

148 FERC ¶ 61,164
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Pivotal LNG, Inc.

Docket No. RP14-732-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued September 4, 2014)

1. On April 11, 2014, Pivotal LNG, Inc. (Pivotal) filed a petition¹ requesting the Commission declare that Pivotal's and its affiliates' liquefaction of natural gas and sales for resale of liquefied natural gas (LNG) that will be delivered by truck, rail, and other non-pipeline modes of transportation to end users will not constitute jurisdictional transportation or sales of natural gas in interstate commerce under sections 1(b) and 7 of the Natural Gas Act (NGA)² and that their LNG facilities will not be deemed LNG terminals under NGA section 3 by reason of the LNG being transported in interstate commerce by waterborne vessel at some point after leaving their facilities. For the reasons discussed below, we find that with the possible exception of certain sales for resale, the facilities and activities described in Pivotal's petition will not be subject to the Commission's jurisdiction.

¹ Pivotal's *Petition for a Declaratory Order (Petition)* was submitted pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207 (2014).

² 15 U.S.C. §§ 717-717z (2012). NGA section 1(b) declares the Commission's jurisdiction shall apply to the transportation and the sale for resale of gas in interstate commerce; NGA sections 4 and 7 describe how the Commission is to exercise aspects of that jurisdiction. We will refer herein to 'section 7' to designate the full range of the Commission's regulatory authority over the transportation and sale for resale of gas in interstate commerce.

I. Background

2. Pivotal operates a natural gas liquefaction and storage facility in Trussville, Alabama from which it makes sales of LNG.³ The Commission has previously had cause to contemplate Pivotal's jurisdictional status. In 2011, in anticipation of acquiring the Trussville facility from an NGA-exempt municipality, Pivotal submitted an application for NGA section 7 certificate authorization to operate the facility. The Director of the Office of Energy Projects (OEP) dismissed the application, finding the activities Pivotal proposed to undertake would not be subject to the Commission's jurisdiction.⁴ Here, Pivotal proposes to expand the scope of the activities described in 2011. More specifically, to date, LNG leaving Pivotal's Trussville facility has been transported by surface vehicle to end-users within the contiguous 48 states; going forward, Pivotal anticipates LNG leaving its facility may also be transported by waterborne vessel to end users in a non-contiguous state or territory (e.g., Hawaii or Puerto Rico). In addition, Pivotal anticipates purchasing LNG from other parties and reselling it. Pivotal asks that we declare these additional activities would be nonjurisdictional.

3. In addition to Pivotal's own Trussville facility, Pivotal's petition concerns three other existing liquefaction and storage facilities – the Riverdale LNG facility in Riverdale, Georgia; the Cherokee LNG facility in Ball Ground, Georgia; and the Macon LNG facility in Macon, Georgia – that are not currently subject to the Commission's jurisdiction. It also concerns a fourth existing facility,⁵ the Chattanooga LNG facility in Chattanooga, Tennessee, which is exempt from Commission jurisdiction under section 1(c) as a Hinshaw facility, but which holds a limited jurisdiction blanket certificate under section 284.224 of our regulations to provide certain liquefaction and sales services.⁶

³ Pivotal is a wholly-owned subsidiary of AGL Resources Inc. (AGL Resources). Pivotal's affiliates that operate the other LNG facilities described in its petition are also subsidiaries of AGL Resources.

⁴ *Pivotal LNG*, 137 FERC ¶ 62,108 (2011).

⁵ Pivotal's facility can liquefy 5,000 thousand cubic feet (Mcf) per day (Mcf/d) and store 400,000 Mcf; the other four facilities can liquefy 10,000 Mcf/d and store between 1.2 and 2.5 billion cubic feet (Bcf) of gas.

⁶ See *Chattanooga Gas Company*, 44 FERC ¶ 62,315 (1988) (authorizing Chattanooga to provide liquefaction service to Austell Natural Gas Company and United Cities Gas Company) and 53 FERC ¶ 61,225 (1990) (authorizing Chattanooga to provide LNG sales service to East Tennessee Natural Gas Company). Atlanta Gas Light Company, Chattanooga Gas Company, and Pivotal Utility Holdings, Inc. d/b/a Elizabethtown Gas clarify that "Chattanooga is authorized to provide customer-specific liquefaction and sales service, but Chattanooga does not currently provide any FERC-

Pivotal asks us to find that if LNG leaving any of these LNG facilities is subsequently transported by waterborne vessel to another state, territory, or the District of Columbia,⁷ this will not render the LNG facility an “LNG terminal” as defined by section 2(11) of the NGA, making it subject to the Commission’s jurisdiction under section 3.

4. Pivotal states that the LNG involved in the transactions described in its petition will be “consumed as vehicular fuel, other end-use fuel, or feedstock,”⁸ and none of the LNG will be regasified and injected into an interstate pipeline. Pivotal asserts the Commission has adopted the position that the section 1(d) exemption from our jurisdiction over certain transportation and sales for resale of gas in interstate commerce applies not only to gas destined to be consumed as vehicular fuel, but also to gas destined for non-vehicular use as well.⁹ In support of this assertion, Pivotal cites the 2011 Director’s order, which found Pivotal’s proposed activities would not be subject to the

jurisdictional services other than occasional sales of excess LNG, which sales are pursuant to the Commission’s blanket marketer sales authorization.” Atlanta LDCs’ *Motion to Intervene and Comments* at 5.

⁷ As defined by NGA section 2(7): “‘Interstate commerce’ means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.” As defined by NGA section 2(4): “‘State’ means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.” We will use ‘state’ herein to also denote the District of Columbia and organized territories.

⁸ Pivotal’s *Petition* at 2.

⁹ Section 1(d) of the NGA states:

The provisions of this Act shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is –

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

NGA section 2(10) defines “vehicular natural gas” as “natural gas that is ultimately used as a fuel in a self-propelled vehicle.”

Commission's section 7 jurisdiction even though the LNG leaving the liquefaction facility was not intended to be used solely for vehicular fuel.

5. Pivotal further asserts that whether the LNG is produced at a jurisdictional or non-jurisdictional facility should not be a factor affecting our jurisdiction under sections 1(b) and 7 of the NGA with respect to Pivotal's sales of LNG to third parties, any sales of the LNG by those third parties for resale, or the transportation of the LNG "in the context of the LNG transactions covered by this Petition."¹⁰ The scenarios described in Pivotal's petition all involve the transportation of the LNG at some point by waterborne vessel in interstate commerce. The scenarios also involve transportation by other non-pipeline modes of transportation, such as trucks and rail cars. Interstate pipelines are the only mode of transportation that Pivotal specifically states will *not* be used to deliver the gas to the ultimate end users.¹¹ Pivotal states that "[i]t is possible, however, that there will be regasification of LNG for delivery into a local distribution company's ('LDC') pipeline, in order to serve the LDC's 'peaking' needs."¹²

II. Notice, Intervention, and Comment

6. Notice of Pivotal's petition was issued on April 14, 2014, and published in the *Federal Register* on May 1, 2014.¹³ Timely, unopposed motions to intervene were filed by Atlanta Gas Light Company, Chattanooga Gas Company (Chattanooga), and Pivotal Utility Holdings, Inc. d/b/a Elizabethtown Gas (collectively, Atlanta LDCs) and by Floridian Natural Gas Storage Company, LLC (Floridian). Floridian submitted comments on the petition, to which Pivotal submitted a reply.

III. Commission Response

7. The Commission authorizes and regulates the transportation and sale for resale of natural gas in interstate commerce and facilities used for such transportation primarily under NGA section 7. We authorize and regulate natural gas facilities used to import or export gas under NGA section 3. In interpreting the scope of our NGA section 7 jurisdiction, the Commission has determined that our regulatory authority only applies to the transportation in interstate commerce of gas by pipeline, and does not apply to gas

¹⁰ Pivotal's *Petition* at n.20.

¹¹ *Id.* at 9-10.

¹² *Id.* at n.18.

¹³ 79 Fed. Reg. 24,721 (May 1, 2014).

transported by other means.¹⁴ In interpreting the scope of our NGA section 3 jurisdiction, we have exercised our regulatory authority over the siting, construction, and operation of facilities at the United States' international borders when a pipeline is used to effect imports or exports, but not when gas is carried across the border by other means.¹⁵

A. NGA Section 1(d)'s Exemption for Vehicular Gas

8. As an initial matter, we turn to the 2011 *Pivotal* decision, in which the Director of OEP determined Pivotal's proposed operations would not require section 7 certificate authorization.¹⁶ While the Director noted the potential for some of the LNG trucked from Pivotal's Trussville facility to be consumed as vehicular fuel, the implications of that were not discussed in the order and the section 1(d) vehicular fuel exemption was not invoked. Rather, the result relied on the understanding that all of the LNG sold by Pivotal would be delivered by trucks directly to end users, and thus "no gas leaving the LNG facility (whether in liquid or vapor form) will be introduced back into a pipeline system for further transportation."¹⁷ Because the 2011 decision made no reference to

¹⁴ See *Exemption of Certain Transport and/or Sales of LNG from the Requirements of Section 7(c) of the NGA*, 35 FR 3076 (Feb. 17, 1970) and *Order Terminating Proposed Rulemaking Proceeding*, 49 FPC 1078 (1973).

¹⁵ Note that in addition to conventional pipelines to and from Canada and Mexico, a pipeline may reach yet another country. We have approved two projects to construct a pipeline from Florida to receive gas from the Commonwealth of the Bahamas, but both were terminated prior to construction. See *Tractebel Calypso Pipeline, LLC*, 106 FERC ¶ 61,273, *Calypso U.S. Pipeline, LLC*, 106 FERC ¶ 61,273 (2004), 118 FERC ¶ 61,051, 119 FERC ¶ 61,119 (2007), and 137 FERC ¶ 61,098 (2011), and also *AES Ocean Express, LLC*, 103 FERC ¶ 61,030, 103 FERC ¶ 61,326 (2003), 106 FERC ¶ 61,090 (2004), and 111 FERC ¶61,219 (2005) .

¹⁶ Questions regarding potential Commission jurisdiction under NGA section 3 were not raised by the 2011 application, given Pivotal's representation that no gas leaving the LNG facility would be exported and the absence of any indication that the LNG leaving Pivotal's facilities might be transported at some point in interstate commerce by waterborne vessel.

¹⁷ 137 FERC ¶ 62,108. The order acknowledged that the qualification that no gas be returned to a pipeline for further transportation did not apply to boil off and tail gas (inevitable byproducts of Pivotal's liquefaction and storage), which would be delivered to the NGA-exempt Trussville municipality's pipeline for delivery to and consumption by its retail customers. The decision we reach herein presumes that the facilities identified in Pivotal's petition will similarly deliver any gas vapor produced as a byproduct of liquefaction and storage into a municipal or other NGA-exempt pipeline (or will

section 1(d), Pivotal's interpretation of the outcome of the 2011 order to mean that the section 1(d) vehicular fuel exemption applies to other end uses is unwarranted.

9. We will clarify that section 1(d) applies, as the words of the statute state, exclusively to gas which will be consumed as vehicular fuel, and not to gas consumed in any other manner. Further, we point out that section 1(d) provides that a person that is not otherwise a natural gas company or that is subject primarily to regulation by a state commission, will not become subject to the Commission's section 7 jurisdiction over natural gas companies "solely" by reason of transporting and selling vehicular fuel for resale in interstate commerce. However, since Pivotal does not purport that all of the LNG it will liquefy and sell is to be used *solely* as vehicular fuel or that it is subject to state regulation, any jurisdictional sales for resale (as discussed below) would cause Pivotal to become a natural gas company, which would, in turn, prevent even its liquefaction and sales for resale of LNG that *is* to be used as vehicular fuel from being exempted from section 7 jurisdiction by section 1(d).

10. Further, while the Hinshaw facilities operated by Pivotal's affiliates and their sales for resale of gas consumed in their own states are exempted from section 7 jurisdiction by section 1(c), if they make any jurisdictional sales for resale of gas that is not consumed in their states or, like Chattanooga, engage in jurisdictional transportation under a blanket certificate of limited jurisdiction issued under section 284.224 of the Commission's regulations, they would become jurisdictional natural gas companies for purposes of those activities. However, because the affiliates are primarily subject to state regulation, their transportation of gas in their pipeline systems and their liquefaction and sales for resale of the gas as LNG that will be used ultimately as vehicular fuel will be exempted by operation of section 1(d), even though not all of the LNG will be used as vehicular fuel.¹⁸

alternatively reliquefy the gas vapor). Similarly, if Pivotal reactivates the currently non-operational 1,500-foot long pipeline that it acquired along with the liquefaction facilities from the Utilities Board of the City of Trussville in order to have a second source of natural gas to supply its LNG sales operations (*Petition* at n.21), Pivotal's use of the pipeline will not affect our jurisdictional findings so long the pipeline is only used to receive gas and all of its unavoidable boil off and tail gas continues to be delivered to Trussville's NGA-exempt municipal gas utility system.

¹⁸ Also, as explained in *Shell U.S. Gas & Power, LLC (Shell)*, 148 FERC ¶ 61,163, at P 19 (2014), issued concurrently with this order, section 1(d) can only shield a person's activities and facilities from becoming subject to section 7 jurisdiction by preventing the person from becoming a "natural-gas company." The term "natural gas company," which is defined in NGA section 2(b) as a person that transports or sells gas for resale in interstate commerce, is only relevant in determining whether a person is subject to

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B. NGA Section 3 Jurisdiction over Facilities

11. NGA section 3(e)(1) states that “[t]he Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.” NGA section 2(11) defines “LNG terminal” to include:

all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include –

(A) waterborne vessels used to deliver natural gas to or from any such facilities; or

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 7.

Pivotal is concerned this definition could be interpreted to include the five inland liquefaction facilities described in its petition if LNG sent out by these facilities is subsequently transported by waterborne vessel to another state.

12. Pivotal states that because the five liquefaction plants are not used to import or export LNG, “they do not fall within the scope of NGA Section 3 jurisdiction as that jurisdiction traditionally has been applied,” and insists this traditional application should continue regardless of EPAct 2005’s introduction of “the concept of transportation in interstate commerce by waterborne vessel into NGA Section 3.”¹⁹ Pivotal asserts that continuing to exclude the liquefaction plants from the scope of section 3 would be consistent with *The Gas Company, LLC (The Gas Company)*, in which we disclaimed section 3 jurisdiction over facilities that would be used to receive LNG transported in interstate commerce by waterborne vessel because the facilities “would not constitute an LNG terminal as contemplated by Congress.”²⁰ Pivotal adds that no public interest would be served by the Commission’s asserting jurisdiction over the five inland liquefaction plants, and that no regulatory gap would be created by the Commission not

section 7’s certification requirements which apply to “natural gas companies.” Section 3 jurisdiction applies more broadly, stating that “no person” shall import or export gas without prior authorization from the Commission, and does not depend on whether a person is also a natural gas company.

¹⁹ Pivotal’s *Petition* at 12.

²⁰ 142 FERC ¶ 61,036, at P 17 (2013).

asserting jurisdiction because these plants are and will remain subject to state and federal regulation.²¹

13. Prior to EPAAct 2005's introducing the NGA section 2(11) definition of "LNG terminal," there was a clear demarcation between section 7, which was confined to activities and facilities in interstate commerce, and section 3, which applied only to activities and facilities operated in foreign commerce. We would have had no reason to contemplate asserting section 3 jurisdiction over the facilities identified in Pivotal's petition because they are not and will not be used to import or export gas.²² However, the addition of section 2(11) raises the question of whether these LNG facilities would be subject to our jurisdiction under section 3 should they be used to liquefy gas that will be "transported in interstate commerce by waterborne vessel."

14. In our order in *Shell*, we consider how section 2(11) might alter how we have traditionally exercised jurisdiction over LNG facilities. We note in *Shell* that to date, the

²¹ We concur with Pivotal's observation that although, as we determine herein, the Commission will not have NGA jurisdiction over Pivotal's and Hinshaw pipeline companies' LNG facilities, other federal, state, and local agencies will have authority over these facilities. For example, pipeline systems that transport natural gas, regasification and liquefaction facilities, and the transportation of LNG by trucks and railcar are subject to the U.S. Department of Transportation's (DOT) regulations and requirements addressing the transportation and storage of hazardous materials. DOT's regulations are set forth in Title 49 of the U.S. Code of Federal Regulations. DOT's Office of Hazardous Materials Safety develops and coordinates implementation of hazardous materials regulations with DOT's various operating administrations, including the Office of Pipeline Safety, Federal Highway Administration, and Federal Railroad Administration. Further, the waterborne vessels that may transport LNG sold by Pivotal and its affiliates in U.S. waters will be subject to the U.S. Coast Guard's requirements and restrictions. Finally, the storage and transportation of LNG is subject to regulations and requirements of the U.S. Environmental Protection Agency under its various enabling statutes, including the Clean Water Act, Clean Air Act, and the Hazardous Materials Transportation Act.

²² Pivotal cites our observation in *The Gas Company* that:

Historically, NGA section 3 has only come into play when gas is transported between the U.S. and another country, not when gas is transported within the U.S. To date, *foreign* commerce, i.e., gas imports and exports and the facilities used to import or export gas, has been subject to section 3, whereas *interstate* commerce, gas transported across state lines and the facilities used to do so, has been subject to section 7. 142 FERC ¶ 61,036 at P 9.

only facilities other than border-crossing pipelines for which the Commission has granted section 3 siting, construction, and operating authority have been coastal LNG facilities that are served by ocean-going, bulk-carrier LNG tankers. Each of these facilities has also been connected to pipelines that deliver gas to or take gas away from the terminal.²³ In *Shell*, we find that the purpose of section 2(11)'s definition of "LNG terminal" as including facilities used in relation to natural gas that is "transported in interstate commerce by waterborne vessel" is to make clear that the Commission has jurisdiction over the natural gas facilities on both ends of the interstate transportation of LNG when a waterside liquefaction facility that has received gas by pipeline will send out LNG by waterborne vessel to a natural gas facility in a second state that will send the gas out by pipeline for ultimate consumption within that state. We explain in *Shell* that absent the addition of section 2(11) and 3(e) to the NGA, this scenario presented a potential regulatory gap, because the Commission would potentially only have had the ability to exercise jurisdiction, under section 7, over the facilities in the first state, since it could be argued that the receiving facilities and pipeline in the second state would be exempt from Commission jurisdiction under section 1(b) as local distribution facilities or under section 1(c) as Hinshaw facilities.²⁴

15. The LNG facilities identified by Pivotal will not fit this description, because they will not be used to receive LNG by waterborne vessel in interstate commerce which will be injected into a pipeline system for consumption entirely within their respective states. Therefore, we find the LNG facilities described in the Pivotal's petition will not be LNG terminals as defined by section 2(11), and consequently will not be subject to our section 3 jurisdiction over LNG terminals.

16. Moreover, as we also explain in *Shell*,²⁵ the Commission has interpreted and exercised its section 3 jurisdiction over import/export facilities consistent with how it has interpreted and exercised its section 7 jurisdiction over facilities used to transport gas in interstate commerce. Specifically, the Commission has long-standing precedent finding that its section 7 jurisdiction does not extend to facilities used solely for the purpose of liquefying gas to transform it into an end product for sale and delivery in its liquid state to end users, with no intent for any of the LNG to be reintroduced into a pipeline.²⁶ Thus,

²³ 148 FERC ¶ 61,163 at P 39.

²⁴ *Id.* P 48. If the receiving facility and/or pipeline in the second state could not qualify for a section 1(b) exemption because it was not a local distributor or for a section 1(c) exemption because no state commission had jurisdiction over its services, then potentially, activities and facilities in both states would be subject to our jurisdiction under section 7.

²⁵ *Id.* P 47.

²⁶ *See, e.g., Air Products and Chemicals, Inc.*, 58 FERC ¶ 61,199 (1992).

we find that the same rationale would exempt any of the liquefaction facilities described by Pivotal from section 3 jurisdiction, so long as all of the LNG leaving the facilities is delivered in its liquid state to the ultimate end users in the United States.

C. NGA Section 7 Jurisdiction over the Transportation and Sale of LNG

17. We have explained above why Pivotal is incorrect in arguing that section 1(d), which exempts the sale or transportation of vehicular natural gas from the Commission's section 7 jurisdiction, shields all of the activities and facilities described in Pivotal's petition from potential Commission jurisdiction. However, while we reject Pivotal's argument that the 2011 *Pivotal* decision implicitly extended the section 1(d) exemption for gas used as vehicular fuel to cover gas used as fuel for compressors and other industrial equipment, that decision does support a finding that Pivotal's described activities and facilities will not be subject to NGA jurisdiction over the transportation and sale for resale of natural gas in interstate commerce. As described above, the Director of OEP dismissed an application by Pivotal for a certificate under section 7 to authorize its operation of liquefaction and storage facilities that had previously functioned as non-jurisdictional peak-shaving facilities for a municipal gas system. Based upon Pivotal's representation that: (1) all gas leaving the facility would do so by truck as LNG; (2) all LNG leaving the facility would be used as vehicular or other end-use fuel; and (3) no LNG leaving the facility would enter a pipeline for further transportation, the Director found that Pivotal's transportation of LNG and facilities would not be subject to the Commission's section 7 jurisdiction.

18. *Pivotal* reflects the rationale in *Air Products and Chemicals, Inc. (Air Products)*,²⁷ where the issue was whether Air Products needed a section 7 certificate to authorize its liquefaction of gas to produce refrigerated liquid methane (RLM) for delivery directly into railroad engines and to the operators of truck fleets and municipal transit systems with RLM-burning capability. The Commission found that there are situations where the liquefaction of gas is not subject to section 7 jurisdiction over the transportation of gas because the purpose of liquefying the gas is to transform it into what is, in effect, an end product, with no intent for any of that LNG to be reintroduced into a pipeline.²⁸ As

²⁷ *Id.*

²⁸ In *Air Products*, the Commission stated that in *Marathon Oil Company (Marathon)*, 53 FPC 2,164, at 2,175 (1975), it had found that an LNG plant in Kenai, Alaska, would need section 7 certificate authorization to liquefy gas that would be transported by cryogenic tanker to Oregon because the liquefaction service was necessary in order for the gas to reach the pipeline system of the Hinshaw pipeline purchasing the gas for its local distribution system in Oregon, and the liquefaction service in Alaska therefore would be "instrumental in facilitating the interstate transportation of the gas" by

explained in *Air Products*, the concern when presented with LNG facilities like those described by Pivotal is whether a circumvention of NGA jurisdiction over the interstate transportation of gas by pipeline could result “merely because liquefaction of the gas was interposed on what would otherwise have been a continuous flow of natural gas in an interstate pipeline system.”²⁹ The facilities and services Pivotal posits resemble those in *Air Products*, where we found our jurisdiction would not extend to liquefaction facilities, stating that they “would not constitute an integral part of the interstate flow of gas because these facilities will not liquefy the gas to facilitate transportation of the gas [by pipeline]. Rather, they will transform the gas into what is, in effect, an ‘end product.’”³⁰

19. The Director’s 2011 order did not address whether any of Pivotal’s sales of LNG for resale might be subject to section 7 jurisdiction. Pivotal now asks that we declare its sales for resale, as well as any of its affiliates’ sales for resale of LNG that would not be exempted from section 7 jurisdiction by their Hinshaw exemption under section 1(c), will be exempt from section 7 jurisdiction by operation of section 1(d)’s exemption for vehicular fuel. Again, we have explained above that section 1(d) applies only to gas that will be used as vehicular fuel, and if any of Pivotal’s sales for resale will be of LNG that will not be used as vehicular fuel, then none of its sales will be exempt from our section 7 jurisdiction by reason of section 1(d). We have also explained that on the other hand, because Pivotal’s Hinshaw affiliates are primarily subject to state regulation, their sales for resale of LNG ultimately used as vehicular gas will be exempted by section 1(d) from our section 7 jurisdiction, to the extent that gas is not deemed to have been consumed in their respective states, even if they make other sales for resale of gas, including LNG, that

pipeline. 58 FERC ¶ 61,199 at 61,618. Pivotal represents that all the LNG produced by it and the other identified liquefaction plants will sold as a final product, moved by non-pipeline modes of transport, and delivered to end-users in its liquid state for use as fuel for vehicles and industrial equipment.

²⁹ *Id.* at 61,619 (emphasis added). In *Air Products*, the Commission explained that whereas the Alaskan liquefaction plant in *Marathon* was analogous to a jurisdictional compressor station because it facilitated the interstate transportation of gas by converting it to a form that could be delivered by cryogenic tanker to Oregon for revaporization and injection into a Hinshaw pipeline’s system, 58 FERC at 61,618, *Air Products’* RLM facility more readily lent itself to the jurisdictional analysis that the Commission applies in determining whether a processing plant is jurisdictional, which turns on whether the processing at the plant is necessary to make the gas fit for safe and efficient transportation by pipeline. *Air Products’* processing (i.e., liquefaction) of gas was for economic reasons (i.e., to sell RLM as final fuel product), rather than “essential to make the gas to make the gas fit for pipeline transportation.” *Id.* at 61,619 (quoting *Texas Eastern Transmission Corp.*, 43 FERC ¶ 61,044, at 61,129 (1988)).

³⁰ 58 FERC ¶ 61,199 at 61,619.

are subject to the Commission's jurisdiction because they are not for vehicular uses and do not qualify as exempt sales for other reasons.

20. Notwithstanding any exemptions from jurisdiction provided by NGA section 1(d), the only sales for resale of domestic gas that are still subject to the Commission's section 1(b) jurisdiction over sales for resale in interstate commerce, section 4 rate conditions, and 7 certification requirements are sales for resale that do not qualify as NGA-exempt "first sales" as defined in section 2(21) of the Natural Gas Policy Act of 1978 (NGPA).³¹ Gas sales by interstate pipelines, intrastate pipelines, LDCs, and their affiliates qualify as first sales provided that the gas sold is produced by one of these entities or one of their affiliates.³² However, if the gas sold for resale by an interstate pipeline, LDC, or an affiliate thereof is produced by a non-affiliated entity, the Commission would have jurisdiction over that sale. Pivotal's identified Hinshaw affiliates are LDCs as well as Hinshaw pipelines, since they provide local distribution service in addition to transporting and selling gas that they do not locally distribute but which is consumed in their states. Thus, Pivotal's and its affiliates' sales for resale of gas that is not produced by an affiliated entity would be subject to our section 7 jurisdiction.³³

21. However, following the legislative decontrol of prices for most gas sales,³⁴ the Commission determined there was no longer a need to impose regulatory requirements on sales other than those by interstate pipelines. Thus, section 284.402 of our regulations provides for the automatic issuance of section 7 blanket marketing certificates to authorize any persons who are not interstate pipelines to make sales for resale of gas remaining subject to section 7 jurisdiction and charge negotiated rates. To the extent Pivotal and its affiliates' sales for resale are subject to section 7 jurisdiction, those sales will be authorized under the provisions of our section 284.402 regulations.

³¹ 15 U.S.C. § 3301(21)(6) (2012).

³² We note that once gas has been sold to and been in the possession of a pipeline, LDC, or retail customer, the chain of first sales is broken, and no subsequent sale of the gas can qualify under the general rule as a first sale, even if the seller or one of its affiliates produced the gas.

³³ See *In the Matter of Amendments to Blanket Sales Certificates*, 107 FERC ¶ 61,174, at P 19 (2004).

³⁴ Decontrol of wellhead gas prices was begun by the NGPA. Decontrol of gas prices was completed by the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60; 103 Stat. 157 (1989), by amending section 601(a)(1)(A) of the NGPA to provide:

For purposes of Section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to any natural gas solely by reason of any *first sale* of such natural gas. (emphasis added).

22. Pivotal maintains that whether the LNG is produced at a jurisdictional or non-jurisdictional facility should not affect our determinations herein regarding jurisdiction under sections 1(b) and 7 of the NGA with respect to Pivotal's sales of LNG to third-parties, any sales of the LNG by those third parties for resale, or the transportation of the LNG "in the context of the LNG transactions covered by this Petition."³⁵ As described in Pivotal's petition, the scenarios all involve the transportation of the LNG by non-pipeline modes of transportation such as trucks and rail cars, in addition to transportation of the LNG at some point by waterborne vessel in interstate commerce. Interstate pipelines are the only mode of transportation that Pivotal specifically states will *not* be used to deliver the gas to the ultimate end users.³⁶ Pivotal states that "[i]t is possible, however, that there will be regasification of LNG for delivery into a local distribution company's ('LDC') pipeline, in order to serve the LDC's 'peaking' needs."³⁷

23. As discussed above, the Commission's concern when presented with liquefaction facilities that will receive gas from a pipeline system and send out LNG by truck or another non-pipeline mode of transportation is whether failure to assert jurisdiction over the liquefaction facilities would allow circumvention of the Commission's NGA jurisdiction over the interstate transportation of gas by pipeline. Based on Pivotal's description of the planned LNG transactions, we find no reason to think any of them present the potential for circumvention of the Commission's jurisdiction. For example, an otherwise non-jurisdictional Hinshaw company, such as one of Pivotal's four identified affiliates, would need section 7 certificate authority in a situation where LNG from its facility would be delivered by truck to an LDC or industrial end user under a jurisdictional gas exchange arrangement that would result in displacement of gas being transported on an interstate pipeline. However, the Commission would not seek to assert jurisdiction over the trucking.³⁸

24. Finally, we address the assertion by Floridian³⁹ that some of the deliveries of LNG as contemplated in the transactions described by Pivotal may require the intermediate use

³⁵ *Petition* at n.20.

³⁶ *Id.* at 9-10.

³⁷ *Id.* at n.20.

³⁸ *See Shell* 148 FERC ¶ 61,163 at P 29, n. 52, discussing circumstances that have caused the Commission to find section 7 jurisdiction over the liquefaction of gas by otherwise non-jurisdictional companies for delivery by truck or waterborne vessel to an LDC or Hinshaw pipeline.

³⁹ Floridian has been granted certificate authorization under section 7 of the NGA to construct storage, liquefaction, revaporization, and LNG truck-loading facilities in

of facilities to receive and store the LNG, and some of those facilities may need to be constructed specifically for such purpose, particularly facilities to be located at ports where waterborne vessels would be loaded with containers of LNG. As an example, Floridian states that a storage tank may be necessary at a dock where LNG delivered to that location by trucks will be transferred to a barge.

25. Floridian asserts that if the Commission disclaims jurisdiction over the liquefaction facilities that will be involved in these arrangements, such disclaimer should not encompass other facilities that have not been identified by Pivotal. Floridian asserts the Commission cannot evaluate these unidentified facilities to determine if they will be used for jurisdictional operations and, if so, ensure that they will meet all applicable engineering and environmental requirements imposed on natural gas facilities regulated by the Commission. Floridian also asserts that to the extent any disclaimer of jurisdiction by the Commission is based on Pivotal's representation that all of the LNG will be delivered to end users without ever reentering pipeline after leaving the liquefaction facilities, the Commission needs to consider how it will enforce such parameters on the LNG commerce.

26. The Commission's declaration in this proceeding is based on the fact patterns presented. The reasoning set forth herein will be applicable only to other situations with the same underlying relevant characteristics. Further, we reject Floridian's suggestion that the Commission cannot disclaim jurisdiction based on end use in the absence of perfect knowledge that the relevant parameters will be met. As is always the case, should

Florida. *See Floridian*, 124 FERC ¶ 61,214 (2008) (order granting certificate), and 140 FERC ¶ 61,167 (2012) (order amending certificate). Floridian will receive its storage customers' gas from interconnections with two interstate pipelines and liquefy the gas for storage as LNG. Although Floridian's facilities will include LNG truck-loading equipment, most of the LNG in storage will be revaporized and reinjected into the interstate pipeline grid. On August 15, 2013, the Commission issued a letter order granting Floridian an extension until August 29, 2014, to complete construction and make its authorized facilities available for service. *See* the August 15, 2013 letter order issued in Docket No. CP08-13-000 by the Director of the Division of Pipeline Certificates, Office of Energy Projects. On September 4, 2013, Floridian filed an application to amend its existing authorization to modify its facilities by substituting a 1 Bcf storage tank for the initially planned 4 Bcf tank and reducing the associated vaporization. That application is pending. On August 7, 2014, Floridian filed a request for a further extension of time, which was granted on August 11, 2014, providing Floridian until August 29, 2015 to complete construction of its authorized facilities and make them available for service.

any party act in a manner that implicates the Commission's jurisdiction, we will not hesitate to take appropriate action.⁴⁰

IV. Summary

27. For the reasons discussed herein, we find that: (1) Pivotal's described transportation of LNG by non-pipeline means will not be subject to our jurisdiction; (2) certain of Pivotal's sales for resale may be subject to our jurisdiction, and if so would be authorized under the automatic blanket certificate provided by section 284.402 of our regulations; and (3) Pivotal's LNG liquefaction and storage facilities and the other similar facilities described in the petition will not become "LNG terminals" as defined by section 2(11) and will not become subject to our jurisdiction under section 3 as a result of sending out LNG by surface vehicle that is subsequently transferred to and transported by waterborne vessel to another state.

The Commission orders:

Pivotal's petition for a declaratory order is granted in part and denied in part as discussed in the body of this order.

By the Commission. Commissioner Bay is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴⁰ We note that, as discussed above, if LNG liquefied by Pivotal, one of its Hinshaw affiliates, or another non-jurisdictional company is delivered by a non-pipeline mode of transportation to an LDC or Hinshaw pipeline, rather than directly to the ultimate end user, that would not cause the liquefaction facility to become subject to our section 7 jurisdiction unless the LNG transported to the LDC or Hinshaw pipeline by a non-pipeline mode of transportation would displace gas transported on an interstate pipeline, be part of a jurisdictional gas exchange, or circumvent in some other way the Commission's NGA jurisdiction over the interstate transportation of gas by pipeline, thus making it necessary for the Commission to assert jurisdiction over the liquefaction facility and/or the LDC or Hinshaw pipeline.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pivotal LNG, Inc.

Docket No. RP14-732-000

(Issued September 4, 2014)

BAY, Commissioner, *concurring*:

I concur with the majority's determination that Pivotal LNG, Inc.'s proposed activities do not fall within the Commission's jurisdiction. I write separately to reiterate my disagreement with the majority's construction of sections 2(11) and 3(e)(1) of the Natural Gas Act for the reasons stated in my dissent from *Shell U.S. Gas & Power, LLC*, RP14-52-000. Nevertheless, here the plain language of those sections establishes that Pivotal's proposed activities fall outside the Commission's jurisdiction over "LNG terminals."

In situations where natural gas will not be transported in foreign commerce, the Commission's jurisdiction under section 3 of the Natural Gas Act extends to "LNG terminals" that "are used to receive" or "transport" natural gas that is "transported in interstate commerce by waterborne vessel." *See* 15 U.S.C. §§ 717a(11), 717b(e)(1). Jurisdictional LNG terminals are limited to those having "natural gas facilities located onshore or in State waters." *Id.* § 717a(11). The term "onshore" – particularly when used in conjunction with the phrase "in State waters" – connotes natural gas facilities located on or close to water or the coast. That reading is buttressed by the fact that section 3 applies to LNG that is "transported in interstate commerce by waterborne vessel." *Id.* *See also id.* § 717b-1(e)(1) (requiring the development of an emergency response plan "in consultation with the United States Coast Guard"). Indeed, had Congress intended the Commission to assert jurisdiction over all non-deepwater LNG terminals, it could have said as much instead of specifying "onshore or in State waters."

Here, Pivotal's proposed activities involve five liquefaction plants that are located well inland. All appear to be in excess of 150 miles from the nearest coast. Such facilities are not "onshore" within the meaning of the statute and thus do not constitute FERC-jurisdictional LNG terminals under section 3 of the Natural Gas Act.

Norman C. Bay
Commissioner