135 FERC ¶ 61,028
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

April 13, 2011

In Reply Refer To:
Distrigas of Massachusetts LLC
GDF SUEZ Gas NA LLC
Docket No. RP11-1871-000

Distrigas of Massachusetts LLC
GDF SUEZ Gas NA LLC
20 City Square
Suite 3
Charlestown, MA 02129

Attention: Marc A. Silver
Counsel for Petitioners

Reference: Temporary Waiver Request

Dear Mr. Silver:

1. On March 3, 2011, Distrigas of Massachusetts LLC (DOMAC) and GDF SUEZ Gas NA LLC (GSGNA) (collectively, the Petitioners) filed a request for temporary waiver of certain of the Commission's capacity release regulations and policies (Petition), in order to facilitate the permanent transfer of DOMAC's gas sales and transportation service agreements to its affiliate, GSGNA, as a part of its internal corporate restructuring (Restructuring). The Petitioners request the Commission grant the waivers to begin on April 13, 2011, and to continue in effect for 180 days.[1] For the reasons discussed below, and for good cause shown, we grant the requested temporary, limited waiver.

2. According to the Petition, DOMAC operates a liquefied natural gas (LNG) import terminal in Everett, Massachusetts (Terminal) and currently purchases LNG imported by

[1] Petitioners originally requested an April 6, 2011 action date, but on April 1, 2011 submitted a Request to Delay specifying April 13, 2011 instead.

GSGNA, DOMAC's affiliate, from various international sources and resells the LNG in liquid and vapor form to customers located throughout the northeastern United States. Petitioners state that DOMAC's customers include local distribution companies (LDC), gas marketers, and electric generating plants. Petitioners further state that until August 23, 2008, DOMAC's Terminal operations and sales were regulated pursuant to a certificate of public convenience and necessity issued by the Commission under section 7 of the Natural Gas Act (NGA). According to Petitioners, during that time, the price, terms, and conditions of DOMAC's liquid and vapor sales were regulated by the Commission under DOMAC's FERC Gas Tariff. On July 17, 2008, the Commission issued an order (Abandonment Order) authorizing DOMAC to abandon its NGA section 7 certificate authorization and to cancel its Tariff.[2] The Abandonment Order also asserted authority to regulate the Terminal under NGA section 3 rather than NGA section 7, consistent with the Commission's regulation of other LNG import terminals. Finally, the Abandonment Order determined that DOMAC's liquid and vapor sales were exempt from the Commission's NGA jurisdiction as "first sales" under sections 2(21) and 601(a)(1)(A) of the Natural Gas Policy Act of 1978 (NGPA).

3. According to the Petition, GSGNA currently imports LNG under authorization granted under NGA section 3 by the Department of Energy, Office of Fossil Energy. DOMAC purchases the LNG from GSGNA, stores and revaporizes the LNG at the Terminal, and makes sales of liquid or vapor under terms and rates as agreed to by DOMAC and its customers. Petitioners state that in order to provide service to its downstream vapor customers, DOMAC has contracted for transportation service with two interstate pipelines in the northeastern United States – Algonquin Gas Transmission, LLC (Algonquin) and Tennessee Gas Pipeline Company (Tennessee).

4. The Petitioners state that their corporate family is restructuring so that, in relevant part, GSGNA will become the organization's singular marketing identity, while DOMAC will focus solely on operating its LNG Terminal. Pursuant to the subject Restructuring, DOMAC will assign or release all of its transportation and sales agreements to GSGNA. Petitioners state that following the transfer, GSGNA will assume all of the rights and obligations under the relevant transportation and sales agreements under the same rates and terms now applicable to DOMAC. Petitioners further state that GSGNA will continue to provide sales service to all of DOMAC's customers under the terms of each customer's sales contract until its expiration.[3] GSGNA will continue to import LNG and will hold title to liquid and vaporized LNG until it is delivered to customers under the

[2] *Distrigas of Massachusetts LLC*, 124 FERC ¶ 61,039 (2008).

[3] Petition at 5.

released transportation service agreements with Algonquin and Tennessee. According to Petitioners, following the completion of the restructuring, DOMAC will no longer be engaged in the sale of natural gas but will exclusively provide LNG terminalling and storage service to its affiliate, GSGNA.

5. In order to permit the Restructuring, the Petitioners seek temporary waiver of the Commission's capacity release rules set forth in section 284.8(b)-(e) of the Commission's regulations and applicable tariff provisions implementing those regulations, as well as the prohibition on tying, the posting and bidding requirements for capacity release transactions, the shipper-must-have-title policy, the prohibition on buy-sell arrangements, and the restrictions on capacity releases below or above the maximum rate, and any other waivers or authorization deemed necessary under the NGA to transfer its gas sales and transportation service agreements to GSGNA. The Petitioners state that the waiver would be temporary and would only be used for the limited purpose of consummating the referenced restructuring.[4]

6. The Petitioners state that the Commission has previously granted temporary waivers of various policies and regulations relating to the transfer of interstate pipeline transportation capacity to facilitate the transfer of natural gas supply and transportation contracts and other assets as a result of various types of corporate restructurings, including corporate mergers and sales of entire business units, similar to the waivers they request here.[5]

7. Public notice of the filing was issued on March 7, 2011. Interventions and protests were due on or before March 14, 2011. Pursuant to Rule 214,[6] all timely filed motions to intervene and any unopposed 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. On March 14, 2011, National Grid[7] and Algonquin each filed comments. On

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[4] *Id.* at 8.

[5] Petitioners cite, *e.g.*, *Sempra Energy Trading LLC*, 133 FERC ¶ 61,128 (2010); *Nexen Marketing U.S.A. Inc.*, 131 FERC ¶ 61,282 (2010); *Macquarie Cook Energy, LLC.*, 126 FERC ¶ 61,160 (2009); and *Bear Energy LP*, 123 FERC ¶ 61,219 (2008).

[6] 18 C.F.R. § 385.214 (2010).

[7] For the purposes of this filing, National Grid refers collectively to The Brooklyn Union Gas Company, d/b/a National Grid NY; KeySpan Gas East Corporation, d/b/a National Grid; Boston Gas Company and Colonial Gas Company, collectively d/b/a National Grid; EnergyNorth Natural Gas, Inc., d/b/a National Grid NH; Niagara Mohawk

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March 18, 2011, NSTAR Gas Company (NSTAR) filed a motion to intervene out-of-time and comments.

8. National Grid, citing the Commission order granting DOMAC authority to abandon its LNG certificate, states that DOMAC promised to fulfill its contractual obligations to customers as a condition of its proposed abandonment, and promised that there would be no degradation in its sales services following abandonment.[8] National Grid argues that "it is not clear how DOMAC and/or [GSGNA] intend to fulfill DOMAC's commitments to its customers,"[9] following the proposed restructuring. National Grid and Algonquin also express concern as to whether GSGNA is significantly less creditworthy than DOMAC.

9. Furthermore, National Grid states that it is unclear, in the proposed transfer of agreements from DOMAC to GSGNA, whether the Petitioners are proposing to unbundle DOMAC's current obligations. Specifically, National Grid states, its current agreements "impose obligations on DOMAC that are either tied to functions [DOMAC] performs as the owner and operator of an LNG terminal or that could be affected by a transfer of the agreements to an entity that is not the owner and operator of the LNG terminal."[10] National Grid is concerned that the Petitioners have not disclosed how GSGNA will have the ability to perform those contractual obligations or compel DOMAC to do so if the underlying agreements are assigned.

10. National Grid acknowledges that it is "not requesting that the Commission become involved in addressing contractual issues that are outside its jurisdictional purview," and that in "a number of Commission decisions … it has granted waivers similar to those sought by Petitioners."[11] National Grid argues, however, that "the Commission's ongoing responsibility to protect the public interest requires [the Commission] to refrain from granting the proposed waivers … unless and until the Commission can satisfy itself

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Power Corporation, d/b/a National Grid; The Narragansett Electric Company, d/b/a National Grid; and National Grid LNG, L.P., all subsidiaries of National Grid USA, Inc.

[8] National Grid Comments at 4 & n.5 (citing *Distrigas of Massachusetts,* 124 FERC ¶ 61,039 at P 7, 14, 19 (2008)).

[9] *Id*. at 4.

[10] *Id*. at 5.

[11] *Id.* at 5-6.

that Petitioners' contemplated restructuring will not undermine the assurances previously provided by DOMAC."[12]

11. Algonquin and NSTAR express concerns with the potential breadth and vagueness of the Petition's request for "other arrangements necessary to implement the Restructuring and the related transfer of jurisdictional transportation service agreements from DOMAC to GSGNA in a timely manner."[13] In particular, Algonquin notes that granting this request could be misinterpreted as a general waiver of all the provisions in Algonquin's tariff related to capacity release, such as creditworthiness and the requirements for permanent releases. Therefore, Algonquin requests the Commission specifically limit the waivers of the tariff provisions relating to: (i) the capacity release posting and bidding requirements; (ii) restrictions on capacity release above the maximum rate; and (iii) the prohibition against tying. NSTAR similarly requests that the Commission explicitly limit any waivers granted "to only those necessary to effectuate the proposed capacity releases and to the tying, buy-sell prohibition, and Shipper-Must-Have-Title rule, as specified on page 7 of the Joint Petition."[14]

12. On April 7, 2011, Petitioners submitted an answer to the comments. Petitioners report that they have met with the intervenors individually in order to more fully discuss the proposed Restructuring. Petitioners state that they have reached some consensus with Algonquin, but continue to work with the other intervenors, including NSTAR, with whom Petitioners state that they currently have no active service agreements.[15] Petitioners reaffirm that they are committed to fulfilling DOMAC's obligations under the agreements at issue in this waiver request, and state that they will continue to work with the intervenors to address any credit concerns.

13. Petitioners clarify that their Petition should not be interpreted as requesting that the Commission take any action that would impinge upon a third party's right to assess GSGNA's creditworthiness following the Restructuring. Petitioners also clarify that they only seek temporary waiver, to the extent necessary to effect the Restructuring, limited to section 284.8 of the Commission's regulations and all applicable pipeline tariff provisions as they relate to the posting and bidding requirements for capacity release transactions and the restrictions on capacity releases above the maximum rate; the tying

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[12] *Id.*

[13] Petition at 9.

[14] NSTAR Comments at 3.

[15] Petitioners' Answer at 5 n.11.

prohibition; and the shipper-must-have-title policy and the prohibition on buy/sell transactions.[16]

14. On April 11, 2011, NSTAR submitted an answer to Petitioners' answer. NSTAR clarifies that its discussions with Petitioners have not resolved NSTAR's concerns. In particular, NSTAR is concerned that Petitioners have yet to provide information demonstrating that GSGNA will meet NSTAR's creditworthiness standards. NSTAR argues that the Commission should not grant waiver unless and until NSTAR provides NSTAR with such information. NSTAR also contests Petitioners' claim in their answer that NSTAR currently has no active service agreements. NSTAR states that it has an effective Base Contract for Sale and Purchase of Natural Gas with DOMAC and that, while there are no transactions in effect under that agreement at the moment, NSTAR has purchased gas under that agreement every year for the past decade and has already requested deliveries for this summer as well.

15. On April 12, 2011, National Grid submitted an answer to Petitioners' answer. National Grid also clarifies that its discussions with Petitioners have not resolved National Grid's concerns. In particular, National Grid argues that the Commission should not grant waiver unless and until DOMAC details how it will fulfill its responsibilities under the transferred contracts, as it committed to do.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[17] prohibits answers to protests or to answers unless otherwise permitted by the decisional authority. We accept all three answers because they help clarify the matters under discussion.

17. The Commission has reviewed the Petitioners' request for a temporary waiver and finds that the request is adequately supported and consistent with previous waivers that the Commission has granted under similar circumstances. The Commission has previously granted temporary waivers of the specified capacity release regulations and policies to permit parties to consummate complex transactions involving, as here, various types of corporate restructurings, including corporate mergers and transfers of entire business units.[18]

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[16] Petitioners' Answer at 6.

[17] 18 C.F.R. § 385.213(a)(2) (2010).

[18] *See, e.g.*, *Request for Clarification of Policy Regarding Waivers of Applicable Requirements to Facilitate Integrated Transfers of Marketing Businesses*, 127 FERC ¶ 61,106, at P 8 (2009); *Macquarie Cook Energy, LLC and Constellation Energy Commodities Group, Inc.*, 126 FERC ¶ 61,160 (2009) (*Macquarie Cook*); and *Bear*

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18. This corporate restructuring includes a transfer of DOMAC's contracts to sell liquid and regasified LNG and the release of its contracts for transportation service on Algonquin and Tennessee to its affiliate, GSGNA. In addition, DOMAC will provide LNG terminal service to GSGNA. DOMAC has always used its LNG terminal to store and sell its own LNG and has never provided open access terminal services. In Order No. 712-A, the Commission declined to grant a blanket exemption from tying and bidding in the context of non-open access LNG terminals, but stated that it would consider individual waiver requests to permit such transactions.[19] Petitioners have filed such a request. In the context of this corporate restructuring, we find Petitioners have justified their waiver request. It does not appear that granting the waiver would have an adverse effect on open access competition.[20] DOMAC is currently using its transportation capacity on Algonquin and Tennessee to transport revaporized LNG to its sales customers pursuant to its existing sales contracts with those customers. GSGNA will use the transportation capacity for the same purpose. The proposed Restructuring does not place any restrictions on GSGNA's use of the released capacity during periods when it is not required to meet GSGNA's obligations under the assigned sales contracts. No entity has filed to state that it has an interest in obtaining the relevant pipeline capacity.

19. However, as noted by both Petitioners and commenters, our previously granted waivers in connection with corporate restructurings have been both limited in scope and temporary in time frame. As the commenters request, our grant of waiver is limited to the regulations, policies, and implementing tariff provisions requested on page 7 of the Petition and reaffirmed in their Answer, namely:

> (1) a temporary waiver of section 284.8 of the Commission's regulations and all applicable pipeline tariff provisions as they relate to the posting and bidding requirements for capacity release transactions and the restrictions on capacity releases above the maximum rate;

Energy LP, 123 FERC ¶ 61,219 (2008).

[19] *See Promotion of a More Efficient Capacity Release Market*, Order No. 712, FERC Stats. & Regs. ¶ 31,271 (2008), *order on reh'g*, Order No. 712-A, FERC Stats. & Regs. ¶ 31,284, at P 45 (2008), *order on reh'g*, Order No. 712-B, 127 FERC ¶ 61,051 (2009).

[20] *See Statoil Natural Gas LLC and Gazprom Marketing and Trading USA, Inc.*, 130 FERC ¶ 61,110, at P 23-24 (2010). *See also* Order No. 712-A, FERC Stats. & Regs. ¶ 31,284 at P 46; *Statoil Natural Gas LLC*, 128 FERC ¶ 61,240 (2009).

(2) a temporary waiver of the tying prohibition; and

(3) a temporary waiver of the shipper-must-have-title [] policy and the prohibition on buy/sell transactions.[21]

20. Further, our grant of waiver is limited, consistent with Petitioners' request, to the extent that waiver is necessary "to permit DOMAC to transfer its gas sales and transportation service agreements to its affiliate, GSGNA."[22] In particular, as commenters request, we note that Petitioners state in their answer that they do not request, and thus are not granted, waiver of any tariff's creditworthiness standards.

21. It also remains the Commission's policy that permanent releases, such as DOMAC's releases to GSGNA, are subject to the relevant pipelines' approval, to the extent that the pipeline has a valid reason not to approve the transaction. For instance, in *Algonquin* we authorized a pipeline to revise its tariff to clarify that it "may refuse to allow a permanent capacity release if it has a reasonable basis to conclude that it will not be financially indifferent to the release," and to simultaneously require that a replacement shipper "satisfies Algonquin's credit appraisal."[23] Petitioners also did not specifically request, and are not granted, waiver of any such tariff provisions, where applicable.

22. Similarly, National Grid and NSTAR express concern as to how GSGNA or DOMAC will perform DOMAC's current contractual obligations as the owner and operator of an LNG terminal, including whether GSGNA is creditworthy. They emphasize that DOMAC has not yet provided them with requested financial information concerning CSGNA. They ask that we delay acting on the Petitioners' waiver request until DOMAC satisfies their concerns. The Commission finds that a delay in granting DOMAC's limited waiver request is not justified. DOMAC states that it will continue to own and operate its LNG terminal. It is only transferring its marketing and sales functions to CSGNA. In the Abandonment Order, the Commission held that DOMAC's sales of gas imported into the United States are "first sales" of natural gas under section 2(21) of the NGPA, and therefore "we have no authority to regulate DOMAC's sales."[24] While the Abandonment Order "acknowledge[d] DOMAC's commitment to continue to fulfill its existing customer commitments until the expiration of its currently effective

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[21] Petition at 7; Petitioners' Answer at 6.

[22] *Id*. at 1.

[23] *Algonquin Gas Transmission, LLC,* 112 FERC ¶ 61,262 (2005) (*Algonquin*).

[24] *Distrigas of Massachusetts LLC*, 124 FERC ¶ 61,039, at P 16-18.

service agreements," we also stated that "compelling compliance with the terms and conditions of future sales agreements will be beyond the reach of the Commission's section 3 jurisdiction."[25] We therefore denied DOMAC's request that we treat its Liquid Service Agreement as a binding obligation enforceable by the Commission. Accordingly, in this order, the Commission merely affirms that its grant of limited waiver does not waive DOMAC's obligations as the owner and operator of an LNG terminal, and that the Commission expects that DOMAC or its assignee will continue to honor its contractual obligations subsequent to the restructuring. In addition, Petitioners state that "GSGNA will continue to provide sales service to all of DOMAC's customers under the terms of each customer's sales contract until its expiration."[26]

23. Petitioners request the time frame of their waiver begin April 13, 2011, and continue in effect for 180 days; we grant that request. In order to assuage further the commenters' concerns that the grant of waiver may be misinterpreted as applying to unrelated transactions, we require Petitioners to provide notice to the Commission in this docket of the closing of the Restructuring, consistent with Commission precedent where we have granted similar temporary, limited waivers.[27]

The Commission orders:

(A) The temporary, limited waivers requested by Petitioners are granted from April 13, 2011, for a period of 180 days, as discussed more fully above.

(B) Petitioners will provide notice to the Commission in this docket of the closing of the Restructuring.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[25] *Id*.

[26] Petition at 5.

[27] *E.g.*, *Duke Energy Ohio, Inc.*, 134 FERC ¶ 61,230 (2010); *Macquarie Cook*, 126 FERC ¶ 61,160.