

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Dominion Cove Point LNG LP

Docket Nos. RP05-43-000
RP05-43-001

ORDER ACCEPTING AND SUSPENDING TARIFF SHEETS SUBJECT
TO REFUND AND ESTABLISHING A TECHNICAL CONFERENCE

(Issued December 23, 2004)

1. On October 28, 2004, Dominion Cove Point LNG, LP (Cove Point) filed revised tariff sheets (see Appendix) reflecting proposed revisions to Rate Schedules FPS-1, FPS-2, and FPS-3 (Firm Peaking Service) and LTD-1 and LTD-2 (Firm and Interruptible Tanker Discharging Service) and to the applicable *pro forma* service agreements and General Terms and Conditions (GT&C) of its tariff. Cove Point proposes an effective date of December 27, 2004, for its proposed revisions. On November 10, 2004, Cove Point filed a revised tariff sheet (see Appendix) to reflect a correction to FPS and LTD-1 rates as filed on November 4, 2004, in Docket No. CP01-76-010.¹ As discussed below, the Commission rejects the tariff sheet filed on November 10, 2004, and accepts and suspends the other proposed tariff sheets, to become effective May 27, 2005, or on an earlier date specified by subsequent Commission order, subject to refund, to conditions, and to the outcome of the technical conference established herein. This order benefits the public by setting forth a procedure by which the Commission and parties may explore the issues raised by Cove Point's filing.

Background

2. Cove Point was originally authorized in 1972 to construct and operate a Liquefied Natural Gas (LNG) terminal and related storage, regasification, and pipeline facilities to import LNG at Cove Point, Maryland, and sell the vaporized LNG. Shipments of LNG to the LNG terminal began in March 1978, were interrupted in April 1980, and ceased in

¹ On November 30, 2004, the Commission issued a letter order in Docket No. CP01-76-009, et al., rejecting Cove Point's proposed rate revisions contained on the tariff filed on November 4, 2004. *Dominion Cove Point LNG LP*, 109 FERC ¶ 61,239, P 9 (2004). Therefore, the Commission rejects the conforming tariff sheet filed in the instant docket.

December 1980. In 1994, the Commission authorized Cove Point to reactivate the mothballed onshore LNG facilities, including four LNG storage tanks, and to construct a liquification unit for the purpose of liquifying domestic natural gas and storing it as LNG during the summer for later regasification and use at peak times during the winter. The Commission also authorized rates for the peaking and transportation services.² Pursuant to that order Cove Point provided 10-day, 5-day and 3-day guaranteed sendout firm peaking services under Rate Schedules FPS-1, FPS-2, and FPS-3, respectively, with associated rights to transportation, to a number of customers under Part 284 of the Commission's regulations. The FPS customers were also granted an "Elected FTS Service Option" under which they could obtain firm Part 284 transportation service under Rate Schedule FTS, approximately 87 miles from the LNG terminal to an interconnection with other pipelines in Virginia, at a priority lower than FTS service.³

3. The FPS peaking services consist of the receipt, liquification and storage of the liquified quantities of natural gas as LNG at the Cove Point facility during an injection season from April 16 to December 14, and vaporization of the customer's LNG and redelivery of the regasified quantities during a withdrawal season from December 15 to April 15. Each FPS customer contracts for a maximum contract peaking quantity (MCPQ), which represents the maximum amount of LNG that Cove point was obligated to store for that shipper. Under the 3, 5 and 10 day FPS services, the customer can take up to one-third, one-fifth, and one-tenth of its MCPQ on any given day (MDPQ) during the withdrawal season, referred to as daily "sendout" capacity. All receipts from and deliveries to the FPS customers are at points along Cove Point's pipeline.

4. Later, Cove Point proposed to reopen and expand the LNG terminal for the importation of LNG and held an open season from February to March, 2000, for new tanker discharging services. At that time, Cove Point had 4,875,000 Dth of storage capacity. Cove Point also was planning to build a fifth tank with 2,500,000 Dth storage capacity, so there would eventually be 7,375,000 Dth total storage capacity. At the time of the open season, there were four FPS shippers who had contracted for a total of 1,290,000 Dth of storage capacity, and 154,000 Dth/d sendout capacity.⁴ Cove Point proposed to make storage capacity available to successful bidders for its proposed LTD-1

² *Cove Point LNG Limited Partnership*, 68 FERC & 61,377 (1994), *reconsideration denied*, 69 FERC & 61,292 (1994).

³ 68 FERC ¶ 61,377 at 62,513-514.

⁴ The FPS shipper could take 115 percent of its MDDQ (Maximum Daily Delivery Quantity) so in total they had 177,100 Dth/d maximum sendout capacity.

tanker discharge firm services based on a fixed ratio of storage capacity to contracted-for daily sendout capacity, which it expected to be 5.7 to 1 upon reactivation and 9.0 to 1 upon activation of the fifth storage tank.

5. In the open season, Cove Point had assumed that its FPS customers with contracts set to expire prior to the reactivation of the terminalling facilities would not renew their contracts. This assumption turned out to be erroneous because certain FPS customers⁵ extended their FPS service and, thus, there was insufficient storage capacity to satisfy all the prospective LTD-1 customers' requests. Following the open season, Cove Point then proposed to increase the capacity of the proposed fifth tank to 2,800,000 Dth so that the LTD customers would be able to receive the full amount of requested storage.⁶ All parties, consisting of Cove Point, the LTD-1 shippers, the FPS shippers, and the one FTS shipper, then entered into a settlement of rates and capacity allocation issues, which Cove Point included in its application for a certificate to reactivate the terminalling facilities.

6. On October 12, 2001, the Commission issued an order (the 2001 Certificate order) granting Cove Point a certificate and approving a settlement (the 2001 Settlement) which permitted the reactivation of the Cove Point LNG terminalling facilities and operations, an increase in the storage capacity of the proposed fifth tank to 2,800,000 Dth with an allocation of all the capacity of that fifth tank to the LTD-1 customers, and approved cost and capacity allocations and rates for the settling FPS and LTD-1 shippers.⁷ As approved in the 2001 Certificate Order, Cove Point was authorized to provide firm and interruptible LNG tanker discharge service under new Rate Schedules LTD-1 and LTD-2,

⁵ The 2001 Certificate Order stated that there were four current FPS customers, and one FTS customer. The FPS customers are parties to the instant proceeding.

⁶ In the open season, there were three bidders who tied at the maximum rate for the highest bid for tanker discharging service by bidding the proposed maximum rate. The three agreed to accept an allocation of one-third of the 750,000 Dth/d available sendout capacity, *i.e.*, 250,000 Dth/d, for each LTD-1 customer. Cove Point executed binding precedent agreements with the three shippers reflecting this allocation of the firm LNG tanker discharging service at the maximum rate for twenty-year primary terms.

⁷ 97 FERC ¶ 61,043 (2001), *reh'g*, 97 FERC ¶ 61,276 (2001), *reh'g*, 98 FERC ¶ 61,270 (2002).

respectively. As provided in each LTD rate schedule, the LTD service consists of receipt of LNG from ocean-going tankers, the temporary storage of the LNG in tanks, the vaporization of LNG and delivery of the regasified LNG at the Cove Point facility.⁸ Further, pursuant to the 2001 Settlement and 2001 Certificate Order, like the existing FPS service, the LTD-1 services also include transportation of the regasified LNG to points on Cove Point's existing pipeline. Accordingly, the respective LTD-1 and FPS settlement maximum reservation charges included a \$0.6759 per Dth component for the transportation service, which was equal to the settlement maximum rate for service under Rate Schedule FTS.⁹ Consistent with the FTS election previously accorded FPS customers, the 2001 Settlement also provided for the inclusion in the tariff of a one-time right of the LTD-1 shippers to elect to take transportation service under Rate Schedule FTS, instead of under Rate Schedule LTD-1, and get a credit to their LTD-1 bill for the FTS reservation charges. All the shippers opted to take the Elected FTS Service Option for their respective services.

7. The Commission described the 2001 Settlement as providing that, until the fifth storage tank is constructed and becomes operational, the FPS shippers retain their 1,290,000 Dth of storage capacity and 154,000 Dth/d sendout capacity, while the LTD-1 shippers obtain the remaining available 3,585,000 Dth of storage capacity and 750,000 Dth/d sendout capacity (one-third to each LTD-1 customer). When the fifth tank becomes operational, absent any capacity release or voluntary contract termination, the FPS customers would still retain their existing capacity entitlements (as long as they extend their contracts under ROFR provisions of their contracts if necessary), whereas the LTD-1 customers' total storage capacity increases to 6,382,500 Dth (one-third to each LTD-1 customer), with no change in their daily sendout capacity. The 2001 Settlement also provided two sets of rates for the FPS and LTD-1 services, with the terminalling component of the rates increasing after the in-service date of the fifth storage tank. The transportation component remains at \$0.6759 per Dth.

⁸ Under section 5.4(f) of the LTD-1 Rate Schedule, unless otherwise agreed, LTD shippers must cause the LNG in storage to be vaporized and delivered within 120 days after discharge of the volumes from a tanker.

⁹ Due to cost increases, the terminalling components of the FPS and LTD rates have since increased above the rate components of the 2001 Settlement as approved by the 2001 Certificate Order.

8. Article II, section 2(b) of the 2001 Settlement also includes the following stipulations in recognition of the fact that the LTD-1 shippers would not otherwise receive the full amount of capacity assumed in the open season. First, the size of Cove Point's proposed fifth LNG storage tank would be increased from 2,500,000 Dth to 2,800,000 Dth. Second, the entire capacity of this tank would be dedicated solely to the LTD-1 Shippers. Third, the parties provided a mechanism for transitioning FPS capacity to the LTD-1 Shippers as follows:

[I]n the event that any Rate Schedule FPS services are terminated, whether by expiration of a service agreement(s) or capacity turn-back, the capacity that becomes available as a result shall be dedicated to Rate Schedule LTD-1 service and allocated among the LTD-1 Shippers in proportion to each such Shipper's firm MDDQ and included in such Shipper's service agreement for the remainder of its term, and the applicable storage ratios for Rate Schedule LTD-1 service will be modified accordingly. Cove Point agrees that in the event of such a reallocation of storage capacity, it will make a compliance filing for the sole purpose of (i) placing into effect rates which will reflect a reallocation of the total revenue responsibility associated with such relinquished Rate Schedule FPS service (at the then-effective maximum rates), together with the associated storage and transportation capacity, to Rate Schedule LTD-1 service, and (ii) revising appropriately the storage ratios applicable to Rate Schedule LTD-1 service.

9. The 2001 Certificate Order described the terms of the settlement, and as to the above provision the order stated:

When the fifth storage tank is built, FPS customers will still have 1,290,000 Dth of storage capacity and 154,000 Dth/d of sendout capacity for as long as they continue to extend their contracts under right of first refusal procedures of Cove Point's tariff. LTD-1 shippers will still have 750,000 Dth/d of sendout capacity, but their storage capacity will increased (sic) from 3,585,000 Dth to 6,382,500 Dth. In the event any of the Rate Schedule FPS services terminate, either by contract expiration or capacity turnback, the storage capacity that becomes available will be allocated to Rate Schedule LTD-1 shippers.¹⁰

¹⁰ 97 FERC at 61,195.

10. The LTD-1 services commenced in August 2003 when the new and reactivated terminal facilities went into service. The fifth LNG storage tank recently went into service and is now available for the storage of LTD shipper LNG supplies at increased rates under the 2001 Settlement..

11. In the transmittal to the instant filing, Cove Point states that it is proposing modifications of its tariff because certain service agreements under FPS rate schedules are nearing the end of their primary terms and it appears that there are divergent views of how the 2001 settlement operates at the end of the primary contract term of an FPS service agreement.¹¹ It asserts that the subject tariff changes will bring certainty to issues relating to contract expirations and renewals, rights of first refusal, and to the potential future uses of FPS capacity.

Details of the Docket No. RP05-43-000 Filing

12. Cove Point states that the first expiration of the primary term of an FPS service agreement will occur on April 15, 2005¹², and if the ROFR process is applied to that contract, then Cove Point must accept bids for that capacity during the period from February 14 – March 16, 2005. Cove Point's proposed modifications are set forth below.

a. Evergreen Provisions and Contract Extension

13. Cove Point states that some of its existing service agreements under Rate Schedule FPS include "evergreen" provisions specifying a primary term and then providing that the term will continue from year-to-year thereafter unless either party gives 12-months prior written notice of termination. It states that the ROFR provisions in GT&C section 4(g) expressly contemplate a service agreement that "extend[s] according to its terms." In addition, it states, GT&C section 5(b) provides for new service agreements entered into following the ROFR process with terms extending from year-to-year unless terminated by six-months prior notice.¹³ However, Cove Point states, the current tariff language

¹¹ It asserts that "many of Cove Point's FPS contracts have primary terms that end in 2005 or 2006." Docket No. RP05-43-000 Transmittal at page 2, note 15. However, Cove Point does not specify which shipper's contracts are expiring.

¹² The 2001 Certificate Order listed one FPS contract as due to expire on April 15, 2006. *See* 97 FERC at 61,195.

¹³ Cove Point states that in *Dominion Cove Point LNG, LP*, 108 FERC ¶ 61,327 at P 13 (2004), the Commission ruled that Cove Point's tariff does not explicitly permit it to negotiate a ROFR with a customer that is not eligible for the "regulatory ROFR" provided in section 4(g) of the GT&C of Cove Point's tariff. Cove Point states that it

(continued)

does not explicitly inform customers and potential customers of Cove Point's willingness to negotiate evergreen provisions in its service agreements. To clarify this point, it states, Cove Point proposes to modify the *pro forma* agreement language to provide that an agreement "... shall continue in full force and effect until ____ [and ____ to ____ thereafter unless terminated by written notice from one party to the other upon ____ notice]."

14. Cove Point also proposes to add new GT&C section 4(k) to clarify that it may mutually agree with a customer under a service agreement with a term of 12 consecutive months or more to extend that term. The length of the extension will be mutually agreed upon by Cove Point and the customer, subject to Cove Point's obligation to act in a not unduly discriminatory manner.¹⁴

b. Allocation of FPS Storage Capacity to LTD-1 Service

15. Cove Point states that the precise meaning of the clause in the 2001 Settlement that provided for the transition of capacity from the FPS services to the LTD-1 service is not clear. It refers to following excerpt from that clause:

[I]n the event that any Rate Schedule FPS services are terminated, whether by expiration of a service agreement(s) or capacity turn-back, the capacity that becomes available as a result shall be dedicated to Rate Schedule LTD-1 service and allocated among the LTD-1 Shippers in proportion to each such Shipper's firm MDDQ and included in such Shipper's service agreement for the remainder of its term, and the applicable storage ratios for Rate Schedule LTD-1 service will be modified accordingly.

(continued)

seeks to amend section 4(g) of the GT&C of its tariff so that it may agree with a shipper on a ROFR where the shipper does not otherwise qualify for a regulatory ROFR. Cove Point also states that it seeks to amend Appendix B of its *pro forma* service agreements to provide a space to describe any applicable contractual ROFR. Although Shell/BP states that the Commission should reject all the proposed changes, it does not specifically object to these changes. Statoil urges approval of these changes.

¹⁴ Cove Point asserts that certain other pipelines have similarly clarified their tariffs to allow for mutually agreed-upon contract extensions, citing *Transcontinental Gas Pipe Line Corp.*, 87 FERC ¶ 61,155 (1999), *clarified*, 88 FERC ¶ 61,295 (1999).

16. Cove Point proposes to clarify in GT&C section 4(e) that the transfer of FPS storage capacity to LTD-1 service could occur only in three situations: (1) if an existing FPS customer and Cove Point do not agree to a service agreement extension and the customer elects not to exercise its ROFR upon the expiration of the contractual term, (2) if the capacity is not awarded to any party in the ROFR process (*i.e.*, if neither the existing customer nor any other bidder offers maximum rates and Cove Point chooses not to discount) or (3) if capacity is turned back to Cove Point prior to the expiration of the term by mutual agreement of a shipper and Cove Point.

17. Cove Point states that there is one more matter related to the Rate Schedule FPS ROFR process that requires clarification. Cove Point argues that the ROFR process cannot change the nature of the service that is being bid on during that process. For instance, it states, a winning bidder in a ROFR process for expiring Rate Schedule FPS-1 service cannot expect to then enter into a contract for service under Rate Schedules FPS-2, FPS-3, or LTD-1 for the capacity obtained in the ROFR process.¹⁵ Accordingly, Cove Point proposes to incorporate in GT&C section 4(g) the clarification that all bids must be for the service under the same Rate Schedule as the posted capacity, and to add the applicable Rate Schedule to the list of items to be included in a posting under GT&C section 4(a).

c. Elimination of Elected FTS Service Option

18. Cove Point proposes to eliminate the one-time option to elect FTS service option from Rate Schedules LTD-1 and FPS. Currently, shippers under those rate schedules can make a one-time election during the term of the contract to receive Rate Schedule FTS transportation service from Cove Point. The reservation charge to be paid by the shipper under Rate Schedule FTS is credited against the shipper's monthly charge to be paid under Rate Schedules LTD-1 and FPS. Cove Point states that all current shippers under Rate Schedules LTD-1 and FPS have made the one-time election, and each shipper has a Rate Schedule FTS contract which runs concurrently with its respective Rate Schedule LTD-1/FPS contract. Thus, it states, no current shipper is affected by the elimination of this provision.

19. Cove Point argues that the continued bundling of FTS with Rate Schedule FPS is unnecessary and contrary to Commission policy. Cove Point states that FPS shippers do require transportation service on Cove Point to utilize the peaking service, but not

¹⁵ Cove Point also proposes to clarify its *pro forma* form of service agreements for its LTD and FPS rate schedules to remove references to secondary delivery points because, it states, the only receipt or delivery point available to those shippers will be Cove Point's LNG storage tanks.

necessarily bundled FTS service at the same level as their FPS service levels. Shippers might have FTS capacity of their own to utilize, or could use released capacity acquired in the secondary market, or interruptible capacity.

20. Cove Point asserts that FPS service agreements have a ROFR attached, and, as those FPS agreements expire together with their related FTS contracts, shippers may elect to retain one or both of the services, or some other shipper may out-bid for one or both of the services. Cove Point asserts that it would be unable to rebundle the services if, for instance, one shipper were to acquire the FPS contract and a different shipper were to obtain some or all of the related FTS capacity. Therefore, Cove Point proposes to delete the elected FTS service option and replace it with the explanation that FPS service is provided only at the terminal, and shippers are responsible for arranging transportation to and from the terminal. Cove Point also proposes to eliminate the transmission component from Rate Schedule FPS, including the related credit provision. Cove Point states that, when the elected FTS service is eliminated, there will be no need for the transmission component in Rate Schedule FPS, and there will be no crediting of the FTS reservation charge, as discussed above.

21. Cove Point states that the same reasoning applies to the elimination of elected FTS service from Rate Schedule LTD-1, but with slightly less urgency because of the longer nature of the LTD-1 contracts. Accordingly, Cove Point proposes to accord the same treatment regarding the elected FTS service under Rate Schedule LTD-1 that it proposes for Rate Schedule FPS by eliminating that option, and the related credit provision, from Rate Schedule LTD-1.

Notice

22. Public notice of the filing in Docket No. RP05-43-000 was issued on November 2, 2004. Notice of the filing in Docket No. RP05-43-001 was issued on November 17, 2004. Interventions and protests were due as provided in section 154.210 of the Commission's regulations. Pursuant to Rule 214 (18 C.F.R. §385.214 (2004)), all timely filed motions to intervene and any motion 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.

23. Shell NA LNG LLC and BP Energy Company (Shell/BP) protests the October 28, 2004 filing. Statoil Natural Gas LLC (Statoil) supports certain aspects of that filing and protests others.¹⁶ Atlanta Gas Light Company and Virginia Natural Gas, Inc. (AGL/VNG), Public Service Company of North Carolina, Inc. (PSNC), and Washington

¹⁶ Shell/BP also protested Cove Point's November 10, 2004 filing.

Gas Light Company (WGL), all the FPS Shippers at the time of the 2001 settlement, and parties to the settlement, support certain aspects of the filing.¹⁷ Cove Point and AGL/VNG filed motions for leave to answer and answers to Shell/BP's protest, and Shell/BP filed a motion for leave to reply to the answers and a reply.¹⁸

Protests, Comments, Answers and Replies

24. WGL supports Cove Point's proposal to revise its tariff to provide for a contractual ROFR, negotiation of evergreen provisions, and a contract extension mechanism. AGL/VNG support Cove Point's contract extension mechanism as embodied in proposed section 4(k) of Cove Point's GT&C. PCNC supports Cove Point's proposal to permit Cove Point to negotiate a contractual ROFR where a regulatory ROFR does not apply. These parties do not comment on other aspects of Cove point's filing.

25. Statoil supports Cove Point's proposal to revise its tariff to provide for a contractual ROFR, negotiation of evergreen provisions, and a contract extension mechanism. However, Statoil states its belief that, since the existing FPS contracts are at maximum tariff rates for one year or longer, they have a regulatory ROFR. In addition, Statoil states that, while Cove Point's October 21, 2004 Index of Customers indicates that some, but not all, existing FPS shippers have evergreen clauses in their contracts, a data response submitted in the reactivation proceeding by Cove Point's former owner states that the FPS contracts do not contain evergreen clauses.¹⁹ Statoil requests that the Commission address this apparent inconsistency. Statoil also states that it takes no position on whether Cove Point has identified the only instances in which FPS capacity should revert to LTD-1 service.

26. Statoil and Shell/BP protest Cove Point's attempt to eliminate elective FTS service. Both parties state that, under the terms of the Settlement, under certain conditions Rate Schedule FPS capacity will be converted to Rate Schedule LTD-1 capacity and will be divided on a pro rata basis to current LTD-1 shippers. The parties

¹⁷ WGL was not a party to the 2001 Settlement. However, in a subsequent settlement in October 2002, WGL joined the 2001 Settlement. *Cove Point LNG Limited Partnership*, 102 FERC ¶ 61,227 (2003). This subsequent settlement did not affect the rights and obligations of the parties under the 2001 Settlement.

¹⁸ The Commission finds good cause to accept the answers and replies because they help clarify important issues in the proceeding.

¹⁹ *Cove Point LNG Limited Partnership*, Docket No. CP01-76-000, Data Response No. 13 (May 2, 2001).

state that if the elective FTS service is unbundled from Rate Schedule FPS, the LTD-1 shippers who assume the converted FPS capacity could be left without transportation service to move gas away from the LNG terminal. They argue that this could result in stranded LTD-1 capacity for them. Both parties request that the Commission reject this aspect of Cove Point's filing.

27. Shell/BP protests Cove Point's proposed tariff revisions regarding the ROFR, evergreen clauses and contract extensions, claiming that the revisions would reverse the agreement reached among Cove Point, the FPS shippers and the LTD-1 shippers in the 2001 Settlement. They assert that "the ROFR is the only means for an existing FPS Shipper to prolong its FPS service."²⁰ Thus, they argue, the Commission should reject the voluntary contract extension or evergreen proposal as inconsistent with the parties' intent underlying the 2001 Settlement.

28. Shell/BP contend that while they agree that an existing FPS Shipper can extend its contract through the ROFR process, the LTD-1 Shippers must be able to participate in the ROFR, and only the existing FPS Shipper and the LTD-1 Shipper can compete for the capacity. They assert that "...no other party can obtain this capacity when the peaking service contracts terminate, because the capacity becomes dedicated to LTD-1 service. Even if a third-party shipper were to submit a bid that might be of a higher value to Cove Point LNG, they state, this would entail termination of the FPS service agreements."²¹

29. Shell/BP cite to the Commission's statement in the 2001 order approving the 2001 Settlement where the Commission explained that after the fifth tank was completed, "FPS customers will still have 1,290,000 Dth of storage capacity and 154,000 Dth/d of sendout capacity for as long as they continue to extend their contracts under right of first refusal procedures of Cove Point's tariff," *citing* 97 FERC at 61,195. This, they argue, establishes that the Commission recognized that there was no means except for the ROFR process by which the FPS shippers could retain their capacity when the primary term expired. Shell/BP states that FPS shippers currently have available to them the regulatory ROFR procedure contained in Cove Point's tariff, and the additional contract extension provisions are contrary to, and in violation of, the 2001 Settlement. Moreover, they assert that Cove Point's proposal would prevent the LTD-1 Shippers from being able to convert FPS capacity in the ROFR process. They assert that this would, in effect, prevent the LTD-1 Shippers from obtaining this capacity until the FPS Shippers choose to relinquish it.

²⁰ Shell/BP Protest at 12-13.

²¹ Shell/BP Protest at 17.

30. Accordingly, Shell/BP contends that the Commission should reject all of Cove Point's proposed tariff extension and evergreen provisions, and confirm the parties' rights under the 2001 Settlement. They argue that the Commission should clarify that under the 2001 Settlement:

- a. FPS Shippers that want to continue receiving peaking service past the existing terms of their contracts can elect to invoke Cove Point's ROFR process;
- b. Cove Point must consider the LTD-1 Shippers' bids for the available capacity for utilization as LTD-1 service; and
- c. an FPS Shipper may retain its own capacity if it submits the highest value bid; otherwise, its service agreement terminates and the Settlement requires that the capacity be allocated among the LTD-1 Shippers.

In effect, they argue that only the current shipper can extend the FPS service of the existing service agreement, and a different, non-LTD-1 shipper cannot replace that FPS shipper through the ROFR process.

31. AGL filed an answer to Shell/BP's protest. AGL argues that Shell/BP's protest rests on the thesis that the Settlement prohibits FPS shippers from extending their contracts by any other means than regulatory ROFR. AGL states that the 2001 Settlement contains no provisions limiting extensions of FPS contracts, and that the Commission must look to the plain language of the 2001 Settlement to determine the meaning of the related provisions. AGL further argues that if the Commission looks beyond the plain language of the 2001 Settlement, it should reject Shell/BP's arguments because Shell/BP's expectations regarding FPS contract extensions were not valid. AGL also states that the 2001 Settlement does not address how the ROFR bidding process for FPS capacity is to be conducted and, therefore, Shell/BP's argument must be rejected because it is not supported by the plain meaning of the settlement.

32. In its answer, Cove Point states that Shell/BP's opposition to the filing rests on two faulty premises: First, that the purpose of the Commission's ROFR policy is to allow competing bidders willing to pay more to take capacity from existing customers and that customers and pipelines are generally prohibited from agreeing to contract extensions, and, second, that the 2001 Settlement supports this argument.

33. Cove Point states that under the terms of the 2001 Settlement, the only FPS capacity that would convert to LTD-1 service upon termination or turnback of the FPS service is *storage* capacity. Cove Point asserts that LTD-1 service differs from FPS service in its physical requirements, since FPS service involves sendout of 3, 5, or 10

days per year, while LTD-1 involves 365-day sendout. Thus, Cove Point states that, regardless of what the Commission finds regarding the circumstances in which FPS capacity can be reallocated to LTD-1, the Commission must confirm that only storage capacity is involved, and not the related vaporization and transportation.

34. Cove Point argues that voluntary contract extensions agreed to by pipelines and their customers are not contrary to the Commission's ROFR policy, and have been permitted in numerous cases for other pipelines. In addition, it asserts, the Commission has permitted several pipelines to revise their tariffs to allow for negotiation of contract extension terms on a nondiscriminatory basis, just as Cove Point has proposed in this case. Cove Point states that some of its FPS customers have long-standing evergreen rights in their contracts which pre-date the 2001 Settlement, and this also argues against Shell/BP's assertion that FPS contract extensions may only be obtained through the ROFR process. Cove Point argues that its tariff currently allows evergreen clauses in contracts, and that its proposal in this docket is merely to clarify that right. Cove Point argues that Shell/BP's assertion that only the existing FPS and the LTD-1 shippers can participate in the ROFR process is contrary to the Commission's ROFR policy, and is not supported by the settlement. Cove Point also reasserts its position that FPS capacity in a ROFR process will remain FPS capacity, and cannot be converted to LTD-1 capacity merely because an LTD-1 shipper outbids the FPS customers.

35. Cove Point states that it has proposed to eliminate the elective FTS provisions which every current shipper has taken because the ROFR applies to each individual service agreement, so that FPS service and associated FTS service could very well be separated through the ROFR process. In that case, it asserts, the new holder of FPS service simply could not have an election to obtain FTS capacity, which would be held by another customer. Cove Point states that it agrees with comments of Statoil that the Commission should require that any ROFR process for this currently bundled FPS service be offered by pairing the FPS capacity with the FT process. However, Cove Point maintains its position that it is only *storage* capacity that would be reallocated under the Settlement, and not the associated revaporization or transportation rights.

36. In its reply Shell/BP basically reiterates its position that the tariff filings are inconsistent with the purpose and intent of the 2001 settlement. It asserts that the 2001 Settlement in Article II, section 10, prohibits Cove Point from making tariff filings that are inconsistent with the settlement. Shell/BP asserts that accepting Cove Point's proposals would prevent the settlement from obtaining the result it was intended to accomplish, which was the transfer of the capacity from FPS service to the LTD service.

Discussion

37. The protested issues in this case arise out of the parties' disparate interpretations of the 2001 Settlement and tariff provisions regarding how FPS shippers can retain their capacity and what happens when an FPS contract terminates. As described above, the 2001 Settlement established a mechanism that would permit, but not require, the transfer of capacity from the FPS customers to the LTD-1 customers on a *pro rata* basis. Despite the existence of a ROFR, the 2001 agreement provided that this would occur “In the event any Rate Schedule FPS services are terminated, whether by expiration of a service agreement(s) or capacity turn back.” The 2001 Settlement in section 2(b) set forth the reason why this provision was necessary, namely, that in the open season for the new LTD-1 services, the LTD-1 Shippers did not “receive the full amount of storage capacity assumed in the open season” because the FPS shippers did not relinquish their contracts for their FPS service at that time.

38. On the one hand, Cove Point, and parties supporting Cove Point’s filing, urge the Commission to accept the filing purportedly in order to clarify the parties' rights under the 2001 Settlement and the tariff. Cove Point asserts that “the precise meaning of the expiration of a service agreement” provision in the 2001 Settlement is not immediately clear. Cove Point argues that its proposed tariff changes concerning the tariff's ROFR as well as contract extension and evergreen provisions are consistent with Commission policies, as well as its existing tariff. It argues that some FPS customers already have evergreen provisions, although this is contested by Shell/BP.²² On the other hand, Shell/BP assert that the 2001 Settlement is clear and that Cove Point's proposed tariff changes actually conflict with the settlement.

39. The issues presented involve interpreting the provision in the 2001 Settlement that “triggers” the transfer of capacity from the FPS service to the LTD-1 service. The first issue is: how does the FPS shipper retain its FPS capacity? The second issue is: what happens if an FPS contract terminates? In the discussion below, we make certain preliminary observations and, on the issue of the evergreen and contract term extension provisions, find that the provisions are consistent with the 2001 Settlement. However, we are still left with uncertainty as to the intent of the 2001 Settlement regarding other aspects of the instant filing.

²² Shell/BP states that at the time of the 2001 Settlement under “the existing Cove Point LNG Tariff provisions, there was the absence of any mechanism for extending service agreements other than the ROFR.” Shell/BP Protest at 17.

40. The Commission, thus, finds that it would be beneficial for the parties in this proceeding to further address the issues raised by the filing, as discussed below, and for Cove Point to have the opportunity to explain how the transfer of capacity would operate. Therefore, the Commission will establish a technical conference to gather additional information and to provide parties with a forum to discuss relevant issues and concerns raised by the filing. Cove Point should be prepared to address all issues raised above. The Commission will accept the tariff sheets listed in the Appendix for filing and suspend their effectiveness until the earlier of five months or the date established in a further Commission order following the technical conference, except for those specifically rejected.

What is the process by which FPS shippers retain their capacity?

41. The argument can be made that, under the 2001 settlement, the ROFR process permits and, indeed, necessitates the tariff changes regarding contractual evergreen and term extensions of FPS service agreements as proposed by Cove Point. Because the 2001 Settlement provides that the existing FPS shippers' rights are unchanged by the settlement, which includes the ROFR, the FPS shippers clearly can use the tariff's ROFR process to retain their FPS capacity. All parties agree that the ROFR process applies to the existing FPS service agreements and that this is the process to be used by the FPS shippers to retain their FPS capacity. The Commission, in the 2001 Certificate Order, stated that under the 2001 Settlement's stipulated capacity allocations to be effective upon the in-service date of the fifth storage tank, "FPS customers will still have 1,290,000 Dth of storage capacity and 154,000 Dth/d of sendout capacity *for so long as they continue to extend their contracts under right of first refusal procedures of Cove Point's tariff.*"²³ Thus, in approving the 2001 Settlement, the Commission appears to have contemplated, along with the parties, that the ROFR process would be the only way for FPS shippers to retain their capacity at the expiration of the primary term of their contract. This is true even though some of the FPS shippers' service agreements may have included evergreen clauses,²⁴ because the Commission was unaware of that fact since a data response submitted by Cove Point's previous owner stated that none of the FPS agreements had an evergreen provision.²⁵

²³ 97 FERC ¶ 61,043 at 61,195 (emphasis added).

²⁴ See WGL Comments at 3, and PSNC Comments at 2.

²⁵ Cove Point states that this is incorrect. See Docket No. RP05-43-000 Transmittal Letter at 11, n. 18.

42. However, because the settlement provides that, upon termination of an FPS contract, the FPS capacity is allocated among the LTD-1 shippers on a *pro rata* basis, no third party can win the capacity under the tariff's ROFR bidding process because even if they make the highest bid, the capacity will still be allocated among the LTD-1 shippers *pro rata*. A non-LTD-1 shipper would have no right to any of the capacity and even an LTD-1 shipper would gain nothing by bidding because it will receive its *pro rata* share of the capacity upon termination of the FPS contract no matter what the outcome of the ROFR bidding process may be. This is true regardless of whether only the storage capacity is transferred, as Cove point argues, or whether the entire bundled package of FPS storage, sendout and transportation services are transferred, as the protests argue. Thus, the 2001 Settlement effectively prohibits any third party from bidding, since the pipeline could not enter into a contract with the third party based on its bid without violating the provision of the settlement for *pro rata* allocation among all the existing LTD-1 shippers upon termination of an existing FPS shipper's contract. Under these circumstances, there really is no "bidding" process as contemplated under the customary ROFR process.

43. The question then is: what happens in such a case where there are no third party bids? For how long is the contract extended and at what price? Section 4(g)(ii) of the ROFR provisions of the tariff governs this circumstance. Under that provision, "[i]f no offers are received, [shipper] may continue to receive service on a month-to-month basis or for such other term agreed to by [Cove Point] and [the shipper], and at the maximum rate set for in the applicable Rate Schedule." Thus, under the existing tariff, as approved in the 2001 Certificate Order, it is up to the FPS shipper and Cove Point to negotiate a new contract term for the same service, *i.e.*, FPS service, including any FTS transportation service and the vaporization and regasification services that are part of the FPS service, at the existing contract storage and sendout capacity entitlements. As part of negotiation of the term permitted by the existing tariff, the parties can agree on a fixed extension of the term and/or may include an evergreen provision different than that provided by section 4(g)(ii) of the GT&C.

44. Accordingly, we agree with Cove Point that its proposed tariff provisions allowing the parties to agree on evergreen or contract term extensions are consistent with the ROFR process in existence at the time of the 2001 Settlement and can be accepted to clarify the process by which FPS shippers may retain their capacity under the ROFR process. This also is consistent with Commission precedent where the Commission has accepted tariff provisions that permit the existing shipper to negotiate with the pipeline as to the term of the extension, and which permits the shipper to retain its capacity if it offers the maximum rate, in the situation where no bids are received under the ROFR

process.²⁶ However, because the proposed provisions cannot change rights accorded under the settlement, the provisions must be modified to make clear that they apply only as part of the ROFR process under section 4(g) when no bids are received. Further, consistent with section 4(g)(ii) of the GT&C, the price must be at the maximum rate. In light of the suspension herein of the tariff sheets conditioned on the outcome of the technical conference, we will not order revised tariff sheets to be filed at this time.

45. Further, given the issues raised regarding Cove Point's proposal to eliminate the FTS Election Option for the FPS and LTD-1 services and other issues discussed below regarding what capacity transfers to LTD-1 shippers under the 2001 Settlement, it is unclear whether the FPS shipper can choose to retain one component of its service under its ROFR, such as the FTS transportation service, and relinquish the rest. The parties do not agree on whether the transportation and storage services are bundled such that they must remain a package or can be unbundled. The same issue would appear to apply to the liquification and vaporization components of the FPS services as well. This latter issue should be addressed at the technical conference along with any other issue raised with respect to the proposed revisions to the ROFR provisions.

What happens if an FPS contract terminates?

46. As to the second issue, the 2001 Settlement is clear on its face that, upon termination of an FPS contract, the FPS capacity reverts to LTD-1 service and is allocated among "the LTD-1 Shippers" on a *pro rata* basis without regard to how the FPS contract terminated.²⁷ What is unclear is whether, as Cove Point argues, the capacity that transfers to the LTD-1 shippers is only the LNG storage capacity held by the former FPS customer, or whether the capacity transferred includes the FPS customer's FTS transportation capacity as well as associated sendout capacity at the LNG facility. While we find that a persuasive case can be made for finding that only the storage capacity would be subject to the 2001 Settlement's reallocation procedure, there still is uncertainty over the intent of the 2001 Settlement which we believe should be explored at the technical conference established herein.

47. The purpose of the capacity reallocation feature of Article II, section 2 (b) of the 2001 Settlement appears to be the same as the other features of that section which provided for an increase in the capacity of the fifth storage tank and the dedication of all

²⁶ *Pan Alberta Gas (U.S.) v. Northern Border Pipeline Co.*, 101 FERC ¶ 61,249 at P 14-16 (2002).

²⁷ We believe the reference to LTD-1 Shippers means the original, three LTD-1 Shipper signatories to the 2001 Settlement and their corporate successors.

of the storage capacity of that tank to the LTD-1 shippers. Both provisions appear to contemplate an increase in storage capacity for the LTD-1 shippers with no increase in sendout capacity. The sendout capacities agreed to in the 2001 Settlement do not change with the addition of the storage capacity created by the addition of the fifth storage tank. Further, that provision specifically requires a revision to the ratios of LTD-1 storage capacity to sendout capacity to reflect any additional capacity allocation to LTD-1 shippers under that provision. The 2001 Settlement, as approved by the Commission, provided that the LTD-1 ratios would increase (from 5.7 to 1 to 9.0 to 1) with the addition of the storage capacity of the fifth tank and it is reasonable to interpret the capacity reallocation feature of that provision in the same way. Because sendout capacity equates to the transportation capacity needed to deliver the volumes once they are regasified at the terminal, and there is no increase in sendout capacity under the 2001 Settlement with the addition of the storage capacity of the fifth tank, there does not appear to be any requirement under the 2001 Settlement to increase transportation capacity in the event that LTD-1 storage capacity is further increased by transference of capacity from an FPS shipper upon termination of the FPS contract.

48. Finally, it is consistent with our above interpretation of the effect of the 2001 Settlement on the tariff's ROFR process to find that only FPS storage capacity is transferred under this settlement provision. Under the 2001 Settlement, the ROFR does not operate to transfer capacity *to* other shippers; the 2001 Settlement does that. Rather, the ROFR only operates to permit the FPS shipper to *retain* its capacity. Thus, it is not necessarily inconsistent with the 2001 Settlement to find that something less than the full bundled array of FPS services automatically transfers to the LTD-1 shippers as a group once an FPS contract terminates. Indeed, Cove Point argues that it is physically impossible to simply transfer FPS service rights to an LTD-1 shipper.²⁸ It argues that the two services are different since LTD-1 service includes more facets of service than FPS service, “including sendout every day rather than only 3-10 days per year.”²⁹

49. However, notwithstanding the logic of Cove Point's position, we are troubled by the claimed lack of a connection between storage capacity, on the one hand, and the sendout and transportation service capacity needed to permit the LTD-1 stored LNG volumes to be removed from storage, on the other hand. As noted earlier herein, section 5.4(f) of the LTD-1 rate schedule requires LTD-1 storage volumes to be removed within 120 days of injection. This feature of the tariff apparently recognizes the need to remove stored LNG volumes to make room for large LNG cargoes that periodically arrive by tanker and which must be off-loaded for injection into the storage tanks.

²⁸ Cove Point Answer at 9-10.

²⁹ Cove Point Answer at 10.

Further, transportation service is bundled with the FPS service and arguably should follow the transference of storage capacity even though the FPS shipper opted to take FTS transportation service under the Elected FTS Option. It would not be inconsistent with the purpose of the 2001 Settlement, *i.e.*, to provide for the transfer and allocation among LTD-1 shippers of FPS storage capacity, to also find that the associated transportation and sendout capacity rights are transferred as well. The parties should address these issues, including Cove Point's claims regarding operational problems, at the technical conference.

Does the elimination of the Elected FTS Option violate the 2001 Settlement?

50. Cove Point also proposes to delete the Elected FTS Service option from both Rate Schedule FPS and LTD-1 service with certain accompanying changes to its tariff to reflect the deletions. Cove Point asserts that its proposal is justified on the basis that the current Elected FTS Option provision is no longer needed since all the original parties have opted for this service and that its elimination will remove complexity caused by an FPS shipper's decision to retain only a part of the FPS service, such as the transportation component. The protestors object that this would take away still viable rights accorded by the 2001 Settlement and will negatively impact the existing FPS shippers. They assert that elimination of this right could cause the storage capacity to be stranded without the transportation capacity to permit the LNG to be removed from storage. Shell/BP assert that whatever capacity rights the FPS shipper had were to go over to the LTD service, not merely the storage capacity, because "If LTD-1 Shippers obtain capacity previously used for FPS services, they would need corresponding vaporization and firm transportation rights."³⁰

51. Cove Point's proposal was based upon its expectation that the customary ROFR process would apply to the expiring FPS service agreement. In view of our ruling above this is not what will occur. However, the parties' positions are clearly at odds as to what would be transferred from the FPS service to the LTD service when the trigger was met.

52. In view of our discussion above regarding what happens when an FPS contract terminates, and because the LTD-1 shippers are clearly at odds with Cove Point as to what would be transferred from the FPS service to the LTD service when the FPS contract terminates, we direct that this issue be further explored at the technical conference.

³⁰ Shell/BP Protest at 21.

Suspension

53. Based on a review of the filing, the Commission finds that, with exceptions noted above regarding the conditional acceptance of certain tariff provisions authorizing the negotiation of evergreen and contract extension clauses, the proposed tariff sheets have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, the Commission will accept the tariff sheets for filing, and suspend their effectiveness for the period set forth below, subject to the conditions in this order.

54. The Commission's policy regarding rate suspensions is that rate filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or that it may be inconsistent with other statutory standards.³¹ It is recognized, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results.³² Such circumstances do not exist here. Therefore, with the exception of the tariff sheet that is rejected, the Commission will accept and suspend the proposed tariff sheets to be effective the earlier of May 27, 2005, or a date set by subsequent Commission order, subject to refund and conditions.

The Commission orders:

(A) With the exception of Substitute Fifth Revised Sheet No. 8, which is rejected, the tariff sheets listed in the Appendix are accepted and suspended, to be effective the earlier of May 27, 2005, or a date specified by subsequent Commission order, subject to refund, to the conditions set forth above, and to the outcome of the technical conference.

³¹ See *Great Lakes Gas Transmission Co.*, 12 FERC & 61,293 (1980) (five-month suspension).

³² See *Valley Gas Transmission, Inc.*, 12 FERC & 61,197 (1980) (minimum suspension).

(B) The Commission Staff is directed to convene a technical conference to further explore Cove Point's proposed tariff changes related to the transfer of capacity and related tariff changes as discussed above. Staff is directed to report the results of the technical conference to the Commission within 120 days of the date of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

APPENDIX

Tariff Sheets Conditionally Accepted Effective December 27, 2004
in Docket No. RP05-43-000

FERC Gas Tariff, Original Volume No. 1

Fifth Revised Sheet No. 5
Fifth Revised Sheet No. 6
Fifth Revised Sheet No. 8
Sixth Revised Sheet No. 11
Third Revised Sheet No. 23
Second Revised Sheet No. 51
Third Revised Sheet No. 71
Third Revised Sheet No. 72
Second Revised Sheet No. 203
Second Revised Sheet No. 213
First Revised Sheet No. 214
First Revised Sheet No. 215
Second Revised Sheet No. 243
Second Revised Sheet No. 400
First Revised Sheet No. 450
First Revised Sheet No. 455
First Revised Sheet No. 460
First Revised Sheet No. 465
Second Revised Sheet No. 475

Tariff Sheet Rejected in Docket No. RP05-43-001

FERC Gas Tariff, Original Volume No. 1

Substitute Fifth Revised Sheet No. 8