

UNITED STATES OF AMERICA 105 FERC ¶ 61,225  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Dominion Cove Point LNG, LP

Docket No. RP03-545-001

ORDER ON COMPLIANCE

(Issued November 18, 2003)

1. On September 2, 2003, Dominion Cove Point LNG, LP (Cove Point) filed revised tariff sheets in compliance with the Commission's order issued on August 1, 2003.<sup>1</sup> The Commission, however, finds that Cove Point has not fully complied with the directives of our earlier order. Accordingly, for the reasons discussed in the body of this order, the Commission will conditionally accept Cove Point's revised tariff sheets,<sup>2</sup> to be effective August 1, 2003, subject to further modification.

**I. Background**

2. On July 1, 2003, Cove Point filed revised tariff sheets to modify its capacity release provisions. Among the revisions, Cove Point proposed to require that non-creditworthy replacement shippers be subject to pre-qualification and bidder eligibility standards. Calpine Corporation (Calpine) and Reliant Energy Services, Inc., however, objected to the proposed revisions claiming that the new provisions would be unreasonable and unworkable.

3. In the August 1 Order, the Commission found that Cove Point's tariff provision requiring prequalification of bidders for capacity release is not workable and may not be reasonable. The Commission specifically found that: (1) Cove Point could establish a tariff provision requiring pre-qualification as long as the releasing shipper had the right to waive that requirement; (2) consistent with Order No. 637, the releasing shipper should have the option of assuming liability for usage charges in the event a replacement shipper defaults; (3) Cove Point's proposal did not provide a timely procedure by which the

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<sup>1</sup>104 FERC ¶ 61,184 (2003) (August 1 Order).

<sup>2</sup>Substitute Second Revised Sheet No. 240 and Substitute First Revised Sheet Nos. 241 and 243 to FERC Gas Tariff, Original Volume No. 1.

replacement shipper could not only obtain, but also maintain its pre-qualified status on a continuing basis; and (4) Cove Point's proposal did not specify how much collateral a non-creditworthy replacement shipper would be required to post when it bids on available capacity. The Commission, therefore, directed Cove Point to either withdraw this proposal or clearly explain how it would operate in a practical manner.

## II. Compliance Filing

4. In order to comply with the August 1 Order, Cove Point modified Section 10(a)(4)(i) of its General Terms and Conditions (GT&C) which describes the requirements of eligibility to bid on released capacity. Specifically, Cove Point added tariff language stating that it will waive the creditworthiness pre-qualification requirement on a non-discriminatory basis for bidders if the releasing shipper provides Cove Point with a guarantee or other form of credit assurance for all financial obligations of the replacement shipper. In the alternative, Cove Point states that if a potential bidder does not meet its creditworthiness standards, it may still qualify for participation in the release program if it provides an adequate assurance of payment as described in Section 6(e)(ii) of the GT&C.<sup>3</sup>

5. In the August 1 Order, the Commission also found that Cove Point included tariff language that appeared to improperly restrict segmentation by capacity release to primary receipt and delivery points. However, Commission policy states that releasing shippers may release a segment of capacity to a replacement shipper seeking to utilize primary points, and if available, secondary points.<sup>4</sup> In response, Cove Point has modified Section 10(b)(6)(vi) to expand the location of capacity to be released to allow releasing shippers to specify the location of the capacity to be released at any receipt and delivery point.<sup>5</sup>

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<sup>3</sup>Section 6(e)(ii) specifies that an adequate assurance of payment includes: (a) deposit equal to two months of reservation and estimated commodity charges; (b) advance payment of service at the time service is scheduled; (c) irrevocable letter of credit; (d) guarantee from a creditworthy entity; or (e) surety bond from an acceptable insurance company.

<sup>4</sup>August 1 Order, at P 10.

<sup>5</sup>The Commission finds that the revisions to this Section are in full compliance with the August 1 Order, and are therefore accepted without further discussion.

### III. Notice of Filing and Responsive Pleadings

6. Public notice of Cove Point's filing was issued on September 5, 2003. A timely protest was filed by Calpine. Cove Point subsequently filed an answer in response to Calpine's pleading, and the KeySpan Delivery Companies (KeySpan) filed a late motion to intervene after the August 1 Order was issued, as well as an answer.

7. Although Rule 213(a) of the Commission's Rules of Practice and Procedure<sup>6</sup> does not allow for answers to protests, the Commission will grant waiver of this Rule and permit the answer of Cove Point as it provides information that aids the Commission in resolving issues raised by the filing. We will deny, pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, KeySpan's late motion to intervene and answer in this proceeding.<sup>7</sup> When late intervention is sought after the issuance of an order, the prejudice to the other parties and the burden can be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.<sup>8</sup> The Commission finds that KeySpan has not met that burden.

### IV. Calpine's Protest

8. Calpine argues that Cove Point failed to comply with the Commission's directives in the August 1 Order and requests that the Commission reject Cove Point's proposal. Among its arguments, Calpine states that the revised tariff language incorrectly provides that in the event that Cove Point waives the pre-qualification requirement, the releasing shipper would have to either provide a guarantee or other form of credit assurance to "all financial obligations" of the replacement shipper stemming from the release. Calpine contends that: (1) it is the releasing shipper, not Cove Point, who is entitled to waive the prequalification; and (2) the Commission has held that the releasing shipper is responsible for paying the reservation charge, not "all financial obligations" of the replacement shipper, in the event the replacement shipper defaults.

9. Calpine also continues to argue that Cove Point's prequalification proposal remains unworkable and is not reasonable. Calpine states that Cove Point failed to address the Commission's concerns which were discussed in the August 1 Order, i.e., (a) Cove Point failed to provide a procedure by which the replacement shipper can maintain its pre-qualified status; (b) Cove Point's proposal was unclear on how the level

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<sup>6</sup>18 C.F.R. § 385.213(a) (2003).

<sup>7</sup>18 C.F.R. § 385.214 (2003).

<sup>8</sup>North Baja Pipeline, L.L.C., 99 FERC ¶ 61,028 (2002).

of security would be determined when a non-creditworthy shipper bids on capacity; and (c) Cove Point's tariff did not address how a replacement shipper can pre-qualify in light of the compressed time frame in which capacity release auctions operate.

10. Calpine also takes issue with Cove Point's proposal that a non-creditworthy replacement shipper must post up to two months of security prior to the bidding cycle. Calpine states that such a proposal is unjust, unreasonable, and not in the public interest. Calpine argues that such a proposal would be a burdensome and inefficient use of a shipper's capital since the proposal would require the customer to post the collateral based on its bid, and not on how much capacity is ultimately awarded.

11. Moreover, Calpine does not believe that it is equitable for customers to post security prior to being awarded the capacity, arguing that customers should not have to be required to continually post security just to be on an approved bidders list. Instead, Calpine states that only after a shipper has been awarded capacity is there any financial risk associated with a transaction. In such a situation, Calpine concedes that collateral in an amount up to three months of service charges would sufficiently address Cove Point's financial risk for existing capacity.

12. Finally, Calpine states that Cove Point's existing tariff language requires non-creditworthy releasing shippers to continue to post collateral on capacity that has been released on a temporary basis to a creditworthy replacement shipper. Calpine states that this is unduly burdensome and discriminatory to non-creditworthy shippers and argues if a non-creditworthy releasing shipper is required to maintain collateral on released capacity during the term of the capacity release, the pipeline is in effect receiving double the needed credit support (once from the collateral posted by the non-creditworthy releasing shipper and a second time from having a creditworthy replacement shipper or collateral posted by a non-creditworthy replacement shipper). Calpine therefore requests that the Commission require Cove Point to state in its tariff that, upon a non-creditworthy shippers' temporary release of capacity to a creditworthy replacement shipper, the non-creditworthy releasing shipper is released of its collateral obligations until one month prior to the expiration of the capacity release.

13. In Cove Point's answer, it states its proposal, as amended, clearly allows a releasing shipper to waive the pre-qualification requirements if that shipper assumes the risk of commodity charges in the event the replacement shipper defaults. Moreover, in responding to Calpine's argument that: (1) it is the releasing shipper's option, not Cove Point's, to waive the prequalification requirement; and (2) the releasing shipper is not liable for "all financial obligations" of a defaulting replacement shipper; Cove Point offers to revise the proposed Section 10(a)(4)(i) to include the following:

[Cove Point], upon a Releasing Customer's request, will waive this pre-qualification requirement on a non-discriminatory basis for bidders on a

release request if Releasing Customer assumes liability for the commodity charges or posts a bond or other form of credit assurance for the commodity charges with respect to the capacity being released by Releasing Customer prior to the commencement of service to the Replacement Customer.

## V. Commission's Determination

14. In the August 1 Order, the Commission determined that the prequalification requirement for creditworthiness was not necessary to protect the pipeline, because the pipeline need not flow gas until it has determined that the winning bidder is creditworthy.<sup>9</sup> However, the releasing shipper could be at risk if the replacement shipper does not pre-qualify, because it could lose release revenues in the event that the replacement shipper cannot meet the pipeline's creditworthiness standards. On the other hand, the releasing shipper might not want to require prequalification if it wanted to expand the class of eligible bidders. Therefore, the Commission required Cove Point to modify its prequalification provision to state that the releasing shipper may waive this requirement on a non-discriminatory basis for any release offer.<sup>10</sup>

15. In the event the releasing shipper chooses to waive the pre-qualification requirement, the Commission provided that the releasing shipper has two options: (1) it can either require the replacement shipper to satisfy the applicable collateral requirements upon the completion of the award process prior to gas flow under the release; or (2) it can choose to assume responsibility in the event the replacement shipper defaults on its contractual obligation either for the entire duration of the release or until such time as the replacement shipper satisfies the collateral requirements.

16. In addition, the Commission required Cove Point to specify how, under its proposal a non-creditworthy replacement shipper will be able to maintain its pre-qualified status "on a continuing basis" (as proposed by Cove Point).

17. Cove Point's filing in this case fails to comply with the Commission's directives in the August 1 Order. First, its proposed tariff revision, while permitting the releasing shipper to waive the prequalification requirement, mandates that if the releasing shipper does so, the releasing shipper must assume liability for the commodity charges or post a bond or other form of credit assurance for the commodity charges. This provision does not comply with the Commission's requirement that the releasing shipper be given the option to waive the prequalification requirement while continuing to insist that the

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<sup>9</sup>August 1 Order, at P 7.

<sup>10</sup>August 1 Order, at P 8.

replacement shipper post the necessary collateral prior to the commencement of service.<sup>11</sup> Further, Cove Point has failed to propose any method by which a non-creditworthy replacement shipper can maintain its pre-qualified status “on a continuing basis.”

18. The Commission, therefore, will require Cove Point to remove the requirement that the shipper maintain its pre-qualified status “on a continuing basis,” since Cove Point has provided no method for this to be done. If the releasing shipper does not waive the prequalification requirement, the replacement shipper will be required to post applicable collateral by the close of the bidding period in order to have its bid considered.<sup>12</sup> This requirement that non-creditworthy shippers post collateral by the end of the bid period will ensure that the bidder that is awarded the capacity will meet the pipeline’s creditworthiness standards, thereby preventing any complications with the timely release of the capacity.

19. Accordingly, the Commission will require Cove Point to revise its tariff in the following respects. First, Cove Point must modify Section 10(a)(4)(i) to provide the following:

Any party desiring to submit a bid under this Section must first pre-qualify by demonstrating that it meets the creditworthiness standards of Section 3 and Section 6 of the General Terms and Conditions of Operator's Tariff. Upon a releasing shipper’s request, Operator will waive this prequalification requirement on a non-discriminatory basis. Depending on whether the releasing shipper waives the requirement, the following conditions will apply:

(1) In the event that the requirement for prequalification applies, the replacement shipper must satisfy the creditworthiness provisions, including the posting of collateral, prior to the close of the bidding period in order to have its bid considered.

(2) In the event the releasing shipper waives the prequalification requirement for a shipper that does not meet the creditworthiness standards of Section 3 and

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<sup>11</sup>See *Equitrans, L.P.*, 99 FERC ¶ 61,210, at P18 (2002) (pipeline may “permit, but not require, releasing shippers to assume responsibility for usage charges and penalties).

<sup>12</sup>If the releasing shipper has waived the prequalification requirement, the replacement shipper would have to post collateral after the bidding is completed prior to the use of the capacity, unless the releasing shipper opts to guarantee the payment of usage and other surcharges.

Section 6 of the General Terms and Conditions of Operator's Tariff, the releasing shipper may either:

(a) require the replacement shipper to satisfy the creditworthiness provisions, including the posting of collateral, prior to service being provided to the replacement shipper, or

(b) prior to the commencement of service to the Replacement Customer, assume liability for the commodity charges or post a bond or other form of credit assurance for the commodity charges with respect to the capacity being released by Releasing Customer either for the entire duration of the release or until such time as the replacement shipper satisfies the collateral requirements.

20. Second, the Commission will require Cove Point to modify its collateral requirements to ensure that collateral need not be posted for longer than the duration of the release. Section 6(e)(2)(1) provides that a non-creditworthy shipper must provide “an amount equal to two (2) months of Reservation and estimated Commodity charges for the service....” This provision would require that collateral be posted for two months even if the capacity is only available for a shorter period. Cove Point should not be able to insist on collateral that is greater than the time period for which the capacity is available, and, therefore, must modify its tariff to ensure that collateral must be provided for two months or for a period corresponding to the shorter time period for which the capacity is available.

21. Calpine maintains that non-creditworthy shippers should not be required to post collateral prior to being awarded that capacity. In the August 1 Order, the Commission determined that, in balancing the rights of releasing and replacement shippers, releasing shippers should be permitted to require replacement shippers to establish creditworthiness prior to the assignment of capacity to “avoid the possibility that the release cannot be completed due to the winning bidders’ failure to meet the pipeline’s creditworthiness standards.”<sup>13</sup> Calpine has not sought rehearing of that determination. This filing is designed only to comply with the August 1 Order, and, therefore, Calpine’s protest goes beyond the scope of the compliance filing and is denied.

22. Calpine further argues that the requirement in the filing that the replacement shipper must continuously maintain collateral is “too much of an administrative and cost burden” on non-creditworthy shippers, and will “tie up” capital simply in order to gain access to Cove Point’s capacity release market. As discussed above, the Commission

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<sup>13</sup>August 1 Order, at P 8.

agrees with Calpine and has rejected Cove Point's requirement that the replacement shipper continuously post collateral.<sup>14</sup>

23. Calpine also argues that requiring two months of collateral based on the replacement shipper's bid is unjust and unreasonable, because it bases collateral on the amount of the bid, rather than the amount of capacity awarded. The Commission finds, however, that it is reasonable to require bidders to post collateral for the entire amount of their bid, since they may be awarded capacity up to that level.<sup>15</sup>

24. Calpine maintains that a non-creditworthy shipper should be released of its collateral obligations if it temporarily releases capacity to a creditworthy replacement shipper. In the August 1 Order, the Commission made clear that its long-standing policy, since Order No. 636, is that in capacity release situations, both the releasing and replacement shippers must satisfy a pipeline's creditworthiness requirements.<sup>16</sup> Again, Calpine did not seek rehearing of this requirement, and its protest, therefore, goes beyond the scope of the compliance filing, and is denied.

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<sup>14</sup>Moreover, upon the close of the bidding period, the pipeline must immediately release any collateral that has been posted by non-winning non-creditworthy bidders.

<sup>15</sup> See PJM Interconnection, L.L.C., 104 FERC ¶ 61,309 (2003) (reasonable to require bidder to provide sufficient collateral to cover its bids).

<sup>16</sup>August 1 Order, at P 7, n.5. See also Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, FERC Statutes and Regulations, Regulations Preambles, January 1991-June 1996 ¶ 30,950 at 30,588 (1992). Under the capacity release regulations, 18 C.F.R. §284.8(f) (2003), the releasing shipper remains obligated under its contract to the pipeline, and must, therefore, satisfy the creditworthiness and other obligations associated with that contract, regardless of how many subordinate releases take place. For example, even if a replacement shipper is creditworthy, it may default and the releasing shipper would be responsible for payment. Moreover, given the ability of releasing shippers to recall and segment releases, both the releasing and replacement shippers need to be creditworthy to ensure their respective obligations.

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The Commission orders:

(A) Cove Point's compliance filing is hereby accepted, in part, and rejected, in part, as discussed in the body of this order.

(B) Cove Point is hereby directed, within 20 days of the date this order issues, to file revised tariff sheets consistent with the discussion in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.