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FERC Issues Orders Conditionally Authorizing Sparrows Point LNG Terminal and Addressing Other Proposed and Existing LNG Terminals

On January 15, 2009, the Federal Energy Regulatory Commission (FERC) issued orders (1) conditionally authorizing the Sparrows Point liquefied natural gas (LNG) receiving and regasification terminal near Baltimore, Maryland; (2) addressing requests for rehearing and clarification of an order conditionally authorizing the proposed Bradwood LNG receiving and regasification terminal in Clatsop County, Oregon; (3) addressing requests for rehearing and clarification of an order on remand from the U.S. Court of Appeals for the United States District of Columbia Circuit (D.C. Circuit) relating to the proposed expansion of the Cove Point LNG receiving and regasification terminal near Baltimore, Maryland; and (4) clarifying the jurisdictional status of the Kenai LNG export terminal in Alaska.

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I. Sparrows Point LNG Project

Pursuant to Sections 3(a) and 7(c) of the Natural Gas Act (NGA), FERC authorized the siting, construction, and operation of an LNG import terminal proposed by AES Sparrows Point LNG, LLC (AES Sparrows Point) and certificated an associated natural gas pipeline proposed by its affiliate, Mid-Atlantic Express, LLC, subject to various conditions, including those contained in the final Environmental Impact Statement (EIS) prepared by FERC staff.¹ The project consists of a proposed LNG import terminal near Baltimore, Maryland, with 1.5 billion standard cubic feet per day of sendout capacity and a proposed 88-mile pipeline that connects the LNG terminal to the interstate pipeline systems of Columbia Gas, Transco and Texas Eastern. The proposed pipeline is estimated to cost approximately \$415 million and will provide cost-based transportation services on an open-access basis under Part 284 of FERC's regulations. Following an open season, AES Mid-Atlantic LNG Marketing, LLC, an affiliate of AES Sparrows Point, executed a precedent agreement for the entire pipeline capacity at the maximum recourse rate.

In conditionally approving the Sparrows Point project, FERC denied motions for additional public meetings or comments, determining that



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adequate opportunities for comments had already been provided. In particular, FERC noted that individual notices were sent to all landowners along the pipeline routing alternatives. While acknowledging that not all landowners received notifications at the start of the pre-filing process in May 2006 and that, in fact, some were not notified until after the issuance of the draft EIS in April 2008, FERC nonetheless concluded that the applicants met the requirements of its regulations in this area and had made a good faith effort to provide timely notice to landowners.

In describing the various alternatives that FERC staff evaluated in the EIS, FERC rejected the suggestion that no action or deferred action were preferable. While no action “would eliminate the short- and long-term environmental impacts identified in the EIS,” the no-action alternative would mean that “the need to provide a new source of gas to the growing mid-Atlantic market would not be met.” Similarly, postponing the project would “delay the day that a new source of gas could be available to meet expected increases in market demand.” With respect to arguments that it had not given sufficient consideration to renewable energy sources as an alternative, FERC recognized renewable energy sources as likely to “play an increasing role in power generation for regional markets,” but added these sources “would not be able to satisfy the projected growth in demand absent the additional energy supply that the proposed project will provide.”

In comments filed on January 6, 2009, the Department of Interior (DOI) submitted a comment urging FERC to delay action on the Sparrows Point application in light of “unanswered questions related to federally listed, endangered and threatened species that may be affected by this project.” FERC responded that such questions are adequately addressed by the environmental conditions imposed in its authorization and stressed that the project must fully satisfy such conditions before actual construction may commence.

In response to comments urging FERC to consider the socioeconomic impacts of the project, FERC noted that it is not subject to Executive Order 12898,² which requires subject agencies to review such impacts, but nonetheless indicated that it will consider a project’s impacts on minority and low-income populations as part of its consideration of a project’s impact on the public. FERC stated that the proposed terminal site is located in a heavily industrial area and, thus, is consistent with existing surroundings. The proposed LNG vessel route is the only available shipping route and it traverses areas of varying socioeconomic populations. Similarly, the proposed pipeline route affects residents of various ethnic and economic backgrounds. For these reasons, FERC determined that the project will not disproportionately impact minority and low-income populations.

II. Bradwood Project

FERC denied all requests for rehearing of its order approving the Bradwood project.³ The project consists of a proposed LNG import terminal in Clatsop County, Oregon, with sendout capacity up to 1.3 billion cubic feet per day, and a proposed 36.3-mile pipeline connecting the LNG terminal to Northwest Pipeline Corporation’s interstate pipeline system. FERC issued the final EIS for the project after conducting over 30 meetings between FERC staff and the public and other agencies. On September 18, 2008, FERC issued an



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order authorizing the project, conditioned on the implementation of the mitigation measures provided in the final EIS.⁴

The State of Oregon and various organizations and agencies filed requests for rehearing of the September 18 Order. In addressing these requests, FERC denied motions for late intervention by the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) and Energy Action Northwest (Energy Action NW). FERC explained that it typically restricts late interventions in the late stages of a natural gas certificate proceeding due to the potential burdens on the other parties and stated that the CTUIR and Energy Action NW had failed to demonstrate good cause for their late interventions. Although Energy Action NW argued that its status as a newly-formed entity justified its late intervention, FERC found that these circumstances were insufficient to justify the granting of an intervention at this late stage.

FERC also denied a request by one of the applicants, NorthernStar Energy LLC (NorthernStar) (an affiliate of Bradwood), to delay the order on rehearing until the issuance of state permits and the completion of a biological opinion. FERC stated that NorthernStar had failed to make a convincing argument as to how a delay would serve the public interest and notes that a delay would negatively affect FERC's obligation to act on rehearing and judicial review of the September 18 Order.

Various parties asserted that the September 18 Order violated the Clean Water Act, the Coastal Zone Management Act and the Clean Air Act because it was issued prior to the state certifications required under these federal statutes. In response, FERC defended its practice of issuing conditioned authorizations, insisting that this practice does not infringe upon states' right to make "substantive determinations" under these federal statutes. According to FERC, its practice provides for timely decision-making under the NGA, while the conditions ensure that actual construction of the project may not commence until all necessary state approvals are received. As support for its practice, FERC relied on several court decisions, including *City of Grapevine*,⁵ which upheld the Federal Aviation Administration's conditioning of an approval upon compliance with the National Historic Preservation Act.

In response to a claim that the final EIS utilized outdated National Air Quality Standards (NAAQS), FERC explained that the Environmental Protection Agency is the entity with jurisdiction to update NAAQS. FERC did not think it appropriate for its staff to determine new air quality standards. FERC noted that the State of Oregon can also address air quality concerns by imposing state-specific air quality standards.

In response to claims that FERC's evaluation of project alternatives was inadequate, FERC stood by the evaluation contained in the final EIS. FERC clarified that potential alternatives are evaluated on the following criteria: technical feasibility and practicality; significant environmental advantage over the proposed project; and meeting the primary objective identified by the project applicant. Where there are competing projects, FERC will evaluate each proposed project on its own merits, and the market, not FERC, will determine which project will be built.



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III. Cove Point Expansion Project

On rehearing and clarification of its October 7, 2008 order on remand, FERC largely affirmed its prior order, which concluded that concerns about unsafe leakage on the distribution system of Washington Gas Light Company (WGL) could be addressed by isolating WGL's system from the expanded Cove Point import terminal and pipeline.⁶ The Cove Point expansion project proposes to increase capacities at Dominion's Cove Point LNG import terminal and the Cove Point Pipeline, as well as add new downstream pipeline and storage facilities.

On review, the D.C. Circuit largely affirmed FERC's orders authorizing the Cove Point expansion,⁷ including determinations regarding the causes of the leakage and that WGL bears responsibility for preventing future leakage, but found that FERC had not adequately addressed "whether the Expansion can go forward without causing unsafe leakage."⁸ The court vacated FERC's orders "to the extent they approve the Expansion" and remanded the case so that FERC could "more fully address whether the Expansion can go forward without causing unsafe leakage."⁹ In the October 7, 2008 remand order, FERC reauthorized the expansion project and adopted an isolation approach with respect to the four pipelines that connect the Cove Point LNG terminal to WGL's system (Cove Point Pipeline; Dominion; Transco; and Columbia Gas).¹⁰

FERC denied various requests for rehearing, including the request for rehearing of the Maryland Office of Peoples Counsel (Md. OPC), which accused FERC of failing to comply with the court's mandate. The Md. OPC asserted that the isolation approach is a temporary solution and requested a full evidentiary hearing to determine a long-term solution to the leakage on WGL's system. Alternatively, the Md. OPC requested clarification that FERC would not grant clearance for operation of the expansion facilities until WGL's system is effectively isolated. In response, FERC defended its reliance on the isolation approach as complying with the court's mandate. FERC stated that "finding a long-term solution to WGL's leakage problem is beyond our jurisdiction," because it lacks the jurisdiction to order WGL, which is subject to regulation by the Maryland Public Service Commission and not by FERC, to undertake the remedial measures that would be necessary to address such leakage. FERC also noted that, consistent with its Policy Statement on Provisions Governing Gas Quality and Interchangeability (GQI) in Interstate Natural Gas Pipeline Company Tariffs,¹¹ an interstate pipeline must ensure the operational integrity of its own system, but it should not be required to make additional concessions in response to downstream GQI needs. Otherwise, FERC explained, downstream pipelines or customers with more restrictive GQI requirements could effectively control GQI standards and supplies on interstate systems.

IV. Kenai LNG Export Terminal

FERC clarified its jurisdiction over the Kenai, Alaska LNG export terminal and ordered Kenai to comply with FERC's standard reporting and inspection requirements for LNG terminals.¹² On April 19, 1967, FERC's predecessor, the Federal Power Commission (FPC) granted authorization for the export of LNG from the Kenai LNG terminal pursuant to section 3 of the NGA.¹³ The 1967 Order also addressed a request for a Presidential Permit for the construction, operation and maintenance of the Kenai LNG terminal. The



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FPC clarified that a Presidential Permit applies only with respect to a facility, such as a pipeline, located at the border of the United States and a foreign country and which physically connects the two countries. Since LNG will be transported by ship from the Kenai LNG terminal, the FPC dismissed the request as unnecessary. Aside from the Presidential Permit, the FPC did not address the siting, construction, operation and maintenance of the Kenai LNG terminal in the 1967 Order.

FERC stated that, since the issuance of the 1967 Order and the completion of the Kenai LNG project in 1969, FERC's jurisdiction under section 3 of NGA has been clarified to include authority over the siting, construction, operation and maintenance of LNG terminals. More recently, the Energy Policy Act of 2005¹⁴ added a new provision to the NGA, clarifying that FERC has "the *exclusive* authority" for such approvals. Thus, the public interest requires that the Kenai LNG terminal comply with the same section 3 reporting and inspection requirements applicable to all other operational LNG terminals in the United States. In particular, FERC ordered a cryogenic design and technical review of the Kenai LNG terminal, pursuant to which FERC staff may recommend facility modifications. Thereafter, the terminal will be subject to regular technical reviews and site inspections. Additionally, FERC ordered that semi-annual operational reports and significant incident reports for the terminal be filed.

¹ *AES Sparrows Point LNG, LLC and Mid-Atlantic Express, LLC*, 126 FERC ¶ 61,019 (2009).
² 59 Fed. Reg. 7629 (February 11, 1994).
³ *Bradwood Landing LLC and NorthernStar Energy LLC*, 126 FERC ¶ 61,035 (2009).
⁴ *Bradwood Landing LLC and NorthernStar Energy LLC*, 124 FERC ¶ 61,257 (2008) (September 18 Order).
⁵ 17 F.3d 1502, 1509 (D.C. Cir. 1994).
⁶ *Dominion Cove Point LNG, LP and Dominion Transmission, Inc.*, 126 FERC ¶ 61,036 (2009).
⁷ *Dominion Cove Point LNG, LP, et al.*, 115 FERC ¶ 61,337 (2006), *on reh'g*, *Dominion Cove Point LNG, LP, et al.*, 118 FERC ¶ 61,007 (2007).
⁸ *Washington Gas Co. v. Federal Energy Regulatory Commission*, 532 F.3d 928, 933 (D.C. Cir. 2008).
⁹ *Id.* at 933.
¹⁰ *Dominion Cove Point LNG, LP, et al.*, 125 FERC ¶ 61,018 (2008) (Order on Remand).
¹¹ 115 FERC ¶ 61,325 (2006).
¹² *ConocoPhillips Alaska Natural Gas Corp. and Marathon Oil Co.*, 126 FERC ¶ 61,037 (2009). The order does not impact the authorization granted to ConocoPhillips Alaska Natural Gas Corporation and Marathon Oil Company to export natural gas from the Kenai terminal. That authorization was recently renewed by the Department of Energy's Office of Fossil Energy.
¹³ 37 FPC 777 (1967) (1967 Order).
¹⁴ Pub. L. 109-58, 42 U.S.C. § 15801 (2005).

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