ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY

In the matter of,	)	
	)	
CONOCOPHILLIPS ALASKA NATURAL GAS CORPORATION	)	FE Docket No. 07-02-LNG
	)	
and	)	
MARATHON OIL COMPANY	)	

MOTION FOR LEAVE TO REPLY OUT OF TIME AND REPLY COMMENTS OF ENSTAR NATURAL GAS COMPANY

ENSTAR Natural Gas Company ("ENSTAR") submits these reply comments ("Reply Comments") pursuant to the authorization granted in the Department of Energy's Office of Fossil Energy's ("DOE/FE") Order, dated June 5, 2007. ENSTAR respectfully requests that the DOE/FE accept these reply comments two days out of time. As the supplier of natural gas to half of Alaska's population, ENSTAR's position in this proceeding cannot be adequately represented by any other party. ENSTAR was unable to file its reply comments by the June 26, 2007 deadline established by the DOE/FE, because key executive personnel were traveling and unable to review and approve the filing before the deadline. ENSTAR respectfully submits that no party will be prejudiced by the DOE/FE's accepting these reply comments, as they are being submitted only two days after the filing deadline.

In their Answer[1] to the various motions to intervene in this proceeding, the Applicants – ConocoPhillips Alaska Natural Gas Corporation and Marathon Oil Company ("Marathon") – have urged the DOE/FE to apply Section 3 of the Natural Gas Act ("NGA") in a manner that

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[1] Answer of ConocoPhillips Alaska Natural Gas Corporation and Marathon Oil Company to Certain Motions to Intervene, Comments, Protests and/or Requests for Additional Procedures, FE Docket No. 07-02-LNG, pp. 12-16 (May 8, 2007) ("Answer").

would dictate an outcome that is plainly opposed to any common sense understanding of the public interest in the Cook Inlet. Furthermore, any discussion of the deliverability of natural gas to consumers must consider the historical role played by producers, including the Applicants, in providing deliverability.

ENSTAR respectfully submits that correctly applying the legal standard to the circumstances of this proceeding should lead the DOE/FE to the conclusion that the requested LNG export authority should be conditioned in the manner requested in ENSTAR's Initial Comments and these Reply Comments. Meeting the needs of natural gas consumers in the Cook Inlet will require the cooperation of producers, consumers, and the State of Alaska. ENSTAR urges the DOE/FE to use its conditioning authority to ensure that the stakeholders work together in a cooperative fashion to find balanced solutions to the region's supply issues. ENSTAR expects that, as a result of such a cooperative process among all stakeholders, the Applicants would be fairly compensated, at market rates, for any natural gas they supply to ENSTAR for use by Cook Inlet consumers and for any facilities necessary to deliver those gas supplies into ENSTAR's system at the moment they are needed.

I. Application of the Legal Standard as Proposed by the Applicants Would Lead to Illogical Results.

The Applicants' Answer asserts that (1) ENSTAR and the other intervenors have misinterpreted Section 3 of the NGA, and (2) the Application meets all applicable legal standards for approval.[2] The Applicants' overly-literal application of the legal standard fails to take into account the circumstances in the Cook Inlet. If the DOE/FE were to adopt the view advocated by the Applicants in this case, that would lead to an incongruous result in direct conflict with any

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2 *Id.*

common sense understanding of what would be in the public interest.

Distilled to its essence, the Applicants' view of the law is that they must be permitted to export Cook Inlet gas as long as a petroleum engineer will opine that there is some probability that the region contains sufficient reserves to meet annual domestic needs during the requested export period. Under this approach, the DOE/FE must put on blinders and ignore the fact that current supplies actually produced into the Cook Inlet market are inadequate to meet current needs, including the undisputed fact that Cook Inlet area industrial plants have had their supplies curtailed significantly during the past year. Under the standard advocated by the Applicants, it does not matter if gas cannot be delivered to residential and commercial customers on the coldest days of winter. It also does not matter if the gas that is theoretically available on an annual basis cannot always be delivered when and where it is needed in the Cook Inlet region on a daily or hourly basis. Nor is it relevant, in the Applicants' view, if reserves remaining on the day after the export period expires will be inadequate to meet local needs.

These practical considerations cannot be ignored under the DOE/FE's statutory mandate. The mere probability that there are reserves of gas in the ground does not compel the DOE/FE to extend the export license. In ENSTAR's view, the DOE/FE should not adopt an interpretation of the broad language of Section 3 of the NGA that is at odds with a common sense understanding of what the legal threshold should be for granting the requested license extension in an area, such as the Cook Inlet, that experiences extreme temperatures and thus significant swings in demand, is served by aging reservoirs, currently lacks sufficient infrastructure to satisfy deliverability requirements, and is physically separate from other potential sources of supply in the Lower 48 and Canada. Instead, the standard employed by the DOE/FE to judge the requested export license extension should take account of these practical realities of the Cook Inlet market.

Closely related to the proper legal standard is the allocation of the burden of proof. Under the test advocated by the Applicants, once their engineer certifies that there probably are enough reserves to satisfy domestic needs during the requested export period, the Applicants would have the intervenors bear the entire burden of proving that the export would be harmful to the public interest.[3] This approach is inconsistent with the traditional legal principle that the moving party and the party with superior (or exclusive) access to the facts ordinarily should bear the burden of proof.[4]

There is a more sensible rule for the DOE/FE to apply in this case. Here, the Applicants are the movants and have superior access to the available information about Cook Inlet gas reserves and deliverability, since they own or control those reserves, existing facilities used to provide sufficient deliverability, and property that could be used to enhance deliverability. In these circumstances, the DOE/FE should decide that ENSTAR and the other intervenors have met their burden by making a *prima facie* showing that there are gas shortages in Cook Inlet today that are likely to intensify during the export period. It is uncontested that there have been actual delivery curtailments during the coldest days during the winters of 2005-2006 and in 2006-2007. The LNG Facility itself had to divert gas deliveries in order to make gas available to meet urgent domestic space heating and electric generation requirements. That the Cook Inlet

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3 *Id.*, at pp. 11-13.

4 *See, e.g.*, Charles H. Koch, Jr., 2 Admin. L. & Prac. § 5.51 (2d ed.2006) ("In the usual situation then the agency has a duty to make a prima facie case.") Charles McCormick, McCormick's Handbook of the Law of Evidence, 785 (2d ed.1972) ("McCormick's"), contends in general: "In most cases, the party who has the burden of pleading facts will have the burden of producing evidence and of persuading the jury of its expertise as well." As to administrative practice in particular, McCormick's states: "The customary common law rule that the moving party has the burden of proof—including not only the burden of going forward but also the burden of persuasion—is generally observed in administrative hearings." McCormick's, at 853. Thus, if an agency process follows the traditional concepts, the person who authors the complaint, usually the agency, will have both burdens. This rule is somewhat moderated by the notion that at least the burden of going forward normally falls on the party having knowledge of the facts involved. United States v. New York, New Haven & Hartford Railroad, 355 U.S. 253, 256 n. 5, 78 S.Ct. 212, 214 n. 5, 2 L.Ed.2d 247 (1957).

area should experience such curtailments and have to rely on such diverted supplies is plainly not in the public interest.

Under the approach advocated by ENSTAR, with the intervenors having made that initial showing, the burden should now shift back to the Applicants to demonstrate that effective steps are being taken to overcome these problems. Absent such a showing, the record may reflect a probability of sufficient gas reserves in the ground, but in fact the gas is not currently being delivered in the quantities and on the schedule demanded by the domestic market. On that record, the only conclusion that the DOE/FE can possibly reach is that additional exports will aggravate the supply shortages and deliverability issues and be detrimental to the public interest, unless the application is appropriately conditioned.

ENSTAR recognizes that the DOE/FE has not previously employed a burden-shifting approach to determine whether a proposed export is in the public interest. However, never before in the 69-year history of the NGA have applicants proposed to export natural gas from an area that is currently experiencing supply shortages and deliverability issues. In light of the evidence that further exports are contrary to the public interest, requiring the Applicants to demonstrate how the exports may be accommodated in a manner that is consistent with the public interest is a reasonable approach in light of the DOE/FE's discretion to condition its authorizations.

II. The Cook Inlet Producers Have Always Taken Responsibility and Been Compensated for Providing Deliverability; ENSTAR and the Other Utilities Cannot Assume that Burden Within the Export Period.

The Applicants' Answer suggests that the DOE/FE's prior order advised ENSTAR and the electric utilities that development of the production and infrastructure necessary to meet the community's deliverability needs is the responsibility of Cook Inlet area utilities, not the

responsibility of the producers.[5] In fact, the DOE/FE Opinion and Order No. 1473 does not assign to ENSTAR responsibility for meeting the deliverability needs of its customers by itself, and any such assignment would be inconsistent with history and industry practice in Cook Inlet.

For almost 50 years, the Applicants (or their predecessors) and a few other gas producers have contracted to provide the deliverability that ENSTAR requires and to follow ENSTAR's demand curve. They have been fairly paid for providing such deliverability services. In 2001, both Applicants objected to the Regulatory Commission of Alaska ("RCA") approval of ENSTAR's contract with Unocal, arguing that they should have had the business and would have offered a better deal.[6] The Unocal contract is a full requirements contract requiring Unocal to provide gas supplies that follow ENSTAR's load curve (through 2008).

Subsequently, Marathon agreed, pursuant to the APL-5 contract, to be ENSTAR's full requirements supplier beginning when Unocal's obligation expired in 2009. Under the APL-5 contract, Marathon would have supplied its full, pro-rata share of deliverability until about 2016. In recognition of the commitment to develop the resources necessary to supply ENSTAR's requirements, the APL-5 contract would have compensated Marathon at a market-competitive rate. Marathon expended considerable time and expense to support ENSTAR's application for approval of the APL-5 contract. In late 2006, the APL-5 contract was rejected by the RCA, which found the contract's price term to be objectionable.[7] Marathon subsequently exercised its right to terminate the contract.

Given these past and proposed arrangements, there was no reason for ENSTAR to develop costly new storage or similar facilities that, by virtue of its contractual arrangements, it

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5 Answer, p. 33.

6 RCA Order No. U-01-7 (8), dated Oct. 25, 2001.

7 RCA Order No. U-06-02 (15) (Sept. 28, 2006), and RCA Order No. U-06-02 (17) (Dec. 29, 2006).

was unlikely to need for many years, if at all. Instead, the deliverability service required by ENSTAR was embedded in the full requirements commitment made by Unocal and then Marathon.

In fact, it makes good sense for Cook Inlet gas producers to provide the deliverability that ENSTAR and the other utilities need. The producers own or control the infrastructure necessary for economically meeting deliverability requirements. The producers' multiple wells, LNG storage tanks and depleted reservoirs have all been used, directly or indirectly, to satisfy the need for deliverability services. The producers, unlike ENSTAR, also have the expertise to develop additional in-ground storage.

Against this factual backdrop, it is surprising that the Applicants now say that they expect ENSTAR and the other utilities in the Cook Inlet region to assume full responsibility for deliverability.

The other critical factor that the Applicants overlook is timing. Even if ENSTAR suddenly assumed sole responsibility to develop storage facilities on the day the proposed Marathon contract was rejected by the RCA, it is not realistic to expect that development of the necessary infrastructure could be accomplished within the export period. The DOE/FE should bear in mind that emergency delivery curtailments have already been necessary and that, as early as 2009, ENSTAR faces a gap between its projected gas requirements and the quantities producers have committed to make available under various supply contracts. Development of underground storage, which is perhaps the most feasible way to meet winter peaking needs, requires considerable time and resources, especially when ENSTAR and others would be tackling the issue from a standing start. ENSTAR is currently engaged in discussions with producers for its unmet requirements beginning in 2009. ENSTAR has expressed its interest in

the opportunity to work with producers in developing storage options to meet long-term deliverability requirements. The producers have conveyed their interest, but the discussions have yet to result in contractual commitments on these important issues.

In short, if, in fact, a reassignment of responsibility to ensure adequate deliverability were to occur, a sudden and dramatic reassignment of responsibility for deliverability would take time. If this reassignment of responsibility could be accomplished, after allowing sufficient time for the identification and acquisition of suitable sites, the construction of facilities, and the RCA approval process (among other necessary undertakings), it almost certainly would take longer than the proposed 2009-2011 export period for adequate new arrangements to be put in place. Therefore, it is not a satisfactory answer to the current deliverability problem for the Applicants to say that that problem is for the local Cook Inlet utilities to fix. ENSTAR and the Cook Inlet area electric utilities cannot possibly address the shortfall in deliverability by 2009 and probably not even by 2011.

III. The Only Solution That Matches the Correct Legal Standard with the Particular Circumstances in Cook Inlet Is to Impose Appropriate Conditions on the License Renewal.

ENSTAR's Motion to Intervene and Initial Comments described the extensive discretion that the DOE/FE has under Section 3 of the NGA to impose appropriate conditions on LNG export license renewals in order to safeguard the public interest. The conditions requested by ENSTAR are to (a) require the Applicants to establish conclusively that *both* reserves and the ability to deliver those reserves when needed will be sufficient to meet domestic needs, or (b) require the Applicants to limit their exports during periods when available supplies are insufficient to meet domestic demand.

In asking the DOE/FE to focus on ensuring, from a practical perspective, that local needs can be met before granting the requested export license extension, ENSTAR expects that the

Applicants would be fairly compensated, at market rates, for any natural gas they supply to the ENSTAR, for use by Cook Inlet area consumers. As has been the case in the past, this includes paying fair, market-based compensation for providing the facilities and services necessary to deliver those gas supplies into ENSTAR's system at the moment they are needed.

For the reasons explained above, it would be illogical for the DOE/FE to conclude that the public interest in having sufficient domestic gas supplies can be protected on the basis of a bare showing that there may be gas in the ground to meet projected demand during the export period, with no consideration given to the inability to deliver those reserves in the volumes and on the schedule required by Alaska consumers. The Cook Inlet is isolated from the interstate gas transmission network in the Lower 48 and Canada, and it has severe seasonal weather swings. Recent experience, particularly in connection with the APL-5 contract, demonstrates that solutions can be reached only with considerable effort and with the cooperation of all stakeholders, including producers, consumers, and the State of Alaska. The DOE/FE should take account of these and other Cook Inlet area realities and fashion a balanced order that preserves the Applicants' opportunities to profitably develop and export their resources, while simultaneously protecting domestic consumers from shortages and wintertime delivery shortfalls.

ENSTAR's request that DOE/FE issue an appropriately conditioned and therefore balanced order extending the LNG Facility's export license is intended to reflect the realities of the Cook Inlet market and therefore satisfy the public interest test applicable to the extension sought by the Applicants. On one hand, ENSTAR and the other intervenors have demonstrated the existence of legitimate concerns about Cook Inlet area gas supplies and deliverability of those gas supplies during peak periods. On the other hand, ENSTAR acknowledges the importance of the LNG Facility in providing a source of natural gas supplies during peak

periods, helping to ensure that those supplies reach Cook Inlet area customers when needed, and serving as a source of current and future demand that is essential to the near- and long-term health of the Cook Inlet and other parts of the State as a source of reliable gas supplies. While there may be other appropriate solutions to the issues raised by ENSTAR, an order that includes the conditions recommended by ENSTAR would properly balance these considerations.

Respectfully submitted,

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Dated: June 28, 2007

VERIFICATION

STATE OF ALASKA)
) ss:
THIRD JUDICIAL DISTRICT)

Thomas East, being first duly sworn, on oath states that he is the Regional Vice President of ENSTAR Natural Gas Company and is authorized to execute this verification; that he has read the foregoing document and that all allegations of fact therein contained are true and correct to the best of his knowledge, information, and belief.

Thomas East

Subscribed and sworn to before me this 26 day of June, 2007

Notary Public, State of Alaska

My Commission Expires: August 1, 2009

CERTIFICATE OF REPRESENTATIVE

I hereby certify that I am a duly authorized representative of ENSTAR Natural Gas Company and that I am authorized to sign and file with the Office of Fossil Energy, on behalf of ENSTAR Natural Gas Company, the foregoing document.

Dated at Washington, D.C. this 28th day of June, 2007.

John S. Decker