

130 FERC ¶ 61,063
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

The Dow Chemical Company, Dow Pipeline Company Docket No. PR09-31-001
and Dow Hydrocarbons and Resources LLC

ORDER ON REQUEST FOR CLARIFICATION

(Issued January 26, 2010)

1. On August 19, 2009, The Dow Chemical Company (Dow Chemical), Dow Pipeline Company (Dow Pipeline), and Dow Hydrocarbons and Resources LLC (Dow Hydrocarbons) (collectively, Dow) filed a petition for declaratory order authorizing Dow Hydrocarbons to link an assignment of firm intrastate pipeline capacity on the Dow Pipeline system, to be used for firm interstate transportation service under section 311(a)(2) of the Natural Gas Policy Act of 1978 (NGPA),¹ with an assignment of some or all of Dow Chemical's capacity rights at the liquefied natural gas (LNG) import terminal owned and operated by Freeport LNG Development, L.P. (Freeport LNG). On November 19, 2009, the Commission granted Dow's request for declaratory order, subject to conditions.²

2. On December 16, 2009, Dow submitted a request for clarification that the declaratory relief provided in the November 19 Order will apply if, instead of assigning some or all of Dow Chemical's capacity rights at the Freeport LNG terminal, Dow Chemical retains its capacity rights at Freeport LNG and enters into an exchange agreement whereby a third party delivers LNG to Dow Chemical at the Freeport LNG terminal and Dow Chemical delivers revaporized LNG to the third party at the end of Freeport's send out pipeline.

¹ 15 U.S.C. §§ 3371(a)(2) (2006).

² *The Dow Chemical Co.*, 129 FERC ¶ 61,130 (2009) (November 19 Order).

3. For the reasons discussed below, the Commission grants Dow's request for clarification.

I. Background

4. The background of this case is discussed in more detail in the November 19 Order and will not be repeated here. Briefly, Dow Chemical owns and operates a large petrochemical manufacturing facility in Freeport, Texas that is dependent upon natural gas supplies. Dow Pipeline and Dow Hydrocarbons are each indirect, wholly-owned subsidiaries of Dow Chemical. Dow Pipeline owns and operates an intrastate pipeline system in the state of Texas. That pipeline was originally constructed in the 1970s as a means of enhancing Dow Chemical's access to supplies of natural gas needed for fuel and feedstock purposes at Dow Chemical's manufacturing facility in Freeport, Texas. Dow Pipeline provides intrastate and interruptible NGPA section 311 transportation service, but does not provide NGPA firm section 311 transportation service.³

5. Dow Hydrocarbons sells natural gas to Dow Chemical at its Freeport manufacturing facility. In order to transport that natural gas to Dow Chemical, Dow Hydrocarbons has a contract with Dow Pipeline for 100 percent of its firm intrastate transportation capacity.

6. In 2004 and 2006, the Commission authorized the construction and expansion of an LNG import terminal by Freeport LNG on Quintana Island, southeast of the City of Freeport, in Brazoria County, Texas.⁴ Freeport LNG's facilities are not subject to the Commission Part 284, open access regulations.⁵ Dow Chemical contracted with Freeport LNG for 0.5 Bcf of terminal capacity for a 20-year period that commenced in July 2008.

³ Section 311(a)(2) of the NGPA allows the Commission to authorize the transportation of natural gas by intrastate pipelines on behalf of interstate pipelines and local distribution companies served by interstate pipelines. Section 601(a)(2) of the NGPA exempts transportation service authorized under NGPA section 311 from the Commission's Natural Gas Act (NGA) jurisdiction. The Commission's regulations governing interstate transportation services by intrastate pipelines under section 311(a)(2) of the NGPA are set forth in Part 284, subpart C of the Commission's regulations, 18 C.F.R. § 284.121 *et seq.* (2009).

⁴ See *Freeport LNG Development, L.P.*, 107 FERC ¶ 61,278 (2004); *Freeport LNG Development, L.P.*, 116 FERC ¶ 61,290 (2006).

⁵ As the Commission noted in Order No. 712-A, LNG facilities approved pursuant to NGA section 3, such as the Freeport LNG facility, are not open access, as permitted by the Commission's *Hackberry* policy. By contrast, facilities approved pursuant to

(continued...)

7. Because of difficulties Dow Chemical experienced in its efforts to locate economically-attractive supplies of LNG, Dow Chemical began exploring alternatives for efficient use of its capacity at the Freeport LNG terminal, including alternatives involving the release or assignment of its Freeport LNG terminal use rights to one or more third parties. Dow eventually found a third party interested in acquiring some or all of Dow Chemical's capacity at the Freeport LNG terminal, but the third party advised that it would also require an equivalent level of firm transportation rights on the Dow Pipeline system to transport regasified LNG to downstream interstate markets.

8. On August 19, 2009, Dow filed a request for declaratory order authorizing, among other things, Dow Hydrocarbons to assign some or all of its firm intrastate capacity on Dow Pipeline to the third party, to be used for firm interstate transportation service under section 311(a)(2) of the NGPA, conditioned on the third party also accepting an assignment from Dow Chemical of an equivalent level of capacity at the Freeport LNG terminal.

9. In the November 19 Order, the Commission found that Dow had presented sufficient information about the proposal to justify granting it the necessary authority to enter into the transactions described above, subject to the Commission's approval of Dow Pipeline's request to provide firm section 311 service. The Commission found that its concerns about the limits Dow proposed to place on the availability of firm section 311 transportation service were outweighed by the benefits of granting Dow the requested authorizations, including more efficient use of capacity at the Freeport LNG terminal and increased likelihood that LNG will be imported into that terminal in the future and eventually, into interstate commerce. The Commission also found that granting the necessary authorizations would not have an adverse effect on open access competition.

II. Request for Clarification

10. In its request for clarification, Dow states that negotiations with the third party alluded to in its August 19 request and, subsequently, the November 19 Order, while still not definitive or binding, have reached the point where the parties have a much better idea of how they would prefer to structure the overall transaction. Dow states that the current operating assumption is that, rather than an outright assignment of Dow Chemical's terminalling rights at Freeport LNG to the third party, Dow Chemical will instead retain its terminalling rights at Freeport LNG and enter into an exchange agreement in which the third party delivers LNG to Dow Chemical at the Freeport LNG

section 7 of the NGA provide Part 284 open access service and are subject to the Commission's capacity release rules. *See Promotion of a More Efficient Capacity Release Market*, Order No. 712-A, FERC Stats. & Regs. ¶ 31,284 (2008) (citing *Hackberry LNG Terminal, L.L.C.*, 101 FERC ¶ 61,294 (2002)).

terminal and Dow Chemical delivers revaporized LNG to the third party at the end of Freeport LNG's send out pipeline.

11. Dow states that this new arrangement will make no substantive difference in what the parties are trying to accomplish, or in how the transaction should be viewed by the Commission. Citing *Hackberry*, Dow states that how service is rendered within the Freeport LNG terminal should not be a matter of interest to the Commission.⁶ Accordingly, Dow requests that the Commission clarify that the declaratory relief provided to it in the November 19 Order will apply if Dow Chemical enters into the exchange transaction described above.

12. Dow states that it anticipates that the negotiations with the third party will reach a critical point in the next few months and securing this clarification is essential to the success of those negotiations. For that reason, Dow asks that the Commission issue its order on clarification as soon as possible, and in any event, on or before February 28, 2010.

III. Commission Determination

13. Based upon the information provided by Dow, we agree that, for purposes of the authorizations in the November 19 Order, there is no substantive difference between Dow Chemical assigning its terminal rights at Freeport LNG to a third party and Dow Chemical entering into the exchange agreement transaction described in this order. Both arrangements would allow the third party to deliver LNG to the Freeport LNG terminal and to downstream markets. Accordingly, Dow's request for clarification is granted.⁷

⁶ Dow Request at 3 (citing *Hackberry LNG Terminal, L.L.C.*, 101 FERC ¶ 61,294 (2002), reh'g, *Cameron LNG, LLC*, 104 FERC ¶ 61,269 (2003)).

⁷ See also *Statoil Natural Gas LLC*, 128 FERC ¶ 61,240 (2009). In *Statoil*, the Commission granted a waiver of its prohibition against tying to permit the direct link of an LNG purchase and sale agreement and a prearranged capacity release on an interstate pipeline. In the LNG purchase and sale agreement, Statoil Natural Gas LLC (*Statoil*), the LNG terminal capacity holder, purchased LNG from La Société Nationale pour la Recherche, la Production, le Transport, la Transformation, et la Commercialisation des Hydrocarbures s.p.a. (*Sonatrach*) at the inlet of an LNG terminal and sold regasified LNG to *Sonatrach* at the outlet of the LNG terminal.

The Commission orders:

The Commission grants Dow's request for clarification, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.