

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Weaver's Cove Energy, LLC

Docket Nos. CP04-36-002

Mill River Pipeline, LLC

CP04-41-002

CP04-42-002

CP04-43-002

ORDER DENYING MOTIONS TO REOPEN RECORD IN PROCEEDING

(Issued April 17, 2006)

1. On July 15, 2005, the Commission issued an order (the July 15 Order) authorizing Weaver's Cove Energy, LLC (Weaver's Cove) under section 3 of the Natural Gas Act (NGA) to site, construct and operate a liquefied natural gas (LNG) terminal in Fall River, Massachusetts.¹ Subsequently, in an order issued January 23, 2006 (the January 23 Order), the Commission addressed requests for rehearing and/or clarification by: Weaver's Cove; the City of Fall River, Massachusetts, jointly with the Attorney General of the Commonwealth of Massachusetts, the Attorney General of the State of Rhode Island, and the Massachusetts Energy Facilities Siting Board (jointly Fall River); the Conservation Law Foundation; Shell Oil Products US (Shell); KeySpan Delivery Companies (KeySpan); and Michael L. Miozza. With one exception, not pertinent here, the Commission denied the requests for rehearing.² Fall River and Mr. Miozza have sought judicial review of our orders.³

¹ 112 FERC ¶ 61,070 (2005).

² 114 FERC ¶ 61,058 (2006).

³ See *City of Fall River, Massachusetts v. FERC*, 1st Cir. Nos. 06-1008.

2. Fall River, the Conservation Law Foundation, Mr. Miozza, and Save the Bay have filed motions to reopen the record in this proceeding.⁴ Each party argues that the Commission should conduct additional analysis of the Weaver's Cove project in view of a recent filing by Weaver's Cove with the U.S. Coast Guard stating an intention to use different LNG vessels than it originally planned for LNG deliveries to the proposed Fall River LNG terminal. Fall River also requests that the Commission stay its orders in this proceeding until this further review is completed. Weaver's Cove filed replies to the motion by Save the Bay on March 3, 2006, and to the motions by Fall River and the Conservation Law Foundation on March 10, 2006. Fall River filed a response to the Weaver's Cove reply to its motion to reopen.

3. For the reasons set forth below, we are denying the motions.

Background

4. The existing Brightman Street Bridge spans the Taunton River a short distance below the site of the proposed Weaver's Cove LNG terminal. Under longstanding plans, the existing bridge was to be torn down and replaced with a new Brightman Street Bridge approximately 1,100 feet upstream of the existing bridge. The existing bridge, with a 98-foot wide clearance, will not allow passage of the 150-foot wide LNG vessels originally contemplated by Weaver's Cove to transport LNG to the new terminal. The new bridge, which is under construction, will accommodate these vessels.

5. In the January 23 Order denying rehearing the Commission acknowledged that recent federal legislation prohibits demolition of the existing Brightman Street Bridge,⁵ which provides inadequate clearance for the LNG vessels Weaver's Cove planned to use. The January 23 rehearing order, however, found that it would be premature to find that the project was moot.

6. On February 2, 2006, Weaver's Cove informed the Coast Guard of a change in its proposed navigational operations. Instead of the LNG vessels described in its May 12, 2004 Letter of Intent to the Coast Guard, Weaver's Cove explained that it now plans to

⁴ The motions to reopen the record were filed by Save the Bay on February 16, 2006, Fall River on February 23, 2006, the Conservation Law Foundation on February 24, 2006, and Michael Miozza on March 1, 2006,

⁵ See *The Safe, Accountable, Flexible, Efficient Transportation Equity Act*, Pub. L. No. 109-59 §§ 1702 and 1948 (2005).

use smaller, specially designed LNG vessels that will fit through the 98-foot wide opening of the existing Brightman Street Bridge, thereby permitting access to the proposed terminal site. The vessels to be used would typically be 725 feet long and 82 feet wide. Because the smaller ships will have a smaller capacity, Weaver's Cove informed the Coast Guard, it anticipates making approximately 120 ship deliveries a year rather than the originally planned 50-70 deliveries.

Requests to Reopen the Proceeding

7. Fall River and the other moving parties argue that the planned use of the smaller LNG vessels by Weaver's Cove and the consequent larger number of vessel transits fundamentally alters the proposal approved by the Commission and requires that the Commission reopen the proceeding to conduct further environmental analysis and public interest review. This change, they contend, requires the Commission to consider several new issues: whether the smaller vessels can safely navigate the two Brightman Street bridges; whether these vessels are likely to be available in a timely manner; how the increased number of vessel transits would affect security plans; burdens on citizens who use the waterways, and on state and local officials; and the potential adverse impact on air quality.

8. Fall River also argues that real questions as to the viability of this proposal and its ability to satisfy public need for natural gas require that the Commission reexamine whether the benefits of the Weaver's Cove project would outweigh its disadvantages. The Conservation Law Foundation argues that the record should be reopened to consider that time of year dredging limitations recently recommended by the U.S. Department of the Interior and the new smaller ship plan will extend the project's in-service date beyond the start-up date for other projects the Commission rejected as alternatives for the Weaver's Cove project. The Conservation Law Foundation asserts that these factors essentially nullify what it calls the essence of the Commission's reasoning for approving the project – that Weaver's Cove is preferable to other alternatives because it promises the quickest and most reliable source of natural gas for New England.

9. In reply to the motions, Weaver's Cove avers that its proposed use of smaller LNG vessels does not change its project in any material respect and is not inconsistent with the Commission's determination that the project will promote the public interest by increasing the availability of natural gas supplies in the New England market. Weaver's Cove also states that the use of smaller ships will not increase the impact on the quality of the human environment or on safety or security considerations so that additional environmental review is required.

Discussion

10. In determining whether there is good cause to reopen the record in a proceeding based on changes after the record is closed, the Commission considers whether or not the party requesting reopening has demonstrated the existence of extraordinary circumstances that outweigh the need for finality in the administrative process. To persuade the Commission to exercise its discretion to reopen the record, the requesting party must demonstrate a change in circumstances that is more than just material – the change must go to the very heart of the case.⁶ We find that movants have not met that burden and will deny their requests to reopen.

11. This Commission is responsible for authorizing the siting and construction of onshore LNG facilities under section 3 of the NGA. The U. S. Coast Guard exercises regulatory authority over LNG facilities that affect the safety and security of port areas and navigable waterways. The Coast Guard is responsible for matters relating to navigation safety, vessel engineering and safety standards, and all matters pertaining to the safety and security of facilities or equipment located in or adjacent to navigable waters.

12. Under a February 11, 2004 FERC/Coast Guard/U.S. Department of Transportation Interagency Agreement,⁷ the Commission assumed responsibility to be the lead agency for the preparation of the analysis and decisions required under the National Environmental Policy Act of 1969 for the approval of new facilities. The scope of the review includes all aspects of the overall project including maritime safety and security operations that would normally be performed by the Coast Guard, not this Commission. With the assistance of the U.S. Department of Transportation, the Coast Guard, and other federal agencies, the Commission conducted substantial environmental and safety analysis described in the Commission's final environmental impact statement on the Weaver's Cove project.

⁶ See *Georgia Strait Crossing Pipeline LP*, 105 FERC ¶ 61,190 (2003). See also, e.g., *Cooley v. FERC*, 843 F.2d 1464, 1473 (D.C. 1988) (the Commission need only reopen the record where it clearly appears that the new evidence would compel a contrary result); *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999).

⁷ *Interagency Agreement Among the Federal Energy Regulatory Commission, United States Coast Guard, and Research Programs Administration for the Safety and Security Review of Waterfront Import/Export Liquefied Natural Gas Facilities* (Feb.11, 2004).

13. In its July 15 Order approving the project, the Commission found that the proposed new LNG terminal will promote the public interest by increasing the availability of natural gas supplies in the New England market.⁸ Pursuant to the July 15 Order, before construction may begin, Weaver's Cove must satisfy numerous environmental and safety conditions. These conditions include, for example, the approval of emergency response and evacuation plans;⁹ concurrence from the states of Massachusetts and Rhode Island that the project is consistent with those states' coastal zone management programs; and conditions to ensure attainment of state or federal standards for, or to mitigate impacts on, water quality, air quality, dredging, and noise.

14. Pursuant to Coast Guard regulations, an owner or operator that intends to construct an LNG facility must submit a Letter of Intent to the Coast Guard describing, as pertinent, the characteristics of the vessels intended to visit the facility and the frequency of the visits.¹⁰ The applicant must notify the Coast Guard of any change in the information submitted.¹¹ The Coast Guard reviews the information provided by the applicant and makes a determination on the suitability of the waterway for LNG vessels. This determination is called a Letter of Recommendation. Factors considered by the Coast Guard under its regulations include, as pertinent: density and characteristics of marine traffic in the waterway; locks, bridges and other man-made obstructions in the waterway; and water depth and tides.¹² The applicant must also prepare a Water

⁸ Contrary to suggestions by movants, our orders in this proceeding did not find that the Weaver's Cove LNG terminal facilities would satisfy all New England's natural gas needs to the exclusion of a need for other supply sources. Rather, our July 15 Order found that the proposed Weaver's Cove terminal facilities will enable the introduction of new gas volumes from new sources of supply into the New England area where substantial market growth is expected. *See* July 15 Order, at P 51. Even should the volumes Weaver's Cove can deliver to customers fall short of its original estimate as a result of using smaller volume vessels for delivery to the terminal, the terminal would still provide a significant volume of natural gas to the New England market. As we also noted in the January 23 Order, the availability of natural gas from other projects can play an important role in meeting New England's overall need. *See* January 23 Order, at P 59.

⁹ 112 FERC ¶ 61,070, Appendix B.

¹⁰ 33 C.F.R. § 127.007 (2005).

¹¹ *Id.*

¹² 33 C.F.R. § 127.009 (2005).

Suitability Assessment (WSA) for review and approval by the Coast Guard. The WSA identifies security threats and safety hazards to LNG marine transportation, and identifies appropriate risk management measures. Condition 75 in Appendix B to our July 15, 2005 Order requires Weaver's Cove to update its WSA for the project annually to reflect any changed conditions, and provide the updated assessment to the Coast Guard, which will review the updated assessment and report its conclusions to the Commission. The Coast Guard has not yet issued a Letter of Recommendation for the project, and no ship operations may take place until it does so.

15. Weaver's Cove has informed the Coast Guard of the changes it is planning for its vessel operations. Pursuant to our July 15, 2005 Order, Weaver's Cove's first annual update of its WSA also must reflect these changes for the Coast Guard's review. The Coast Guard will evaluate this material and determine in accordance with its responsibilities whether the proposal to use smaller vessels with a larger number of deliveries meets its navigation and safety requirements. This is a matter for the Coast Guard, not this Commission.¹³

16. Movants have not shown good cause for reopening the record in this proceeding for the purposes they set forth. Issues relating to the navigability and safety of LNG vessels on the Taunton River and other pertinent waterways are properly before the agency with appropriate jurisdiction to address them – the Coast Guard. No changes to our authorization or additional analysis are required with respect to the other matters raised by movants. As noted above, these matters remain subject to the conditions in our July 15 Order. The navigational changes Weaver's Cove has proposed to the Coast Guard do not affect these conditions or our approval of the project. We note, however, that if the Coast Guard's review of this matter results in changes to the project that require a change to our authorization, we would determine at that time what additional review we might be required to undertake in connection with such changes. We also note that we stand ready to offer the Coast Guard any assistance we can provide in connection with its consideration of this matter. Finally, because we are denying the motions to reopen the record, we likewise will deny Fall River's motion to stay the Commission's orders.

¹³ By letter dated March 13, 2006, to Weaver's Cove addressing its Letter of Intent describing its proposed operational changes, the Coast Guard informed Weaver's Cove that its smaller ship proposal presents a practical challenge with no margin for navigational error, and appears "unsuitable in its current state". The Coast Guard's March 13 letter further stated that a revised Water Suitability Assessment and environmental impact review may be required for issuance of a Letter of Recommendation.

The Commission orders:

(A) The motions by Fall River, the Conservation Law Foundation, and Save the Bay to reopen the record in this proceeding are denied.

(B) The request by Fall River that the Commission stay its orders in this proceeding is denied.

By the Commission. Commissioner Kelly concurring with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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KELLY, Commissioner, *concurring*:

I agree that the issues raised in this proceeding should be addressed by the jurisdictional agency, the Coast Guard, particularly because the order is clear that, if the Coast Guard's review results in changes to the project that require a change to our authorization, then we will determine what, if any, additional Commission review is required.

However, for the reasons set forth in my dissents from the July 15, 2005 order¹, and the January 24, 2006 Order on Rehearing², I continue to believe that, under the facts and circumstances of this case, it would not be in the public interest to authorize the Weaver's Cove LNG facility under NGA section 3.

Sudeen G. Kelly

¹ 112 FERC ¶ 61,070.

² 114 FERC ¶ 61,058.