

137 FERC ¶ 61,158
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Dominion Cove Point LNG, LP

Docket Nos. RP11-2136-000
RP11-2137-000
(not consolidated)

ORDER ON TECHNICAL CONFERENCE

(Issued November 25, 2011)

1. On May 27, 2011, Dominion Cove Point LNG, LP (Cove Point) filed revised tariff records pursuant to section 4 of the Natural Gas Act (NGA) in Docket No. RP11-2136-000, proposing to change certain terms and conditions relating to its liquefied natural gas (LNG) terminal service (May 2011 filing). On that same date, Cove Point also filed an NGA section 4 general rate case in Docket No. RP11-2137-000. On June 24, 2011, in Docket No. RP11-2136-000, and on June 30, 2011, in Docket No. RP11-2137-000, the Commission issued orders that, among other things, directed Commission Staff to convene a technical conference to examine the non-rate issues raised by both of Cove Point's filings.¹ On July 14, 2011, Commission Staff convened a technical conference for both dockets. In the instant order, the Commission reviews all issues discussed at the technical conference, and, as discussed below, accepts certain of Cove Point's tariff proposals subject to conditions, to be effective on as specified in the appendices to this order, and rejects others. The Commission also exercises its NGA section 5 authority to require Cove Point to modify its existing tariff to provide for reservation charge credits during *force majeure* and non-*force majeure* periods consistent with Commission policy. Any changes to those tariff provisions in compliance with this directive will not take effect until after the Commission acts on Cove Point's filing to

¹ *Dominion Cove Point LNG, LP*, 135 FERC ¶ 61,261 (2011) (June 24 Order); *Dominion Cove Point LNG, LP*, 135 FERC ¶ 61,276 (2011) (June 30 Order).

comply with this order. The Commission directs Cove Point to submit its compliance filing within 30 days of the date that this order issues.

I. Background

2. Cove Point owns and operates the Cove Point liquefied natural gas (LNG) Terminal in Lusby, Maryland and the Cove Point Pipeline facilities. Cove Point provides firm and interruptible LNG terminal services to LNG importers under Rate Schedules LTD-1 and LTD-2, respectively. It also provides firm and interruptible transportation service along its pipeline to and from the onshore LNG facilities under Rate Schedules FTS and ITS, respectively. In addition, Cove Point provides firm peaking service under Rate Schedules FPS-1, FPS-2, and FPS-3, and off-peak transportation service under Rate Schedule OTS.

3. In the May 2011 filings, Cove Point proposed revised tariff records to address certain operational difficulties in Docket No. RP11-2136-000, and changes to its rates and certain rate-related terms in Docket No. RP11-2137-000. Specifically, Cove Point sought to:

- a. provide for Cove Point's right to issue an Operational Flow Order (OFO) requiring the tender of LNG at the terminal if Cove Point determines that the integrity and performance capability of its system is threatened,² and to allow Cove Point to bill the responsible Buyer for the costs incurred in obtaining the LNG that have not been collected through any applicable OFO penalties;³
- b. allow the prepayment of fuel obligations;⁴
- c. remove current barriers to the availability of interruptible discharging service under Rate Schedule LTD-2 (Interruptible LNG Tanker Discharging Service);⁵

² Section 17 of the General Terms and Conditions (GT&C), Tariff Record No. 40.18, GT&C – Operational Flow Orders, 1.0.0.

³ Section 12 of the GT&C, Tariff Record No. 40.13, GT&C - Penalties, 1.0.0.

⁴ Section 1.42.C of the GT&C, Tariff Record No. 40.2, GT&C - Definitions, 1.0.0.

⁵ Section 1.1 of Rate Schedule LTD-2, Tariff Record No. 20.2, LTD-2 Rate Schedule, 2.0.0.

- d. modify the Scheduling Provisions in Rate Schedule LTD-1 (Firm LNG Tanker Discharging Service) to encourage more accurate nominations,⁶ and to provide for a \$10,000 per occurrence scheduling penalty for its Rate Schedules LTD-1 and LTD-2 shippers;⁷
- e. eliminate the current fuel retainage cap of 20.5 percent applicable to the FPS rate schedules;⁸
- f. treat authorized overruns under its firm rate schedules on an equal basis with other interruptible services;⁹ and
- g. revise its rates.

4. In the May 2011 filing in Docket No. RP11-2136-000, Cove Point stated that its facilities are experiencing operational issues due to the lack of LNG cargos being delivered and as a result, Cove Point had taken a number of steps to reduce the amount of liquid needed at the terminal and to manage the boil-off gas. These steps included installing a new compressor, warming up certain facilities that will not impair Cove Point's ability to meet its firm service obligations, and working with interconnecting pipelines.

5. On June 24, the Commission rejected tariff revisions regarding Operational Flow Orders, and accepted and suspended for the maximum suspension period all other revised tariff records in Docket No. RP11-2136-000. The June 24 Order directed Commission Staff to convene a technical conference to discuss the issues raised by the suspended tariff records. On June 30, 2011, in Docket No. RP11-2137-000, the Commission accepted in part and suspended in part the rate filing, set the rate issues for hearing, and directed Staff to include the authorized overrun and reservation charge crediting issues in the forthcoming technical conference. Parties participated in the technical conference on July 14, 2011, and submitted initial and reply comments for the record.

⁶ Section 4.2 of Rate Schedule LTD-1, Tariff Record No. 20.1.5, LTD-1 Rate Schedule, 2.0.0.

⁷ Section 5.3(g) of both Rate Schedules LTD-1 and LTD-2, Tariff Record Nos. 20.1.6, LTD-1 Rate Schedule, 2.0.0 and Tariff Record 20.2, LTD-2 Rate Schedule, 2.0.0.

⁸ See Tariff Record No. 20.10 and Tariff Record No. 40.2.

⁹ See Tariff Record No. 40.16 and Tariff Record No. 40.17.

6. In comments on the technical conference, Statoil, Shell, and BP generally argue that Cove Point has not supported its proposals, which they claim will degrade LTD-1 service. Statoil and Shell state that Cove Point has acknowledged that market forces, not tariff issues, are causing a decline in LNG cargos and has provided no evidence that the proposed changes are likely to result in a single LNG cargo being delivered to the terminal. Shell and BP state that the proposals are unnecessary because Cove Point already has a tariff mechanism to purchase LNG cargos if needed for operational reasons. Statoil argues that no interruptible shipper or shippers have supported Cove Point's proposal, and all affected shippers have protested the changes. Statoil contends that the proposed tariff changes unnecessarily degrade Firm Import Shippers'¹⁰ service by reducing their ability to use the terminal as was agreed during extensive negotiations relating to the reactivation and expansion of the terminal. Shell contends that Cove Point is attempting to shift its operational risk to its customers, while at the same time seeking to be compensated for these same risks in its new rate case. Statoil contends that Cove Point provided no factual support to its claim that its existing tariff provisions deter potential interruptible shippers from importing LNG to Cove Point.

7. On July 22, 2011, Cove Point submitted a Stipulation and Agreement of Interim Partial Settlement (Interim Partial Settlement). Cove Point stated that the Interim Partial Settlement provides a limited solution to the operational issues at the terminal by arranging for a one-time operational purchase of LNG by Cove Point. The Interim Partial Settlement is limited and applies only to the delivery of one LNG cargo to the Cove Point terminal. Cove Point stated that the purpose of the settlement is to provide all of the parties in this proceeding with additional time to arrive at a resolution of the issues pending in this docket. The Interim Partial Settlement in no way alters, amends, or limits the rights of any party in the captioned docket. The Commission accepted the Interim Partial Settlement on July 27, 2011.¹¹ In its comments on the settlement, Cove Point states that the Interim Settlement postpones the potential operational problems until the fourth quarter of 2011 but does not provide a long-term solution. Cove Point asserts that the proposed tariff modifications are still necessary and will encourage deliveries to the terminal.

¹⁰ Rate Schedule LTD-1 shippers and the 2004 Terminal Expansion Service shippers are collectively referred to as Firm Import Shippers.

¹¹ *Dominion Cove Point LNG, LP*, 136 FERC ¶ 61,059 (2011)

II. Discussion

8. As discussed below, we accept the proposed prepayment option, reject Cove Point's proposed revisions to Rate Schedule LTD-2, accept the proposed scheduling flexibility revisions, accept the proposed scheduling penalty subject to conditions, and accept the authorized overrun revision. We also direct Cove Point to file revised tariff records to bring its reservation charge crediting provisions into line with Commission policy.

A. Prepayment Option

9. Cove Point's tariff provides for it to recover its fuel use and lost and unaccounted for gas pursuant to a tracking mechanism. Cove Point makes annual filings on or before March 1 to adjust its fuel retention percentages to recover its projected fuel use for the next year and to return or recover any over- or under-recoveries from the previous calendar year. In addition, section 1.42.B of Cove Point's General Terms and Conditions of Service (GT&C) caps the fuel retention percentage applicable to Firm Import Shippers at 3 percent. However, if at the end of any calendar quarter, Cove Point's actual fuel use has exceeded the cumulative amounts it has retained from the Firm Import Shippers by 100,000 Dth or more, Cove Point can recover the under-recovery from those shippers based upon their contract demands. The Firm Import Shippers may reimburse Cove Point for such under-recoveries either in natural gas or LNG.

10. In the May 2011 filing, Cove Point proposed to add a new section 1.42.C to allow a Firm Import Shipper to prepay its share of Cove Point's anticipated future under-recoveries through LNG tendered at the terminal. Cove Point stated that it was making the proposal in response to a request from an LTD-1 shipper. Cove Point argues that the prepayment proposal provides benefits to both Cove Point and its customers. According to Cove Point, the proposal would not create any additional obligations for any Firm Import Shipper but would be entirely voluntary and would give the Firm Import Shippers additional flexibility to meet their retainage obligations. Cove Point did not propose to permit firm Import Shippers to make such prepayments in natural gas.

1. Comments

11. Statoil and BP support Cove Point's proposal as a voluntary option that creates additional flexibility for management of the repayment of fuel under-recoveries but are concerned that Cove Point is using fuel recovery as a backdoor means to force Firm Import Shippers to deliver LNG cargos. BP requests that the Commission ensure that neither this nor the in-kind reimbursement provision in general be used to improperly force LTD-1 shippers to involuntarily provide LNG to Cove Point. Statoil states that, because Cove Point has provided no justification for limiting the ability to prepay to imported LNG, the Commission should require Cove Point to amend new section 1.42.C to allow for the prepayment of fuel via in-tank transfers of LNG and also by natural gas

tenders. BP states that Cove Point has no right to refuse to honor its obligation to accept natural gas tendered as fuel reimbursement simply because Cove Point prefers to receive fuel reimbursement as LNG to help with its cooling issues. Statoil argues that Cove Point should be required to accept all tenders of natural gas as a form of prepayment. Shell contends that any “operational” restrictions Cove Point imposes on fuel reimbursement make-up must be based on whether its system can accept a delivery of natural gas instead of LNG, rather than a self-serving desire to receive LNG to avoid making an operational purchase. Shell adds that Cove Point has not demonstrated that its preference for LNG over vaporized gas is not unduly discriminatory and preferential. Shell contends that Cove Point’s proposal is overly restrictive and that shippers should have additional options to prepay fuel obligations via deliveries from their own LNG cargos, any in-tank transfers from other shippers, and deliveries of pipeline gas to the fuel meter.

12. In reply comments, Cove Point re-emphasizes that its proposal to allow Firm Import Shippers the opportunity to tender LNG as a means of prepaying anticipated fuel obligations is wholly voluntary and will not create any additional obligations for any of the Firm Import Shippers. Cove Point notes that the proposal should result in a win/win situation as it provides Firm Import Shippers flexibility in meeting their fuel obligations, and any LNG received by Cove Point pursuant to this provision, even limited quantities, would help address the operational issues at the terminal. With regard to Shell’s contention that the proposal is too restrictive in that it only applies to new tanker deliveries, Cove Point states that its proposal relates solely to an additional option for shippers to meet their fuel obligations and that existing tariff provisions regarding other means of fuel reimbursement, which it has not proposed to modify, are not at issue in this proceeding. Cove Point notes that if the Firm Import Shippers wish to challenge Cove Point’s existing tariff or Cove Point’s operational reasons for limiting payback options from time to time in accordance with the existing provisions, then they may raise those issues in a separate proceeding.

2. Commission Decision

13. We accept the proposed prepayment option as just and reasonable. The plain language of Cove Point’s proposal demonstrates that it is entirely voluntary and merely provides Firm Import Shippers an option to pre-pay their fuel retainage obligations with LNG, an option that did not previously exist in the tariff. The proposal does not replace an existing prepayment method or otherwise reduce shippers’ rights.

14. Moreover, we do not find Cove Point’s proposal to be overly restrictive. As noted by Cove Point, it tailored its proposal to provide an additional and voluntary means for Firm Import Shippers to meet their fuel obligations in a manner that would benefit both Cove Point and the shippers. This objective appears reasonable, given Cove Point’s operational difficulties, and Cove Point is not required to propose additional prepayment methods. To the extent that any shipper considers Cove Point’s existing tariff to be

unjust and unreasonable or that Cove Point is improperly implementing its tariff, it may file a complaint with the Commission.

B. Nomination, Scheduling, and Penalties

15. In its May 2011 filing, Cove Point proposed tariff revisions that would compress the current nomination schedule contained in Rate Schedule LTD-1 (Firm LNG Tanker Discharging Service) of Cove Point's tariff. Cove Point's current tariff requires LTD-1 shippers to submit a binding schedule for the succeeding month seven business days prior to the beginning of that month (Monthly Discharge Schedule), and a non-binding preliminary schedule for the next two succeeding months (Forward Schedule).¹² Cove Point is obligated to confirm the Monthly Discharge Schedule, and preliminarily confirm the Forward Schedule, the earlier of two business days after receipt of the proposed Monthly Discharge Schedule from all LTD-1 shippers or five business days prior to each month. Once Cove Point confirms such nominations they cannot be bumped.¹³

16. Cove Point's proposed revisions to section 4 of Rate Schedule LTD-1 would require shippers to schedule seven days prior to the beginning of each month for only two instead of three months (the succeeding month's schedule remaining the Monthly Discharge Schedule and the next succeeding month becoming the Forward Schedule). Under its revised provision, both the Monthly Discharge Schedule and the Forward Schedule would be binding. Cove Point further proposed to add scheduling penalties for LNG shippers who schedule to deliver cargos on a certain day but whose cargos do not either arrive as scheduled or who do not provide 15 days' notice of their delay or cancellation. Pursuant to Cove Point's proposal, both LTD-1 and LTD-2 shippers would be subject to a scheduling penalty of \$10,000 per occurrence, in addition to "all costs incurred by Operator as a result of the LNG tanker's failure to arrive as scheduled."¹⁴ However, Cove Point would not "impose this scheduling penalty if no harm resulted from the LNG tanker's failure to arrive as scheduled."¹⁵

¹² Cove Point Rate Schedule LTD-1, section 4.2(a)(ii).

¹³ Rate Schedule LTD-1, section 4.4.

¹⁴ Rate Schedule LTD-1, section 5(g)(i) and Rate Schedule LTD-2, section 5(g).

¹⁵ *Id.*

1. Comments

17. Cove Point argues that the proposed revisions would encourage more accurate nominations and give interruptible shippers a more accurate picture of scheduling availability. Cove Point contends that inaccurate scheduling hinders its ability to provide efficient and reliable service by causing Cove Point to stand ready to provide service almost every day, even though in almost every case no ships actually arrive. Cove Point also cites inaccurate scheduling as one reason it is unable to attract potential interruptible shippers. According to Cove Point, providing more accurate schedules would not degrade Firm Import Shippers' service.

18. Cove Point also argues that the proposed \$10,000 penalty is in line with penalty provisions of other LNG terminal operators and is nominal because it is substantially less than a penalty equal to the volume of LNG associated with a scheduled but not delivered tanker multiplied by the applicable interruptible rate.¹⁶ Cove Point states that, given the time it takes to arrange for and transport an LNG cargo, the proposed nominal penalty is easily avoided.

19. Shell argues that the scheduling flexibility revisions are overreaching, unsupported and would degrade LTD-1 shippers' rights. Shell claims Cove Point has failed to demonstrate that there is a problem with the existing procedures that justifies this change. Shell states that the issue Cove Point is trying to address is not a scheduling accuracy matter but the reality of changed LNG market conditions. Shell acknowledges that LNG cargos have been diverted from the Cove Point terminal in recent years due to global LNG market economics, but claims that fact does not show that past cargo schedules were "inaccurate" or provide a legitimate basis for the changes proposed. Shell states that it and other Firm Import Shippers pay reservation charges in return for scheduling flexibility that allows them to optimize their world-wide LNG terminal capacity and supply portfolios. Shell asserts that its arrangements with its suppliers are predicated on the scheduling flexibility in Cove Point's existing tariff, and that it is dependent upon this flexibility to make its supply arrangements and to manage contractual obligations with its suppliers. Shell argues that Cove Point's proposal will degrade this flexibility and other existing rights of firm shippers in a manner that would adversely affect Shell's ability to manage its own contractual arrangements with its supplier.

¹⁶ See *Natural Gas Pipeline Co. of Am.*, 103 FERC ¶ 61,174, at P 63 (2003).

20. BP states that “the Commission should accept Cove Point’s greater scheduling flexibility revisions.”¹⁷ Statoil states that Cove Point has not supported its flexibility revisions.

21. Shell, Statoil, and BP also oppose the proposed penalty as unsupported. BP states that Cove Point has failed to demonstrate that the existing tariff language is problematic, or to provide any operational justification to warrant the proposed change. Shell states that Cove Point has provided no real explanation of how this penalty will provide interruptible shippers with a better understanding of when cargos can be scheduled or how the proposed notice will facilitate additional LNG deliveries. BP predicts that taking flexibility away from Firm Import Shippers will not encourage incremental deliveries of LNG by anyone given current international market conditions. BP argues the penalties are needlessly punitive, unwarranted and counterproductive. BP argues that there is no Commission precedent for this kind of penalty because the Commission has not affirmatively ruled on similar provisions.

22. In addition, Shell is concerned that the language in section 5.3(g)(i) that permits Cove Point to collect “all costs incurred by Operator as a result of the LNG tanker’s failure to arrive as scheduled,” is overly broad and may permit over-recovery. BP states that this language inappropriately shifts operational costs to the LTD-1 shippers. Shell and BP argue that the LTD-1 shippers are already responsible for capacity payments for an under-utilized facility, and the costs associated with Cove Point standing ready to receive cargos should already be included in the firm rates paid by the LTD-1 shippers. Thus Shell asserts that a “cancellation penalty” such as the one proposed here is unwarranted for LTD-1 shippers who have paid for the right to preserve the possibility of bringing in cargos.

2. Commission Decision

23. We accept the scheduling flexibility revisions in section 4 of Rate Schedule LTD-1 as just and reasonable. Contrary to Shell’s and Statoil’s claim that Cove Point has not supported the proposed scheduling revisions, Cove Point has submitted evidence that in recent years the Firm Import Shippers have regularly scheduled cargos on the forward schedules to the extent that all available ship slots are taken, and yet the vast majority of those cargos are never actually delivered.¹⁸ This evidence supports Cove Point’s claims that the recent forward schedules by the Firm Import Shippers have been highly inaccurate, resulting in inefficient use of the terminal due to Cove Point having to stand

¹⁷ BP Initial Comments at 7.

¹⁸ May 2011 Filing, Attachment A.

ready to provide service during periods when no shipments are actually going to arrive. Moreover, it stands to reason that this inaccurate scheduling creates an impediment to Cove Point's ability to schedule interruptible shippers. Because all the slots are previously reserved there is essentially no opportunity or incentive for a potential interruptible shipper to schedule a cargo. Cove Point's proposal to eliminate one non-binding forward month schedule appears to be a reasonable means of addressing the inaccurate scheduling issue while still affording the firm import shippers the ability to schedule deliveries well in advance.

24. We also accept the proposed penalty provisions subject to conditions. As discussed above, a firm shipper scheduling terminal capacity for service that it does not intend to use results in the inefficient use of the terminal, and inhibits potential interruptible shippers from exercising their rights to access the LNG terminal. Further, the proposed penalty is appropriately tailored to address the inaccurate scheduling issue as it can be easily avoided by shippers providing fifteen days notice of a change in the schedule. Finally, the penalty is also properly limited in scope, as it would only be imposed when harm resulted from the LNG tanker's failure to arrive.¹⁹

25. The additional penalty language, requiring an offending party to pay "all costs incurred by Operator as a result of the LNG tanker's failure to arrive as scheduled," however, is vague and overbroad. While Cove Point does support its claim that it incurs costs from preparing for shipments that do not arrive, such as arranging for additional labor and coordinating with the U.S. Coast Guard, the proposed tariff language is not tailored to such costs or limited in any way. Accordingly, while the Commission finds it reasonable for Cove Point to require an LTD-1 shipper to compensate it for the actual additional variable costs it incurs as a result of preparing to receive the scheduled LNG delivery, the Commission requires Cove Point to revise its proposed tariff to define more specifically the types of costs which it may assess the shipper in addition to the \$10,000 penalty payment. Thus, the Commission accepts Cove Point's proposed penalty provisions subject to Cove Point revising the language, consistent with this discussion.

C. LTD-2 Availability

26. Cove Point also proposed in the May 2011 filing to revise the availability section of Rate Schedule LTD-2 (Interruptible LNG Tanker Discharging Service) of its tariff to

¹⁹ See *Columbia Gulf Transmission Co.*, 124 FERC ¶ 61,121, at P 6 (2008), holding that Commission policy permits nominal scheduling penalties up to the interruptible rate level during non-critical periods and higher scheduling penalties during critical periods.

eliminate what it calls the “veto” rights of the firm LTD-1 shippers. In particular, pursuant to the existing tariff, Rate Schedule LTD-1 shippers are entitled to receive 30 days written notice of a proposed LTD-2 nomination to deliver and unload an LNG cargo, including certain information regarding the potential LNG cargo, before Cove Point can schedule an LTD shipper’s delivery.²⁰ Each LTD-1 shipper then has until 10 days prior to the proposed LTD-2 delivery date to “veto” the LTD-2 cargo by claiming that it could adversely affect some aspect of LTD-1 deliveries.²¹ Cove Point proposes to eliminate the thirty day notice and ten day veto provisions in sections 1.1(a) and 1.1(b) of Rate Schedule LTD-2 and replace them with language providing that Cove Point will not schedule LTD-2 tanker discharging service on any day an LNG tanker is scheduled to be discharged at the Cove Point Terminal based on the confirmed Monthly Discharge Schedule or the Forward Schedule submitted by an LTD-1 shipper.

27. Cove Point contends that the elimination of the LTD-1 veto provisions will encourage interruptible shipments of LNG to the Terminal. Cove Point states that substantial market changes have rendered the LTD-1 veto provisions outdated and a potential impediment to the scheduling of interruptible LNG shipments. Cove Point claims that the LTD-1 veto provisions discourage interruptible LNG deliveries and thus make it more difficult for Cove Point to address its current operational problems. Cove Point argues that the Firm Import Shippers are not utilizing the terminal at the same rate as in the past and that there is thus no practical reason to retain the LTD-1 veto provisions.

1. Comments

28. Shell and BP oppose the proposed change, arguing that Cove Point has not shown that the proposed changes are just and reasonable. Shell argues that Cove Point’s claim that LTD-1 shippers have veto rights over LTD-2 cargos is misleading. BP states that the 30-day notice requirement is not a veto, but simply allows an LTD-1 shipper to object to an LTD-2 shipment that it has a reasonable basis to believe will interfere with the exercise of its LTD-1 shipper rights. BP argues that the 30-day notice ensures that LTD-1 shippers, who pay significant reservation charges, will have firm access to the terminal. BP and Shell contend that Cove Point is degrading LTD-1 service for the benefit of LTD-2 service. Shell and BP assert that Cove Point has not documented any actual occurrences of lost opportunities to provide LTD-2 service as a result of these provisions and it is thus disingenuous for Cove Point to claim that the provision is

²⁰ Cove Point Rate Schedule LTD-2, section 1.1(a).

²¹ Cove Point Rate Schedule LTD-2, section 1.1(b).

creating obstacles to interruptible cargos when the provision has never been triggered. Shell further argues that Cove Point ignores the fact that LTD-1 shippers can release their terminal capacity to interruptible shippers if they have no plans to utilize that capacity. Shell contends that Cove Point is seeking to elevate LTD-2 service to quasi-firm status by imposing a “use it or lose it” mechanism on LTD-1 service. Shell states that the proposed change could preclude LTD-1 shippers from using the terminal for 60 days if an LTD-2 shipper schedules an interruptible cargo, which would be an unjustified and inappropriate degradation of LTD-1 shippers’ firm service rights. Shell asserts that it has previously brought in cargos within the current 37 day window, which it would not have been able to do under Cove Point’s proposed tariff change. Shell and BP conclude that Cove Point has not made a convincing showing that there is a problem with LTD-1 shippers blocking LNG cargos or that the proposed change will attract an interruptible cargo. BP states that Cove Point’s previously stated reason that current conditions have rendered these protections outdated and would cause competitively sensitive information to be disclosed is completely at odds with its contention that LNG imports have declined and thus there is a lack of competition.

29. In reply comments, Cove Point states that, in the past, it has been contacted by parties interested in receiving interruptible service at the terminal but that these parties declined to make a formal request for interruptible LNG service upon learning about the workings of Cove Point’s tariff and the LTD-1 veto provisions. Thus Cove Point states that it has never had the occasion to inform the LTD-1 shippers of such a request. Cove Point states that the Firm Import Shippers have provided no evidence or support to show how their service will be inappropriately degraded. The Firm Import Shippers will still have scheduling priority if the veto provisions are eliminated, and the scheduling of an interruptible delivery will in no way shut out the Firm Import Shippers from scheduling a cargo for 60 days.

2. Commission Decision

30. The Commission rejects Cove Point’s proposed modifications to Rate Schedule LTD-2 as unjust and unreasonable because they would degrade existing firm shipper rights. As noted by the LTD-1 shippers, they pay monthly reservation charges for the right to firm access to the terminal capacity. Pursuant to our regulations, firm service cannot be subject to a prior claim by another customer or class of service.²² Cove Point’s current tariff provides such protection for firm shippers and also offers service on an interruptible basis.²³ The very nature of interruptible service, however, is that it is

²² See 18 C.F.R. § 284.7(a)(3) (2011)

²³ See 18 C.F.R. § 284.9(a)(2) (2011).

subject to a prior claim by another customer or class of service. While Cove Point's proposed modifications may attract potential interruptible shippers, they potentially allow LTD-2 interruptible shippers to interfere with LTD-1 firm customers' rights to access the terminal.

31. To illustrate the degradation of LTD-1 shippers' rights under Cove Point's proposal, consider the following example. As discussed above, LTD-1 shippers must submit binding monthly and forward schedules at least seven days prior to the succeeding month. Suppose that on January 23, an LTD-1 shipper submits its scheduling nominations requesting a tanker delivery on February 15 and no deliveries in March, and pursuant to the tariff Cove Point confirms that schedule on January 25. Suppose further that on February 1, an LTD-2 shipper, seeing that there are no deliveries scheduled in March, submits a nomination for interruptible discharge service on March 15 in accordance with sections 4.1 and 4.2 of Rate Schedule LTD-2. Cove Point then confirms the interruptible tanker delivery. As with service under Rate Schedule LTD-1, once Cove Point confirms a nomination for LNG discharging service pursuant to Rate Schedule LTD-2 that service cannot be bumped.²⁴ Now, not having been provided notice of the LTD-2 shipper's nomination, and absent the ability to "veto" that nomination ten days prior to the tanker's arrival date, all LTD-1 shippers are precluded from scheduling a tanker on March 15 when they submit their Monthly Discharge Schedule for March seven business days before March 1. Thus under this scenario, the LTD-2 shipper's interruptible service would interfere with the LTD-1 shippers' ability to schedule firm service. Such a result is contrary to our regulations, and thus, Cove Point's proposed modifications are rejected. The Commission's rejection of Cove Point's proposed modifications of Rate Schedule LTD-2 is without prejudice to Cove Point making an alternate proposal to encourage the use of interruptible LTD-2 service, while protecting the Firm Import Shippers' right to access the terminal.

D. Overrun Provisions

32. Cove Point proposes to modify its scheduling and curtailment priority in order to treat authorized overrun volumes under its firm rate schedules on an equal basis with other interruptible service. Currently, authorized overruns under Cove Point's firm rate schedules have a higher priority under Cove Point's capacity and imbalance allocation and under interruption of service procedures. Cove Point argues authorized overruns are indistinguishable from any other interruptible service on its system and that its proposed modification would conform its tariff to existing Commission precedent.

²⁴ See section 4.4 of Rate Schedule LTD-2.

1. Comments

33. Shell and Statoil object to Cove Point's proposed reduction of priority for authorized overruns. In their comments, these parties contend that Cove Point has failed to fully support the change in priority. They argue that Cove Point's reliance on conforming to Commission precedent here is inconsistent with its argument that Commission precedent on reservation charge credits should not apply to LNG import services.

2. Commission Decision

34. The Commission finds that Cove Point's proposed modifications to its tariff language on authorized overruns are consistent with longstanding Commission policy,²⁵ and thus we accept them as just and reasonable. Firm shippers are only entitled to firm service up to their contract demands. Authorized overrun service for firm shippers is an interruptible service similar to any other interruptible service and thus is appropriately given the same scheduling priority as other interruptible services. Shell and Statoil have provided no justification for treating LNG terminal service differently from other open access services.

E. Reservation Charge Credits

35. Section 3.3 of Rate Schedule LTD-1 provides for only very limited circumstances when a shipper would be entitled to any reservation charge credit.²⁶ That section

²⁵ *Northwest Pipeline Corp.*, 84 FERC ¶ 61,347, at 62,516 (1998); *CNG Transmission Corp.*, 81 FERC ¶ 61,346, at 62,592 (1997).

²⁶ Section 3.3 of Rate Schedule LTD-1 states:

If Operator is unable to provide the service required by this Rate Schedule LTD-1 for any reason, including an inability to provide service to Buyer under Elected FTS service, for a period (other than periods of reasonably scheduled maintenance not to exceed ten (10) days in any calendar year) that exceeds either (i) a cumulative total of twenty (20) days in any calendar year, or (ii) three (3) consecutive calendar days, Operator shall provide Buyer with a credit in an amount equal to (a) the cost of common equity and associated income taxes reflected in the Reservation Charge for LNG tanker discharging service under this Rate Schedule LTD-1 multiplied by (b) the quantity of the service that was

(continued...)

generally provides that, if Cove Point is unable to provide service under that rate schedule for any reason that exceeds either three consecutive days or a cumulative total of 20 days in a calendar year, Cove Point will provide reservation charge credits equal to the return on equity and associated income taxes included in the LTD-1 reservation charge multiplied by the quantity of service interrupted or curtailed. That section also exempts Cove Point from providing credits for periods of reasonably scheduled maintenance not to exceed ten days.

36. Cove Point's other firm rate schedules do not contain any provision for reservation charge credits. Section 14 of Cove Point's GT&C concerning *force majeure*, provides that "no claim of *force majeure* by a party shall relieve such party from its payment obligations under the applicable service agreement. If a party is unable, wholly or in part, to render service to another party due to *force majeure* the party not receiving service shall be relieved of any payment obligation to the extent and for so long as it is not receiving service."

37. While Cove Point did not propose any changes to the reservation charge crediting provisions of its tariff in either of its May 27, 2011 filings, Shell argued in its June 8, 2011 protest to Cove Point's rate case filing in Docket No. RP11-2137-000 that those provisions do not conform to the Commission's current policy regarding reservation charge credits.²⁷ According to Shell, the Commission issued several orders restating its policy with respect to reservation charge crediting in both *force majeure* and non-*force majeure* events.²⁸ Based on the Commission's invitation in *NGSA* to shippers that believe a pipeline's tariff does not comply with Commission policy on reservation charge crediting to "raise the issue in any section 4 filing by that pipeline," Shell alleges in its protest that neither Cove Point's rates schedules nor the GT&C of its tariff properly reflect the Commission's reservation charge crediting policy.

interrupted or curtailed. Such credit shall be calculated prospectively for the period that the interruption or curtailment of service exceeds the periods set forth above

²⁷ Motion of Shell NA LNG LLC to Intervene, Protest, Request for Rehearing and Suspension and Request Concerning Other Tariff Revisions, dated June 8, 2011, Docket No. RP11-2137-000 at 11-12 (Shell Protest).

²⁸ *Id.*, and n.21 (citing *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208 (2011); *Natural Gas Supply Assn., et al.*, 135 FERC ¶ 61,055 (2011) (*NGSA*); *Southern Natural Gas Co.*, 135 FERC ¶ 61,056 (2011) (Southern); *Kern River Gas Transmission Co.*, 135 FERC ¶ 61,050 (2011)).

38. Specifically, Shell asserts that the *force majeure* provisions of Cove Point's tariff do not follow one of the two methodologies required by the Commission for *force majeure* reservation charge credits. Shell further states that section 3.3 of Rate Schedule LTD-1 provides for only very limited circumstances when a shipper would be entitled to any reservation charge credit. Accordingly, Shell requests the Commission direct Cove Point to modify its tariff to provide firm shippers with reservation charge credits in both *force majeure* and non-*force majeure* situations consistent with Commission policy.

1. Comments

39. In its Initial Comments, Cove Point states it would be agreeable to modifying its tariff to provide for reservation charge credits consistent with Commission precedent for its firm transportation and peaking services. Cove Point does not agree, however, that the Commission's reservation charge crediting policy should apply to LNG terminal services. Cove Point argues that the unique scheduling provisions of its terminal services could allow its Firm Import Shippers to manipulate the reservation charge crediting provision in such a way so as to trigger the crediting mechanism in situations where it would otherwise be inappropriate. As discussed above, Cove Point contends that Shell and the other Firm Import Shippers regularly submit inaccurate and unreliable forward schedules that bear little or no resemblance to the number of ships that actually arrive at the terminal. Cove Point asserts that if the Commission's reservation charge crediting policy is applied to its terminal services, then the firm shippers could submit inaccurate forward schedules, wait for Cove Point to schedule maintenance based on those schedules, then change the schedule and claim reservation charge credits for the period when Cove Point was unable to provide service due to the previously scheduled maintenance.²⁹ Cove Point further asserts that Shell and others could simply wait until the LNG terminal warms up, rendering it unable to receive LNG cargos, and then assert that they should be eligible for reservation charge credits. In addition, Cove Point notes Section 3.3 of Rate Schedule LTD-1 currently provides a mechanism for reservation charge crediting.

40. While acknowledging Cove Point's agreement to modify its tariff to provide for reservation charge crediting with respect to its firm transportation and peaking services, Shell, Statoil, and BP continue to request that the Commission require Cove Point to provide reservation charge crediting consistent with Commission policy for its terminal services. Those parties contend Cove Point's terminal services are no different from standard storage services offered by other natural gas pipeline companies. They also argue Cove Point's posited scenario of a Firm Import Shipper manipulating the

²⁹ Cove Point Reply Comments at 10.

reservation charge crediting mechanism is pure speculation, and otherwise without merit. According to the Firm Import Shippers, Cove Point has failed to provide any justification for differentiating between its terminal services and those of standard storage service providers, and thus the same reservation charge crediting mechanism should apply. Finally, those parties contend the existing reservation charge crediting mechanism in Section 3.3 of Rate Schedule LTD-1 was the product of a settlement between the parties, which settlement has since expired and is no longer controlling.

2. Commission Decision

41. As Shell points out, the Commission recently explained its reservation charge credit policy in an order on a petition by various industry associations requesting that the Commission take action to enforce its reservation charge crediting policy.³⁰ As these orders state, Commission policy requires that pipelines and shippers share the risk of *force majeure* service interruptions because such service interruptions are no-fault occurrences. The risk sharing is accomplished by the pipeline providing partial reservation charge credits for all scheduled gas not delivered due to a *force majeure* event, using either the “No-Profit” method, or the “Safe Harbor”³¹ method, or “any other method provided it results in the same type of risk-sharing as the two approved methods do.”³² Furthermore, the Commission’s policy also requires a pipeline to provide full reservation charge credits for non-*force majeure* events. More specifically, where the curtailment occurred due to circumstances within a pipeline’s control, including scheduled maintenance, the Commission requires the pipeline to provide shippers a full

³⁰ See *NGSA* and contemporaneously-issued decisions in *Southern*, 135 FERC ¶ 61,056 and *Kern River Gas Transmission Co.*, 135 FERC ¶ 61,050 (2011).

³¹ Under the No-Profit method the pipeline provides for partial refunds starting on the first day of the interruption in service, covering the portion of the pipeline’s reservation charge that represents the pipeline’s return on equity and associated income taxes. Under the Safe Harbor method reservation charges must be credited in full to the shippers after a short grace period when no credit is due the shipper (i.e., 10 days or less).

³² *NGSA*, 135 FERC ¶ 61,055 at P 16.

reservation charge credit for the amount of primary firm service they nominated for scheduling which the pipeline failed to deliver.³³ In *North Baja Pipeline, LLC v. FERC*,³⁴ the Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed Commission orders requiring a pipeline to modify its tariff to conform to these policies.

42. We find that Cove Point's shippers can raise the issue of reservation charge crediting issues for section 5 determinations in this section 4 proceeding, even though Cove Point has not proposed to change those provisions. While we generally discourage parties from raising unrelated issues in section 4 proceedings, the Commission may use its discretion to act under section 5 of the NGA when it is made aware of a tariff provision that is clearly contrary to Commission policy³⁵ consistent with our explanation of this issue in our recent decision in *Southern*.³⁶ Furthermore, in *NGSA*, the Commission determined that, in the interest of obtaining pipeline compliance with our longstanding reservation charge crediting policy, we will permit parties to raise the issue in any NGA section 4 proceeding filed by a pipeline.³⁷

43. As discussed, Cove Point does not object to implementing the Commission's crediting policy for its transportation and peaking services. Accordingly, we direct Cove Point to file tariff records doing so within 30 days of the date that this order issues.

44. We also find that Cove Point's existing tariff provision in section 3.3 of Rate Schedule LTD-1 regarding reservation charge crediting, which admittedly does not apply the Commission's policy on this issue to Cove Point's terminal services, is unjust and unreasonable. Cove Point's argument that its terminal services and scheduling are so unique that the Commission's reservation charge crediting policy should not apply is not compelling. The Commission's policy on non-*force majeure* event reservation charge

³³ See, e.g., *Tennessee Gas Pipeline Co.*, Opinion No. 406, 76 FERC ¶ 61,022 (1996), *order on reh'g*, Opinion No. 406-A, 80 FERC ¶ 61,070 (1997), *as clarified by*, *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 63 (2006) (*Rockies Express*).

³⁴ *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819 (D.C. Cir. 2007) (*North Baja*), *affg*, *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh'g*, *North Baja Pipeline, LLC*, 111 FERC ¶ 61,101 (2005).

³⁵ *Wyoming Interstate Gas Co., Ltd.*, 129 FERC ¶ 61,022, at P 11 (2009).

³⁶ 135 FERC ¶ 61,056 at P 12-17.

³⁷ *NGSA*, 135 FERC ¶ 61,055 at P 13.

crediting “is not dependent upon specific operating conditions on the pipeline.”³⁸ Moreover, the Commission has defined *force majeure* events as “events that are not only uncontrollable, but also unexpected.”³⁹ Though Cove Point does not have control over whether or not shipments arrive at the terminal, the very basis for its filings in this proceeding is that the warming of the terminal due to poor market conditions is expected, and thus would constitute a non-*force majeure* event requiring full crediting. Accordingly, Cove Point must implement the Commission’s crediting policy for its LNG import service.

45. As noted, Cove Point expresses concern that, if it were to implement the Commission’s crediting policy for its LNG import service, then its firm shippers could potentially manipulate the peculiarities of scheduling LNG terminal access to obtain unwarranted credits. For example, Cove Point is concerned that firm import shippers could submit inaccurate forward schedules to Cove Point, wait for Cove Point to schedule maintenance based on that schedule, and then change the schedule and assert that they should receive reservation charge credits, even if they have no intention of delivering a ship during the period.⁴⁰ Based on the record in this proceeding, these concerns are not wholly without merit.

46. Commission policy, however, provides sufficient flexibility to allow Cove Point to address its concerns about gaming. In *Southern*,⁴¹ the Commission approved a crediting mechanism that used an average of recent actual deliveries in situations where shippers have advance notice of the event, before shippers have submitted scheduling nominations for the day (or days) of the outage. The Commission held that this was a reasonable method to minimize the potential for gaming, where shippers would submit scheduling nominations for high amounts knowing that the scheduling nomination will be rejected. We recognize that Cove Point’s flexible scheduling provisions may present a comparable potential for gaming, for example under the scenarios outlined by Cove Point. Therefore, Cove Point may submit for Commission review a fully supported mechanism to ensure that credits are only given in connection with *bona fide* scheduling nominations. We thus direct Cove Point to file revised tariff records consistent with Commission policy

³⁸ *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at P 15 (2003).

³⁹ *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 823 (D.C. Cir. 2007).

⁴⁰ Cove Point June 15, 2011 Answer at 6; *see also*, Cove Point Reply Comments at 10.

⁴¹ *Southern*, 135 FERC ¶ 61,056 at P 29-34.

regarding reservation charge credits for outages due to *force majeure* and non-*force majeure* events, within 30 days of the date that this order issues.

The Commission orders:

(A) As detailed in the body of this order, the Commission rejects certain of Cove Point's proposals and accepts others subject to conditions, effective on November 26, 2011 and December 1, 2011, as shown in Appendix A and Appendix B.

(B) Within 30 days of the date of this order, Cove Point shall file revised tariff records concerning reservation charge credits consistent with the discussion in this order, and shall file revised tariff records for those tariff records that were accepted subject to conditions.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix A

**Dominion Cove Point LNG, LP
FERC NGA Gas Tariff
DCP_DATABASE
Docket No. RP11-2136-000**

Tariff Records Accepted Effective November 26, 2011

Tariff Record 20.1.5, LTD-1 Rate Schedule, 2.0.0
Tariff Record 40.2, GT&C – Definitions, 1.0.0

**Tariff Records Accepted Subject to Conditions
Effective November 26, 2011**

Tariff Record 20.1.6, LTD-1 Rate Schedule, 2.0.0
Tariff Record 20.2, LTD-2 Rate Schedule, 2.0.0

Appendix B

**Dominion Cove Point LNG, LP
FERC NGA Gas Tariff
DCP_DATABASE
Docket No. RP11-2137-000**

Tariff Records Accepted Effective December 1, 2011

Tariff Record 40.16, GT&C – Capacity and Imbalance Allocations, 1.0.0
Tariff Record 40.17, GT&C – Interruption of Service, 1.0.0