration. The Commission's procedural rules generally do not allow replies to requests for rehearing, and we therefore deny the motion. *See* 18 C.F.R. § 385.213(a)(2) (2010).

³ *Weaver's Cove Energy, LLC*, 112 FERC ¶ 61,070 (2005) (2005 Order), *order on reh'g*, 114 FERC ¶ 61,058 (2006) (2006 Order on Rehearing). The 2005 Order also authorized Mill River Pipeline, LLC to construct and operate a pipeline under section 7(c) of the NGA that would transport gas from Weaver's Cove's LNG terminal.

provided, however, that before construction of the project may begin, Weaver's Cove must satisfy a number of environmental and safety conditions relating both to construction and operation of the LNG terminal facilities and to safety and security along the LNG vessel transit route.

4. One of the conditions of the July 2005 Order -- Condition 40 -- relates to what is known as the Wedge Lot, a small, triangular-shaped piece of property consisting mostly of wetlands formed by its borders with the Taunton River, the proposed LNG terminal facility property, and a steep embankment to a state highway. The Wedge Lot abuts the terminal property and falls within the thermal exclusion zone for the project mandated by the U.S. Department of Transportation's (DOT) regulations.⁴ In its application to construct LNG terminal facilities, Weaver's Cove stated that legal title to the Wedge Lot was unclear and could be difficult to establish.⁵

5. The 2005 Order found that no uses that would be contrary to DOT regulations currently existed on the Wedge Lot. Nevertheless, in accordance with DOT requirements, Condition 40 required Weaver's Cove to provide evidence of its ability to exercise legal control over activities on the Wedge Lot prior to initial site preparation. Acknowledging Weaver's Cove's statement that it might have difficulty establishing title to the Wedge Lot, Condition 40 alternately provided that Weaver's Cove could satisfy the exclusion zone control requirement by obtaining a waiver of this requirement from DOT that spells out alternative mitigation methods that would assure an equal or greater level of thermal protection within the exclusion zone.

6. Weaver's Cove filed for rehearing, requesting that the Commission waive strict technical compliance with the DOT regulations because activities inconsistent with the regulations could not take place on the Wedge Lot. On rehearing, the Commission explained that it may not waive DOT regulations. The Commission found that it is unlikely that prohibited activities could reasonably occur on the Wedge Lot, but

⁴ DOT regulations require that an LNG storage facility and transfer system must have a thermal exclusion zone (an area that can be controlled to limit public access, for safety purposes) in accordance with National Fire Protection Association (NFPA) standards (incorporating NFPA standards by reference). (49 C.F.R. § 193.2057 (2010)). DOT regulations further define the term exclusion zone as "an area surrounding an LNG facility in which an operator *or government agency* legally controls all activities in accordance with § 193.2057 and § 193.2059 of DOT regulations for as long as the facility is in operation." (49 C.F.R. § 193.2007 (2010) (emphasis added)).

⁵ In September 2004, Weaver's Cove requested an exemption or waiver from the requirement of legal control over activities on the Wedge Lot from DOT. Weaver's Cove's request is still pending.

concluded that Weaver's Cove must either comply with the DOT site control requirement or obtain a waiver of the requirement from DOT.

7. In 2006, Weaver's Cove filed a letter with the Commission requesting a determination that Condition 40 has been satisfied. Weaver's Cove contended: (1) that the DOT exclusion zone requirement provides that *either* the operator *or* a government agency must have legal control of the areas that fall within the exclusion zone for as long as the facility is in operation; and (2) that new evidence showed that the Wedge Lot is owned by Massachusetts. In response to Weaver's Cove's filing, the Massachusetts Intervenors acknowledged that Massachusetts owns a portion of the Wedge Lot, but disputed Massachusetts ownership of the entire Wedge Lot. In addition, the Massachusetts Intervenors contended that Weaver's Cove would need permission from the government agency with title to the property to use the property for an exclusion zone.

8. In the 2009 Letter Order, the Chief of the LNG Compliance Branch found, among other things, that Weaver's Cove had satisfied Condition 40. On rehearing, in the October 21 Order, the Commission noted that the parties could not agree on the ownership of a large segment of the Wedge Lot and held that property ownership issues were outside its expertise and jurisdiction, but rather were contract and property law matters to be addressed by a court of appropriate jurisdiction. Thus, the Commission found that it could not conclude that Weaver's Cove had control of the Wedge Lot portion of the thermal exclusion zone. Further, even if Massachusetts owned all the Wedge Lot, the Commission concluded that it was unclear whether ownership of the Wedge Lot by Massachusetts could, by itself, satisfy the DOT exclusion zone requirement, as DOT regulations do not spell out whether a government agency must agree that its property will serve as part of the exclusion zone. The Commission stated that it would not interpret regulations of another government agency or otherwise resolve issues raised by parties relating to the appropriate application of those regulations. In making this finding, the Commission noted an interpretation letter issued by DOT relating to a filing by Calais LNG Project Company that suggested that more than ownership of land by a state or governmental entity may be necessary to satisfy the site control provision of DOT's LNG regulations.

Weaver's Cove's Rehearing Request

Ownership of the Wedge Lot

9. Weaver's Cove contends that it was error for the Commission to conclude that it cannot determine who owns the Wedge Lot. Weaver's Cove asserts that well-settled Massachusetts case law makes it clear that Massachusetts is the owner of the entire Wedge Lot and that there is no issue or dispute for Weaver's Cove to take to a court for resolution. Weaver's Cove states that the Massachusetts Intervenors concede that Massachusetts owns a portion of the Wedge Lot (approximately 10,125 square feet) by

virtue of condemnation. According to the company, the additional, and larger, portion (approximately 41,711 square feet), located on the Taunton River side of the Wedge Lot is the result either of filling or other topography-changing activities by the state, or of accretion (the gradual addition of sand or the like by natural processes or human intervention). Weaver's Cove submits that Massachusetts law provides that all accretions and fillings automatically belong to the parcel owner. Weaver's Cove states that because the boundary of the Wedge Lot is described in the original deed as the river bank, under Massachusetts law, all land fillings and accretions automatically belong to the parcel owner.

10. Moreover, states Weaver's Cove, Massachusetts has engaged in activities on the property in connection with highway construction and maintenance, such as adding fill to expand the Wedge Lot and constructing a storm drain. Weaver's Cove contends that the Commonwealth's own actions on the property provide conclusive indicia of its ownership of the Wedge Lot. Weaver's Cove contends that it is disingenuous for the Massachusetts Intervenors to claim that ownership of the additional Wedge Lot property is in dispute, or that there "is no evidence that the remaining portion of the property is owned by any Commonwealth or other governmental agency."

Commission Response

11. As the October 21 Order correctly held, disputes over the legal ownership of property are matters of state law outside the expertise and jurisdiction of the Commission. We will not get involved in a dispute that should be addressed by a court under Massachusetts laws. We therefore find no reason to reverse the holding in the October 21 Order.

Interpreting the DOT Exclusion Zone Regulation

12. Weaver's Cove asserts that the Commission erred in the October 21 Order in finding that, even if it is determined that Massachusetts owns the entire Wedge Lot, the question of whether Weaver's Cove has satisfied the DOT exclusion zone requirement is a determination for DOT, not this Commission to make.⁶ Weaver's Cove also contends that the Commission's reliance on DOT's interpretation letter regarding thermal exclusion zone compliance for the Calais LNG project⁷ is misplaced because the facts in

⁶ This issue did not arise in the July 2005 or January 2006 orders because no party had suggested at that time the possibility of Massachusetts ownership of the Wedge Lot.

⁷ See July 1, 2009 letter from John A. Gale, Director, Office of Regulations, Pipeline and Hazardous Materials and Safety Administration, U.S. Department of Transportation to George H. Williams, Jr., Attorney for Calais LNG Project Company, LLC in Docket No. PF08-24-000.

the *Calais LNG* case are different from the facts here. Weaver's Cove asserts that the description of the property in the Calais LNG proceeding suggests that the land is susceptible to being used for the activities prohibited by DOT's exclusion zone requirements, making more than governmental ownership potentially necessary to ensure that activities prohibited within an exclusion zone do not take place. In contrast, Weaver's Cove maintains, the Commission has already found in this proceeding that prohibited activities "cannot" take place on the Wedge Lot. Because of this finding, Weaver's Cove contends that it is able to insure, as described in the Calais LNG interpretation letter, that the Wedge Lot complies with the thermal exclusion zone requirements. Accordingly, insists Weaver's Cove, it is not necessary to "force" Weaver's Cove to go to the further step of asking the DOT to decide whether something "more than ownership of the land by a state or governmental entity" is required to ensure compliance with such thermal exclusion requirements. According to Weaver's Cove, such a determination is not necessary in this case as the application of DOT's exclusion zone regulations to the facts before the Commission demonstrates that Weaver's Cove satisfies DOT's exclusion zone requirements.

Commission Response

13. The holding in the October 21 Order was premised on the fact that the DOT's exclusion zone regulations are not clear on the subject of whether Massachusetts ownership of the Wedge Lot by itself demonstrates compliance⁸ or, if it owns the Wedge Lot, whether Massachusetts must agree that its property will serve as part of an exclusion zone. The October 21 Order held that the Commission would not interpret regulations of other agencies or otherwise resolve issues raised by parties relating to the appropriate application of those regulations. Now, on rehearing, Weaver's Cove claims that: (1) DOT's interpretation letter in the *Calais LNG* proceeding implies that DOT's regulations are satisfied in situations where, as here, the Commission has already found that the Wedge Lot "cannot" be used for any purpose inconsistent with exclusion zone regulation;⁹ and (2) in relying on the letter, the Commission has misinterpreted its implications.

14. Weaver's Cove has misconstrued the rationale underlying the holding in the October 21 Order. That order did not rely on or make any specific findings based on the

⁸ As discussed above, Massachusetts ownership of the Wedge Lot is in dispute.

⁹ Weaver's Cove asserts that the Commission found that activities prohibited by DOT regulations "cannot" take place on the Wedge Lot. This assertion is not correct. The 2005 Order found that no excluded uses currently existed on the Wedge Lot. The 2006 Order on Rehearing found that it was unlikely that prohibited activities can reasonably occur on the Wedge Lot.

DOT interpretation letter. Instead, we referred to the Calais LNG interpretation letter to indicate that Weaver's Cove's position that ownership of the Wedge Lot by a government agency alone conclusively satisfies the exclusion zone requirements may not be true.

15. Weaver's Cove's new claim about the interpretation letter, however, merely raises another potential question that is not answered by DOT's regulations. Because it is unclear how DOT would apply its regulations to the circumstances of this case, we will not disturb the holding in the October 21 Order by making a determination here that Weaver's Cove has satisfied DOT's regulatory requirements. Weaver's Cove's arguments regarding compliance with the exclusion zone requirements should be made before DOT.

The Commission orders:

The requests for rehearing or, in the alternative, for reconsideration by Weaver's Cove are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.