148 FERC ¶ 61,163
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Shell U.S. Gas & Power, LLC Docket No. RP14-52-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued September 4, 2014)

1. On October 16, 2013, Shell U.S. Gas & Power, LLC (Shell) filed a petition in Docket No. RP14-52-000.[1] Shell requests the Commission declare that, by virtue of the exemption in section 1(d) of the Natural Gas Act (NGA)[2] for the transportation and sale of natural gas that will be used as vehicular fuel, Shell will not be subject to any provisions of the NGA as a result of its importing liquefied natural gas (LNG) from Canada, liquefying domestic gas, and transporting Canadian and domestic LNG by truck, train, and waterborne vessel between states for the purpose of selling the LNG for use as fuel for vehicles, with any excess LNG being sold as fuel for non-vehicular uses.

2. We find herein, for reasons that do not rely on the exemption provided by NGA section 1(d) for vehicular gas, that Shell will not need to apply to the Commission for authorization under NGA section 3 or section 7 for any of its planned facilities and activities.

I. Notice and Intervention

3. Notice of Shell's petition was published in the *Federal Register* on October 29, 2013.[3] Timely, unopposed motions to intervene were filed by Encana Natural Gas Inc.

[1] Shell'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, *et seq*. (2012).

[3] 78 Fed. Reg. 64,490-01 (Oct. 29, 2013).

(Encana), the Natural Gas Vehicle Coalition (NGV Coalition),[4] Noble Energy, Inc., and Pivotal LNG, Inc. (Pivotal).[5] An untimely motion to intervene was filed by Clean Energy Fuels Corporation, which we will grant, as we find that to do so will not delay, disrupt, or otherwise prejudice this proceeding or the parties thereto.

II. Shell's Request for a Declaratory Order

4. Shell anticipates an expansion in the use of LNG (1) as fuel to propel both waterborne vessels and surface vehicles, and (2) as fuel for non-vehicular uses, e.g., to power compressors and other field equipment used in oil and gas exploration and production operations. This has prompted Shell to prepare to install a natural gas liquefaction unit at its Sarnia Manufacturing Centre on the shore of Lake Huron in Sarnia, Ontario, Canada, with the intent to import LNG into the United States by means of truck, train, and waterborne vessel for use as fuel for vehicular and non-vehicular uses.[6] In addition, Shell contemplates constructing an intermediate docking and storage facility near Detour, Michigan, and possibly similar facilities at other locations on the Great Lakes, to transfer LNG being imported from Canada directly from one moored ship to another, or to transfer Canadian LNG from ship to shore for storage and subsequent distribution by truck or train.

5. Shell is also considering constructing a liquefaction unit at its Geismar Chemical Plant located along the Mississippi River in Geismar, Louisiana, which would liquefy domestically-produced natural gas. Shell indicates that as gas is liquefied it would be loaded from the existing dock at its Geismar chemical plant to waterborne vessels that would transport LNG (1) to other waterborne vessels which would use the LNG as fuel, or (2) to on-shore storage facilities, including facilities in other states, for subsequent

[4] Encana and NGV Coalition each state support for Shell's request.

[5] Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214 (2014).

[6] Shell states that it plans to construct up to 100 LNG fueling stations throughout the United States at existing Travel Centers of America truck stops. Shell expects the Sarnia, Ontario, facility to supply LNG to the upper Midwest region, and potentially beyond, using trucks that can each carry a cargo of up to 10,000 gallons of LNG to fueling stations, which will be equipped with storage tanks that will hold 15,000 to 20,000 gallons of LNG.

transfer to other waterborne vessels for use as fuel, or to trucks or trains for transport to fueling facilities.[7]

6. Shell asks the Commission to find that its importation of Canadian LNG, liquefaction of domestic gas, and transportation and storage of LNG in the United States will not subject Shell to NGA jurisdiction.[8] As the basis for its belief that all the activities and facilities described in its petition will be NGA-exempt, Shell primarily relies on NGA section 1(d), which provides an exemption from the NGA's jurisdiction for the transportation and sale of natural gas by otherwise non-NGA-jurisdictional persons if the gas will be used as vehicular fuel. Shell asserts the Commission has interpreted section 1(d) to also exempt other non-vehicular end uses of gas, and as a result, concludes that all the activities and facilities described in its petition should be NGA-exempt.

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[7] More specifically, Shell explains that its waterborne LNG vessels arriving at a facility on the Great Lakes or leaving the dock at the Geismar, Louisiana, facility, may:

(1) transfer LNG away from a pier in open water to ships that burn the LNG as fuel;
(2) transfer LNG to a vehicle to be used as fuel, with the vehicle moored to Shell's delivery vessel, which would be moored to a pier;
(3) transfer LNG from a pier where Shell's delivery vessel is moored to refuel a ship moored to the other side of the same pier with connections crossing the pier;
(4) transfer LNG from a pier into shore storage, from which vehicles would be refueled from the shore storage across the same pier or, alternatively, from which bunkering vessels would be loaded from the shore storage across the same pier; and
(5) transfer LNG from a pier into shore storage, from which the LNG would be redistributed by truck or train transport to fueling stations.

[8] 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. NGA section 3, which provides for Commission jurisdiction over gas in foreign commerce, is described and discussed below.

III. Commission Response

7. NGA section 1(b) states that the provisions of the NGA shall apply (1) to the transportation and sale for resale of natural gas in interstate commerce and natural gas companies engaged in such transportation and sales and (2) to the importation and exportation of natural gas in foreign commerce and persons engaged in such importation and exportation.[9] Section 3 of the NGA provides that no person shall export or import natural gas without prior Commission authorization.[10] Section 7 of the NGA requires that a natural gas company or person that will be a natural gas company obtain a certificate of public convenience and necessity from the Commission before undertaking jurisdictional transportation and sales for resale of natural gas in interstate commerce or the construction or operation of facilities to engage in natural gas transportation that is subject to the Commission's jurisdiction.[11]

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[9] Prior to the Energy Policy Act of 2005 (EPAct 2005), Pub. L. No. 109-58, 119 Stat. 594 (2005), NGA section 1(b) did not include any reference to foreign commerce. EPAct 2005 amended section 1(b) to clarify that the provisions of the NGA also apply, by reason of section 3, "to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation."

[10] Following enactment of the NGA in 1938, the Commission did not initially view its section 3 jurisdiction over the importation and exportation of natural gas as including jurisdiction over the construction and operation of any facilities needed to import or export gas. Rather, the Commission only exercised jurisdiction over import and export facilities under delegated executive authority to act upon applications for Presidential Permits for the construction and operation of pipeline facilities at the borders with Mexico and Canada to import and export volumes of natural gas in vapor form. *See, e.g., United Gas Pipe Line Company*, 2 FPC 775 (1940), and *Montana Power Company*, 11 FPC 1 (1951). However, in 1974 the D.C. Circuit Court held that the Commission's section 3 "authority over imports of natural gas is at once plenary and elastic," and thus "it is fully within the Commission's power [under NGA section 3], so long as that power is responsibly exercised, to impose on imports of natural gas the equivalent of Section 7 certificate requirements *both as to facilities and ... sales within and without the state of importation."* (*Emphasis added*.) *Distrigas Corporation v. FPC*, 495 F.2d 1057, at 1064 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 834 (1974).

[11] Section 4 of the NGA provides that the rates, terms, and conditions for service filed by natural companies for jurisdictional gas sales and transportation service must be just and reasonable and not unduly preferential or discriminatory. Section 5 of the NGA provides for the Commission to take prospective remedial action under that section if it determines that any previously approved rate, charge, or classification by a natural gas

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8. Section 301 of the Department of Energy Organization Act of 1977 transferred all jurisdiction under NGA sections 3 and 7 from the Federal Power Commission (this Commission's predecessor) to the Department of Energy (DOE).[12] As discussed further below, DOE has retained the authority to exercise section 3 jurisdiction to approve or deny applications to import or export gas and delegated back to the Commission jurisdiction under section 3 over the siting, construction, and operation of gas import and export facilities.[13]

9. NGA section 1(b) exempts the production, gathering, and local distribution of natural gas from NGA jurisdiction over the transportation of natural gas in interstate commerce. NGA section 1(c) exempts transportation and sales for resale of gas in interstate commerce by so-called "Hinshaw" pipeline companies located entirely within a single state that are subject to regulation by a state commission, and that only transport gas consumed in their states.[14] In addition, an exemption is provided by NGA section

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company or any rule, regulation, practice or contract affecting jurisdictional services is unjust, unreasonable, or unduly preferential or discriminatory.

[12] DOE Organization Act, 42 U.S.C. § 7151 (2012). Sections 402(C) and (D) of the DOE Act transferred jurisdiction under sections 1, 4, 5, 6, and 7 of the NGA over the transportation and sales for resale of gas in interstate commerce from the Federal Power Commission to the Federal Energy Regulatory Commission.

[13] We note that in addition to DOE, other federal, state, and local agencies will have authority over Shell's facilities and operations. 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 transport the LNG sold by Shell in the Great Lakes and the Mississippi River 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.

[14] 15 U.S.C § 717(c) (2012). Section 1(c) was added to the NGA in 1954. Pub. L. 323, 83rd Cong., 2nd. Sess. (1954). Section 1(c) is referred to as the "Hinshaw amendment" and pipelines exempted by its provisions are referred to as "Hinshaw

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1(d) to prevent a person from becoming subject to section 7 requirements solely by reason of transporting and/or selling gas that will be used as vehicular fuel, if that person does not engage in other transactions that are subject to section 7 or if the person is primarily subject to state regulation.

10. In its petition, Shell acknowledges that some of the Canadian and domestic LNG it sells and transports by waterborne vessel, truck, and train will not be used as vehicular fuel. However, Shell argues that the section 1(d) exemption for vehicular fuel will exempt its planned transportation, sales, and facilities from all NGA jurisdiction under both sections 3 and 7 and asserts its position is supported by rules of statutory construction, judicial precedent, and Commission precedent.

11. As discussed below, we do not agree with Shell's arguments to support its position that all of its transportation and sales of LNG and its facilities used for such activities will be exempt from NGA jurisdiction. However, for the reasons explained herein, we find with certain qualifications that Shell will not be subject to the Commission's section 1(b) jurisdiction or need to apply to the Commission for authorization under either NGA section 3 or 7 for any of its planned activities or facilities.[15]

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

12. Shell states that most of the imported and domestic LNG that it transports and sells will be sold for use as vehicular fuel and asserts that based on the exemption in NGA section 1(d) for vehicular gas all of its facilities and activities to market LNG will be exempt from NGA jurisdiction.

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pipelines" because section 1(c)'s exemption was sponsored by Representative Carl Hinshaw of California. *See House of Representatives Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 5976* at 19-28, June 29, 1953, 83rd Congress, 1st Sess. (H.R. 5976). Reproduced in *Natural Gas Act, Legislative History* (Roach, F. and Gallagher, W.), Vol. II at 23 (1968).

[15] The Commission issued public notice of Shell's petition informing any interested entities that the Commission was considering the question of whether the activities proposed by Shell would make it subject to the Commission's NGA jurisdiction. Thus, the public was fully aware of the jurisdictional questions under consideration in this proceeding. The Commission's rationale for reaching its jurisdictional determination is not limited by the arguments raised by the filing parties.

13. 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.[16]

14. NGA section 2(10) defines "vehicular natural gas" as "natural gas that is ultimately used as a fuel in a self-propelled vehicle,"[17] which can include gas in a liquid state as LNG or as refrigerated liquid methane (RLM),[18] and gas in vapor state as compressed natural gas (CNG).

15. In 1992, prior to the addition of section 1(d) to the NGA, the Commission issued a final rule[19] that adopted section 152.1(b)[20] of its regulations, providing for the automatic issuance of blanket certificates authorizing Hinshaw pipelines, local distribution companies (LDCs),[21] and otherwise non-jurisdictional entities to make sales

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[16] Section 1(d) of the NGA was added by section 404 of the Energy Policy Act of 1992 (EPAct 1992). Public Law 102-486, 106 Stat. 2776 (1992).

[17] The definition of "vehicular natural gas" in section 2(10) of the NGA also was added by section 404 of EPAct 1992.

[18] As cryogenic fluids, LNG contains approximately 95 percent methane and RLM is further refined to approximately 99 percent methane.

[19] *Regulations Governing Vehicular Natural Gas*, Order No. 543, 57 Fed. Reg. 32,890 (1992), FERC Stats. & Regs. ¶ 30,948 (July 16, 1992).

[20] 18 C.F.R. § 152.1(b) (2014).

[21] The NGA does not include a definition of an LDC. However, "local distribution company" is defined in section 2(17) of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3301(21)(6) (2012), as an entity "engaged in the transportation, or local distribution, of natural gas and the sale of natural gas for *ultimate consumption*." (*Emphasis added.*) The Commission's 1992 final rule added section 152.1(b)(1)(ii) to the

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for resale of gas that will be used as vehicular fuel. The blanket certificates gave these companies assurance that they might make sales of gas for use as vehicular fuel without jeopardizing their otherwise non-jurisdictional status, even if the gas sold for use as vehicular fuel was not consumed entirely within a single state. Section 152.1(b) of the Commission's regulations became effective August 24, 1992; on October 24, 1992, Congress enacted section 1(d).[22]

16. Because section 1(d) prevents any person that is "not otherwise a natural-gas company" or "subject primarily to regulation by a State commission" from becoming NGA jurisdictional *solely* by reason of "any sale or transportation of vehicular natural gas,"[23] the enactment of section 1(d) eliminated the need for Hinshaw pipelines and LDCs to rely on section 152.1(b)'s automatic blanket certificate authority to transport and make sales for resale of gas that will be used as vehicular fuel. Thus, for example, section 1(d) provided an exemption from NGA jurisdiction over the transportation and sale for resale of natural gas in interstate commerce for LDCs selling and delivering gas through their local distribution pipeline systems to vehicular fueling stations where the gas would be resold, and for LDCs and Hinshaw pipelines selling compressed or

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Commission's regulations to provide additional assurance to both LDCs and Hinshaw pipelines by codifying the Commission's conclusion, initially reached in *Northern Illinois Gas Company*, 20 FERC ¶ 61,267 (1982), that, for purposes of the NGA's exemptions for local distribution and Hinshaw pipelines, gas should be deemed to be "ultimately consumed" in the state in which it is delivered into a vehicle fuel tank, even if the fuel tank itself is transported to another state before being attached to a vehicle.

[22] The Commission subsequently provided, in section 284.402 of the regulations, for the issuance of blanket marketing certificates to authorize any persons who are not interstate pipelines to make sales for resale at negotiated rates of gas subject to NGA jurisdiction.

[23] *Emphasis added*. While NGA section 2(10) uses the term "self-propelled vehicle," it does not define "vehicle." In its 1992 final rule on vehicular natural gas, the Commission stated that the definition of vehicles "shall be broadly construed to include, among other things, automobiles, trucks, buses, trains, aircraft, boats, non-road farm vehicles, and construction vehicles, or any other self-propelled vehicle." Order No. 543, 57 Fed. Reg. 32890 at 32, 893 FERC Stats. & Regs. ¶ 30,948 at 30,517, 57 Fed. Reg. 32,890, at 32,893. Shell notes that its liquefaction facilities in Canada will be capable of producing 480,000 gallons of LNG, enough to fuel twenty-five 1,000-foot-long freighters on the Great Lakes or several thousand heavy-duty trucks. Consistent with the foregoing description, we confirm that both the freighters and trucks are "vehicles" for purposes of section 1(d).

liquefied gas that would be used as vehicular fuel but not consumed in their own states and which might actually leave their states before being injected in vehicular engines.

17. Shell maintains that "where there are explicit exemptions stated in the statute related to the use of the LNG," such as section 1(d)'s exemption for vehicular gas, then separate sections of the statute "which might otherwise be interpreted to confer jurisdiction over the LNG" should not apply. Shell therefore argues that section 1(d)'s exemption for vehicular gas also will exempt its facilities, importation, sales, and transportation of LNG for other end uses from *all* NGA jurisdiction.

18. Shell asserts that Commission precedent supports its position, citing *Pivotal LNG, Inc.*,[24] in which its asserts the Commission's Director of the Office of Energy Projects (OEP) interpreted section 1(d)'s exemption for vehicular gas to include LNG transported by non-pipeline modes of transportation for end uses other than vehicular fuel. Shell also cites the Commission's order in *The Gas Company, LLC*,[25] in which Shell asserts the Commission found that facilities that would be used by The Gas Company in Hawaii to receive domestic LNG supplies from the continental United States would not be subject to section 3 jurisdiction as LNG terminal facilities because The Gas Company is an LDC whose local distribution activities are NGA exempt under section 1(b).[26]

19. Given that section 1(d) operates to prevent a person from becoming a "natural-gas company," a term that only has relevance for purposes of the NGA with respect to the transportation and sale of gas in interstate commerce, we conclude that section 1(d)'s exemption is limited to the transportation and sales of vehicular gas in interstate commerce by (1) a person that does not engage in any other activities in interstate commerce that cause it to be a jurisdictional "natural-gas company" under sections 1(b) and 7, and (2) an LDC or Hinshaw pipeline company which, but for section 1(d)'s exemption, would become a jurisdictional "natural-gas company" and need section 7 certificate authority to engage in transportation and sales activities involving vehicular gas that do not qualify as exempt local distribution or Hinshaw activities. However, while NGA section 2(b)'s definition of natural-gas company and section 7's certification requirements are limited to persons that transport or sell gas for resale in interstate commerce, section 3 is not limited to a person that is also a natural gas company.[27]

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[24] 137 FERC ¶ 62,108 (2011) (*Pivotal*).

[25] 142 FERC ¶ 61,036 (2013) (*The Gas Company*).

[26] Shell's *Petition* at 19.

[27] NGA section 3 applies more broadly, stating that "no person" shall import or export gas without prior authorization from the Commission.

Therefore, a person becomes subject to section 3 jurisdiction by engaging in import/export activities, regardless of whether that person meets the section 2(6) definition of a natural gas company.[28] Accordingly, the section 1(d) exemption for vehicular gas is not relevant in determining section 3 jurisdiction over the importation and exportation of gas, and section 1(d) does not provide any exemption from section 3 jurisdiction for gas that will be used as vehicular fuel. Further, since section 1(d) only prevents a person from becoming a natural gas company *solely* by reason of any sale or transportation of vehicular gas, it does not prevent a person from becoming a natural gas company by reason of jurisdictional sales and transportation of gas that will not be used as vehicular fuel, which Shell has stated will be the case with some of the volumes it intends to transport.

20. The precedent cited by Shell is not inconsistent with our finding that section 1(d)'s exemption for vehicular gas does not exempt a person's import/export facilities and importation of LNG from section 3 jurisdiction or our finding that section 1(d)'s exemption does not shield a person's transportation and sales for resale of non-vehicular gas in interstate commerce from section 1(b) jurisdiction over such activities or section 7 certification requirements. While the Director found in *Pivotal* that the applicant did not need Commission authorization for its liquefaction and truck loading facilities, or to transport LNG by truck to destinations where the LNG would be consumed as vehicular fuel or as for fuel for industrial equipment, that finding was not based on an expansion of section 1(d)'s exemption for vehicular gas to cover other, non-vehicular end uses. As

[28] Similarly, while section 1(b) exempts LDCs' local distribution activities in interstate commerce and facilities used for such activities from section 7 certification requirements, and section 1(c) exempts Hinshaw pipelines' qualifying activities and facilities from section 7 certification requirements, these companies are nonetheless subject to the Commission's section 3 jurisdiction over the siting, construction, and operation of import/export facilities. *See, e.g., Michigan Consolidated Gas Company Utility Divison*, 48 FERC ¶ 61,300, at 61,959 (1989), where the Commission issued section 3 authorization for a Hinshaw pipeline that also provided local distribution service to construct and operate border-crossing facilities, and *San Diego Gas & Electric Company*, 64 FERC ¶ 61,221 (1993), where similar authorization was issued to another LDC/Hinshaw pipeline. The same is true with respect to intrastate pipelines that do not transport or sell for resale any gas in interstate commerce and therefore are not encompassed by section 1(b) jurisdiction over such activities in interstate commerce or subject to section 7 certification requirements. *See North Country Gas Pipeline Corporation*, 53 FERC ¶ 61,321, at 62,178 (1990) (issuing section 3 authorization and a Presidential Permit for an intrastate pipeline to construct border-crossing facilities to transport gas from Canada for consumption in New York).

explained below in our discussion of the potential applicability of section 7 jurisdiction to Shell's planned activities and facilities, the jurisdictional determination in *Pivotal* was based on long-standing Commission precedent supporting a finding that Pivotal's liquefaction operations and facilities were not subject to the Commission's jurisdiction over the transportation of gas in interstate commerce because the purpose of liquefying the gas was to transform it into what is, in effect, an end product for sale and delivery in its liquid state to an end user, with no intent for any of the LNG to be reintroduced into a pipeline.[29]

21. Further, Shell is incorrect that the Commission dismissed the application in *The Gas Company* for authorization under section 3 of pier facilities as jurisdictional LNG terminal facilities because the applicant's facilities downstream of the pier are exempt from section 7 jurisdiction both as local distribution and Hinshaw pipeline facilities.[30] Rather, the Commission disclaimed jurisdiction over the pier facilities because "[w]e do not believe these pier facilities constitute 'natural gas facilities' as that term is used in the section 2(11) definition [of LNG terminal]."[31]

22. Shell cites *Texas Gas Pipeline Association and Railroad Commission of Texas v. FERC* (*Texas Gas*),[32] in which the court ruled that Commission could not rely on newly enacted authority in section 23 of the NGA to require *intrastate* pipelines to report information regarding their activities to facilitate price transparency in the *interstate* gas market. Shell contends *Texas Gas* establishes that an entity exempted by one section of the NGA is exempt from all other sections of the NGA. Based on its reading of *Texas Gas*, Shell asserts that because section 1(d) provides an exemption for the transportation and sale of vehicular gas by a person that is not otherwise a natural gas company, section 1(d) will operate to exempt all of its activities and facilities from all NGA jurisdiction.[33]

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[29] *See Air Products and Chemicals, Inc.*, 58 FERC ¶ 61,199, at 61,619 (1992) (*Air Products*).

[30] Shell's *Petition* at 19.

[31] *The Gas Company*, 142 FERC ¶ 61,036 at P 14.

[32] 661 F.3d 258 (5th Cir. 2011).

[33] Shell contends that section 1(d) exempts its transportation and sale of LNG that will be used as vehicular fuel from section 7 jurisdiction and, therefore, that other provisions of the NGA "which might otherwise be interpreted to confer jurisdiction over the LNG 'import' or LNG 'terminal facilities' (*e.g.*, an on-shore storage terminal that receives and stores the LNG), cannot be interpreted to establish jurisdiction where there are explicit exemptions stated in the statute." Shell's *Petition* at 16.

We do not agree that *Texas Gas* supports Shell's position that section 1(d)'s explicit exemption for the transportation and sale of vehicular gas will operate to exempt Shell's other activities and facilities from jurisdiction under all provisions of the NGA.

23. In *Texas Gas,* the court addressed the extent of the Commission's jurisdiction under section 23 of the NGA, which was added by the Energy Policy Act of 2005 (EPAct 2005),[34] and authorized the Commission to obtain information from "any market participant" and disseminate such information in order to facilitate price transparency in the interstate market. The Commission attempted to rely on this authority to require that "major" non-interstate pipelines, which the Commission defined to include intrastate pipelines that transport more than 50 MMbtu of gas per year, post their flows and information regarding receipt and delivery points. The *Texas Gas* court found that in the section 23 context, the market referred to by the term "any market participant" is limited to the interstate market. The court therefore held that the Commission's reliance on section 23 to require reporting by "wholly" intrastate pipelines[35] impermissibly expanded the intended coverage of section 23. We believe our findings here are consistent with the court's approach in *Texas Gas*, since we acknowledge that section 1(d) has applicability only in limited situations, i.e., when gas that will be used as vehicular fuel is being transported or sold in interstate commerce.

B. Shell's Transportation, Sales, and Facilities Will Not Be Jurisdictional under NGA Section 7 for Reasons Separate and Apart from the Section 1(d) Exemption

1. NGA Section 7 jurisdiction over transportation and facilities only applies to transportation by pipeline and pipeline facilities

24. In 1970, prompted by an increase in the use of LNG as a means to store gas for peak demand days and in anticipation of an increase in LNG imports, the Commission issued a Notice of Proposed Rulemaking (NOPR) that reflected the assumption that NGA jurisdiction extended to the transportation of LNG by surface vehicle and waterborne vessel.[36] However, in the NOPR the Commission stated its conclusion that its regulation

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[34] Pub. L. No. 109-58, 119 Stat. 594 (2005).

[35] 661 F.3d 258 at 263.

[36] *See Exemption of Certain Transport and/or Sales of LNG from the Requirements of Section 7(c) of the NGA, Notice of Proposed Rulemaking*, 35 Fed. Reg. 3,076 (Feb. 17, 1970). At the time the NOPR was issued, the Commission had long-standing precedent for asserting section 7 jurisdiction over interstate pipelines'

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of the transportation of LNG by truck, barge, or train "would generally be duplicative of other Federal regulatory agencies such as the Interstate Commerce Commission and the Department of Transportation."[37] Therefore, the Commission proposed to amend its regulations to provide for an exemption from certificate requirements for the transportation of LNG by motor carrier, barge, or rail in interstate commerce and for a person's sales for resale in interstate commerce of LNG to be transported by such non-pipeline means if its total sales of LNG would not exceed 65,000 gallons in a calendar year.[38]

25. After considering comments on the NOPR, the Commission terminated the rulemaking without issuance of a final rule, concluding that its jurisdiction over interstate transportation only applies to the transportation of gas, including LNG, by pipeline.[39] The Commission reached that decision based on the fact that the NGA was a "remedial statute" enacted to eliminate abuses by interstate pipelines whose rates for interstate

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liquefaction, storage, and regasification of LNG, their facilities used for such purposes, and rates and charges in connection therewith. *See, e.g., Transcontinental Gas Pipe Line Corporation* (*Transco*), 30 FPC 38 (1963) (finding that Transco's proposed LNG facilities to store gas for its sales customers during off-peak periods would be used in the transportation of natural gas in interstate commerce subject to the jurisdiction of the Commission and section 7(c) of the NGA).

[37] 35 Fed. Reg. 3,076.

[38] *Id.*

[39] *Order Terminating Proposed Rulemaking Proceeding,* 49 FPC 1078, 1081 (1973). Subsequently, the Commission has declined on several occasions to exercise jurisdiction over the movement of LNG by non-pipeline modes of transportation. *See Marathon Oil Company (Marathon),* 53 FPC 2164, at 2175 (1975), where in response to contentions that it should find that section 7 jurisdiction would apply to the tankers that would transport LNG from Alaska to Oregon because "pipeline" is only mentioned once in the NGA (in section 7(h)), the Commission pointed out that "Section 7 is phrased in terms of 'extend,' 'physical connection,' 'abandon,' and 'construct,' all of which relate to stationary, not movable, facilities." *See also Southern LNG Inc.*, 131 FERC ¶ 61,155 (2010) (*Southern LNG*) and *New England LNG Co., Inc.*, 49 FPC 1460 (1973) (transportation of LNG by truck); *Distrigas of Massachusetts Corporation,* 55 FPC 3121 (1976) (transportation of LNG by barge and truck); and *Wisconsin Gas Company,* 53 FPC 2198 (1975) (transportation of LNG by truck). Although the cited decisions address gas in a liquid state, the Commission's reasoning is equally applicable to gas vapor, e.g., CNG, being moved by a non-pipeline mode of transportation.

service were beyond state commissions' control,[40] and because the provisions of section 7 relating to transportation only contemplate transportation by pipeline.[41] In view of the NGA's legislative history and the fact that Congress recognized that pipelines were the only method of transporting gas in 1938 when the NGA was enacted, the Commission concluded that "Congress was addressing itself to regulation of pipelines in order to eliminate demonstrated abuses rather than to the regulation of all modes of transportation of gas in interstate commerce," and that "Congress never foresaw the transportation of natural gas (liquefied natural gas) by any means other than pipeline."[42] Thus, the Commission stated that "legislative action is necessary if Congress wishes to regulate this type of activity."[43]

26. As described in Shell's petition, LNG supplies from Canada will have been transported in vapor form by pipeline to Shell's Sarnia Manufacturing Centre in Ontario, but the pipeline transportation will end at that liquefaction facility in Canada. Further, while the liquefaction facility that Shell may construct in Geismar, Louisiana, presumably will receive gas supplies via a domestic pipeline, all gas liquefied at that

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[40] 49 FPC 1078, 1079.

[41] *Id.* at 1080. The Commission cited section 7(a), which provides that the Commission may direct a natural gas company to "extend" its transportation facilities and to establish "physical connection" of its transportation facilities to the facilities of others; section 7(b), which requires a natural gas company to seek the permission and approval of the Commission in order to "abandon" any portion of its facilities; section 7(c), which provides that no person may undertake, without certificate authority, the "construction" or "extension" of facilities to transport or sell gas for resale in interstate commerce; and section 7(h), which specifically gives to holders of certificates granted by the Commission authorizing construction the power of eminent domain in federal district courts to obtain the necessary property rights "to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operations of such pipe line or pipe lines."

[42] *Id*. at 1079. The Commission also acknowledged that, while the Interstate Commerce Commission (ICC) had jurisdiction to regulate railroads, oil pipelines, motor vehicles and inland, coastal, and intercostal shipping, the transportation of LNG by private carrier and as liquid bulk cargo in tanker vessels was exempt from the ICC's jurisdiction. *Id*. at 1080.

[43] *Id*. at 1081.

facility and at Shell's liquefaction facility in Canada will leave and be delivered by truck, train, or ship to vehicular fueling stations, to end users, or to intermediate storage facilities, from which the LNG will be delivered to vehicular fueling stations or to end users. As described in Shell's petition, no gas will enter another pipeline system after leaving Shell's facilities. While Shell acknowledges that minimal amounts of unavoidable boil-off and tail gas will be produced by its liquefaction operations in Geismar, the boil-off and tail gas will be moved by short segments of pipe to large industrial customers adjacent to the liquefaction site. Shell states that gas leaving the Geismar liquefaction facility "will not be introduced into a pipeline system for further transportation."[44]

27. While we have rejected Shell's argument that *Pivotal* implicitly extended the section 1(d) exemption for vehicular fuel to cover LNG used as fuel for compressors and other industrial equipment,[45] *Pivotal* does support a finding that Shell's activities and facilities will not be subject to NGA jurisdiction over the transportation and sale for resale of natural gas in interstate commerce. As discussed 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 an adjacent municipal gas system. Pivotal planned to purchase gas from the municipal utility and use its facilities to liquefy the gas and transfer it into containers to be loaded onto trucks for delivery to vehicle fueling depots and other locations to be used to fuel stationary equipment such as compressors. Pivotal represented that, except for unavoidable boil-off or tail gas vapor that would be delivered back to the municipal utility: (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 be introduced, in either liquid or vapor form, back into a pipeline system for further transportation. Based on these representations, the Director found that Pivotal's transportation of LNG and facilities would not be subject to the Commission's section 7 jurisdiction.[46]

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[44] Shell's *Petition* at 2.

[45] *Id.* at 15.

[46] The Director's order also noted that Pivotal represented that no gas leaving the LNG facility would be exported, so any jurisdictional implications of gas exports were not addressed. The Director's order did not address whether any of Pivotal's sales for resale in interstate commerce could be NGA jurisdictional and subject to section 7 certification requirements. However, as discussed below, as a result of statutory changes, jurisdiction under section 7 over sales of gas, including LNG, in interstate commerce is limited to sales for resale of domestic gas by inter- or intrastate pipelines, LDCs, and

(continued…)

28. *Pivotal* reflects the rationale explained in *Air Products*, where the issue was whether Air Products needed a section 7 certificate to authorize its liquefaction of gas to produce 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 regasified and introduced into a pipeline.[47] As explained in *Air Products*, the concern when presented with independent LNG facilities like those planned by Shell is whether a circumvention of NGA jurisdiction over the interstate transportation of gas by pipeline

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their affiliates, and the sales by such entities of gas that enters interstate commerce after being imported from non-free trade countries. Further, if Pivotal has affiliations that prevent its sales for resale from qualifying as NGA-exempt first sales, it would be able rely on the automatic blanket certificate authority provided by section 284.402 of the Commission's regulations to sell its LNG at negotiated rates and would not need to apply for case-specific certificate authority under section 7 to make such sales.[47] In *Air Products*, the Commission stated that in *Marathon* 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 pipeline. *Air Products*, 58 FERC ¶ 61,618. Shell represents that all its LNG 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.

[47] In *Air Products*, the Commission stated that in *Marathon* 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 pipeline. *Air Products*, 58 FERC ¶ 61,618. Shell represents that all its LNG 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.

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."[48]

29. Thus, even when gas is delivered to a liquefaction facility by a jurisdictional interstate pipeline, when the purpose of liquefying the gas is to transform it into an "end product"[49] to be delivered by a non-pipeline mode of transportation to end users, the Commission has viewed the liquefaction facility as the ultimate destination for the pipeline transportation of the gas.[50] This fits Shell's description of its anticipated activities, whereby it will produce and sell a "consumer product" – LNG – that "will not be introduced into a pipeline system for further transportation."[51]

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[48] *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 ¶ 61,199 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 the 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).

[49] *Id*. In addition to its use as fuel for combustion engines, we note that LNG can also be sold and delivered in its liquid state as a product for use as a feedstock for manufacturing end products such as plastics and commercial organic chemicals.

[50] *Id*. In *Air Products*, the Commission found that jurisdictional gas transportation by pipeline had reached its "ultimate destination" at Air Products' liquefaction plant where the gas would be used to produce RLM for delivery directly into railroad engines or to the operators of truck fleets or municipal transit systems with RLM-burning capability. *Id*. at 61,618-19.

[51] Shell's *Petition* at 2. With one possible exception discussed below, none of Shell's LNG will be transported by an NGA-jurisdictional pipeline or any other pipeline system in the United States before or after being sold and transported by Shell. In *Air Products*, the Commission described the instances where it had found that the operator of an independent liquefaction facility was engaging in jurisdiction transportation of gas, and stated that "[t]he paradigm which characterizes these cases is as follows: (1) the natural gas is transported by *interstate* pipeline to a liquefaction facility, (2) the gas is

(continued…)

30. In view of the above considerations, we find that none of Shell's described facilities, including its Geismar, Louisiana, facility, nor any of its transportation of LNG will be subject to section 7 jurisdiction over the transportation of gas in interstate commerce. As discussed below, we further find, with a possible exception, that Shell's sales of LNG for resale in interstate commerce also will be exempt from section 7 jurisdiction.

2. NGA Section 7 jurisdiction over sales for resale only applies to gas transported at some point by interstate pipeline.

31. As discussed by the United States Supreme Court in *FPC v. Hope Natural Gas Co.*,[52] the "primary aim" of the NGA was to "protect consumers against exploitation" by interstate pipeline companies which, at the time, were also the merchants of the gas they

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liquefied, and then either (3) stored at or near the LNG plant for later revaporization to meet market demand, or (4) transported by truck or tanker to a destination where the LNG is revaporized and injected into a pipeline for either interstate transportation or local distribution." *Air Products*, 58 FERC ¶ at 61,618 (*emphasis added*, footnote omitted). However, in *Air Products'* cited cases where the Commission asserted section 7 jurisdiction over the use of facilities to liquefy gas for transportation by waterborne vessel or truck to an LDC's non-jurisdictional pipeline system (id. at n. 13), additional considerations were involved. In *Marathon*, 53 FPC 2164, 2173, where the existing Kenai LNG plant in Alaska needed section 7 certificate authority to liquefy and load LNG onto tankers for transportation to a Hinshaw pipeline system in Oregon, the Commission was already exercising section 3 jurisdiction over exports of LNG from the plant; the Commission had already found that both pipelines transporting gas to the LNG plant would need section 7 certificate authority as jurisdictional interstate transmission facilities; the LNG plant was leased to Marathon, which also was an owner of one of the upstream pipelines; the LNG plant was operated by Phillips Petroleum Company (Phillips), which was an owner of the other upstream pipeline; and Marathon and Phillips would be using the LNG plant to make their bundled sales of gas to the Hinshaw pipeline company in Oregon. In *Wisconsin Gas Company*, 53 FPC 2198 (1975), the Commission asserted section 7 jurisdiction over an LDC's liquefaction facility because it was being used to load trucks with LNG for delivery to an affiliated LDC to implement an exchange arrangement involving the displacement of gas moving on an interstate pipeline and a jurisdictional sale for resale. Similarly, in *Natural Gas Company*, 55 FPC 919 (1976), an LDC purchasing gas from an interstate pipeline had the interstate pipeline deliver its gas to another LDC that liquefied the gas and redelivered it as LNG by truck.

[52] 320 U.S. 591, 610 (1944) (*Hope*).

transported. Due to the lack of regulatory oversight over interstate pipelines, state commissions were being "thwarted in local regulation" because it was difficult or impossible for them to ascertain interstate pipelines' costs of purchasing and delivering gas.[53] Further, most of the pipeline mileage in the country, together with an increasing percentage of available gas supplies, had been acquired by a handful of companies.[54] Consequently, "State commissions, independent producers, and communities having or seeking the service [by interstate pipelines] were growing quite helpless against these combinations."[55] The Court found that "[t]hese were the types of problems with which those participating in the [Congressional] hearings were pre-occupied,"[56] and that it was "those specific evils" [57] which Congress had addressed in enacting the NGA to give the Federal Power Commission broad powers to insure that interstate pipelines' bundled transportation and sales rates were just and reasonable and to require them to extend or improve their facilities in order to sell gas to local distribution companies.[58]

32. Further, the Supreme Court's findings in *Phillips Petroleum Co. v. Federal Power Commission* (*Phillips*)[59] indicate that section 7 jurisdiction over sales of gas in interstate commerce only extends to sales of gas which is transported at some point by an interstate pipeline. In *Phillips*, the Court found that the legislative history of the NGA indicated Congressional intent to give the Commission jurisdiction over the rates of wholesales of natural gas in interstate commerce, "whether by a pipeline company or not and whether occurring before, during, or after transmission *by an interstate pipeline company,*"[60] and the Court was "satisfied that Congress sought to regulate wholesales of natural gas

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[53] *Id.* at 610 (citing H.R. Rep. No. 709, 75th Cong., 1st Sess., p. 2).

[54] *Id.* (citing S.Doc. 92, Pt. 84-A, ch. XII, Final Report, Federal Trade Commission to the Senate pursuant to S.Res.No. 83, 70th Cong., 1st Sess).

[55] *Id.* (citing S.Doc. 92, Pt. 84-A, chs. XII, XIII, *op. cit.*, *supra*, note 17).

[56] *Id.* (citing Hearings on H.R. 11662, Subcommittee of House Committee on Interstate & Foreign Commerce, 74th Cong., 2d Sess.; Hearings on H.R. 4008, House Committee on Interstate & Foreign Commerce, 75th Cong., 1st Sess).

[57] *Id*. at 610.

[58] *Id*. at 611.

[59] 74 S.Ct. 794 (1954) and 347 U.S. 672 (1954) (*Phillips*).

[60] *Id*. at 682 (*emphasis added*).

occurring *at both ends of the interstate transmission systems*."[61] The Court's decision also concluded that exempting producers that sold interstate pipelines their system supplies could defeat the purpose of the NGA because "[u]nreasonable charges exacted at this stage of the interstate movement become perpetuated" because unreasonable prices by producers for gas would result in interstate pipelines' gas prices being unreasonable and state commissions would have limited ability, as a practical matter, to not allow the full pass-through of such charges by LDCs to consumers.[62]

33. Thus, the Court's decisions in both *Hope* and *Phillips* turn on findings based on a conclusion that the NGA's purpose is to ensure that consumers are not charged unreasonable prices for gas supplies that would be delivered by interstate pipelines, which at the time the NGA was enacted were the only feasible means of moving significant volumes of gas in interstate commerce. Therefore, we do not believe that section 7 jurisdiction over sales for resale in interstate commerce contemplated or was intended to apply to sales of gas that never enters interstate pipeline facilities subject to section 7 jurisdiction over the transportation of gas in interstate commerce. Based on Shell's representations, none of its imported LNG supplies will be transported by any pipeline in the United States before or after leaving Shell's facilities. Further, all of the domestic gas that would be liquefied at the potential Geismar facility will be transported from that facility by waterborne vessels, trucks, and/or trains to vehicular fueling stations and end users.

34. While Shell states that "[i]n both of the Sarnia and Geismar projects, there would be no jurisdictional interstate transportation into or out of the LNG receiving facility,"[63]

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[61] *Id*. at 684 (*emphasis added*).

[62] *Id. at* 680.

[63] Shell's *Petition* at 20. In view of our finding above that section 7 jurisdiction over sales for resale in interstate commerce does not apply to sales of gas that never enters interstate pipeline facilities, Shell's sales of gas liquefied at Geismar would not become subject to section 7 jurisdiction if local production is delivered to the liquefaction facility by an NGA-exempt gathering line, since Shell represents that no gas will enter interstate pipeline facilities after leaving any of its facilities. For the same reason, section 7 jurisdiction over sales would not attach to any of Shell's sales of LNG leaving Geismar if the source of the gas is Louisiana production received from an intrastate pipeline that has not commingled the Louisiana production with interstate supplies received from an upstream pipeline. Note that if any of the gas the intrastate pipeline transports to Geismar is from outside Louisiana, that intrastate pipeline can only avoid becoming NGA-jurisdictional by providing such service under section 311 of the NGPA.

this statement only makes it clear that the Geismar liquefaction facility will not have a direct interconnection with an interstate pipeline, not that none of the gas will have been transported at some point upstream by an interstate pipeline. So long as all of the gas leaving Shell's liquefaction facility by waterborne vessel, truck or train is delivered in liquid state to end users and none of the gas is reintroduced into a pipeline, upstream transportation by an interstate pipeline would not affect our finding that Shell's operation of its Geismar liquefaction facility will not be subject to section 7 jurisdiction over transportation and facilities. However, upstream transportation by an interstate pipeline could affect whether Shell's sales for resale of LNG from its Geismar facility are potentially jurisdictional sales under section 7.

35. All of the gas liquefied at Geismar will be from domestic sources. As the result of post-NGA legislation, the only sales for resale of domestic gas still subject to section 1(b) jurisdiction over sales for resale in interstate commerce, section 4 rate conditions, and section 7 certification requirements are sales for resale that do *not* qualify as NGA-exempt "first sales" as defined in section 2(21) of the NGPA. Under the general rule of that definition, first sales of domestic gas include any sale *to* an interstate pipeline, intrastate pipeline, LDC or retail customer, or any sale in the chain of transactions *prior* to a sale to one of those entities. Sales *by* interstate pipelines, intrastate pipelines, LDCs, and their affiliates only qualify as first sales if the gas was produced by one of those entities or one of their affiliates. However, 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.[64]

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[64] *See In the Matter of Amendments to Blanket Sales Certificates*, 107 FERC ¶ 61,174, at PP 19 – 28 (2004) (order denying rehearing of Final Rule, Order No. 644). EPAct 1992 added section 3(b) of the NGA to provide that the importation of gas vapor from countries with free trade agreements, such as Canada and Mexico, and the importation of LNG also have first sale status.

While the decontrol of wellhead gas prices was begun by the NGPA, decontrol 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.*)

36. Since Shell's petition indicates that all of its sales of domestic gas liquefied in Geismar, Louisiana, will be of gas that is its own production, any affiliation Shell may have with a domestic pipeline or LDC will not disqualify its sales as first sales. Further, none of Shell's sales will be disqualified from first-sale status unless the gas has been previously sold to and in the possession of a domestic pipeline, LDC, or retail customer. Thus, for example, if an intrastate pipeline provides transportation service to bring Louisiana production to the Geismar liquefaction facility, but does not own the gas, transportation of the gas by the intrastate pipeline will not prevent Shell's sales of the gas from qualifying as first sales exempt from section 7 certification requirements.[65] In any event, following the legislative decontrol of prices for most gas sales, the Commission determined there was no longer a need to exercise its jurisdiction over sales other than those by interstate pipelines. Therefore, the Commission adopted section 284.402 of its regulations to provide 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.[66] Thus, if any of Shell's sales for resale are subject to section 7 certification requirements, Shell will not need to apply for certificate authority to make the sales as they will be authorized under the automatic blanket certificate provided by section 284.402 of the regulations.

3. Shell's Facilities will not be subject to the Commission's NGA Section 3 Jurisdiction as import facilities

[65] As noted above, section 3(b) of the NGA provides that with respect to the importation of LNG or of gas vapor from countries with free trade agreements, the importation of such will be treated as a "first sale." Based on Shell's representations, none of its imported Canadian LNG or its LNG produced from its own domestic gas production will have been *sold* to and in the possession of any domestic pipeline, LDC, or retail customer prior to being sold by Shell. Although Shell's domestic production will be delivered by pipeline to the planned liquefaction facility in Geismar, Louisiana, Shell does not indicate that the gas will be sold to the pipeline. Thus, all of Shell's sales of its domestic gas production and all its imported Canadian LNG should qualify as first sales exempt from NGA certification and rate requirements.

[66] 18 C.F.R. § 284.402 (2014). Subpart L of Part 284 of the regulations provides that a blanket certificate issued under that section is a certificate of limited jurisdiction which will not subject the certificate holder to any other NGA regulations other than the Subpart L regulations.

37. As discussed above, the DOE Organization Act transferred all NGA section 3 jurisdiction from the Federal Power Commission to DOE in 1977, and the Secretary of Energy delegated siting authority for import and export facilities back to this Commission.[67] Specifically, the Commission has been delegated section 3 authority to: "Approve or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports."[68]

38. The Commission has interpreted and exercised its delegated section 3 authority over import/export facilities similarly to how it has interpreted and exercised its section 7 jurisdiction over facilities used to transport gas in interstate commerce.[69] As discussed above, the Commission has found that its section 7 jurisdiction over gas in interstate commerce is limited to gas transported by pipeline, and consequently has only asserted section 7 jurisdiction over pipeline facilities used to transport gas in interstate commerce and facilities used to store gas, including LNG, that is being transported in interstate commerce by pipeline.[70] All of the liquefaction facilities over which the Commission has exercised section 7 jurisdiction have had pipeline interconnections with the interstate pipeline grid.[71] As discussed above, the Commission has not sought to assert section 7

[67] The Commission's current delegated authority over section 3 functions is provided by DOE Delegation Order No. 00-004.00A, which was effective May 16, 2006.

[68] *Id.*, section 1.21A.

[69] Although section 3 relating to the importation and exportation of gas was included in the NGA when it was enacted in 1938, the Commission did not seek to exercise its jurisdiction under section 3 until 1947. *See Border Pipe Line Co. v. FPC*, 71 F.2d 149, at 151 (1948).

[70] While having never found cause to do so, the Commission has cautioned that it could act in the event it determined that the liquefaction and transport by surface vehicle or waterborne vessel of gas in interstate commerce effected a circumvention of its regulation over gas moving on interstate pipelines. *Air Products*, 58 FERC at 61,619.

[71] *See, e.g., Transco*, 30 FPC 38 (1963). The length of pipe operated as part of the LNG storage facility, or that needs to be constructed to interconnect a proposed LNG terminal with the interstate pipeline system, is irrelevant in determining whether the storage facility is jurisdictional under section 7. *See, e.g., Pine Needle LNG Company, LLC*, 75 FERC ¶ 61,121, at 61,405 (1996) (preliminary determination describing proposed LNG storage facility that would include 1.05 miles of pipe to interconnect with Transco's system), and 77 FERC ¶ 61,229 (1996) (order issuing certificate).

jurisdiction over vehicles and vessels that haul natural gas between states. Nor did the Commission seek, even prior to adoption of section 1(d)'s exemption for vehicular gas, to assert section 7 jurisdiction over facilities, such as CNG fueling stations, that receive and deliver gas by truck or other non-pipeline modes of transportation.

39. Similarly, the Commission has only exercised its section 3 authority over the siting of facilities used for imports or exports at the borders with Mexico or Canada when gas is being moved by pipeline.[72] To date, aside from such border-crossing pipelines, the only other facilities 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.[73]

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[72] In two separate proceedings, the Commission also granted section 3 authorization for the portion of a pipeline crossing the offshore boundary between the United States and The Bahamas Exclusive Economic Zone to transport gas from a planned LNG terminal in the Bahamas to Florida. Both projects were terminated prior to construction. *See Tractebel Calypso Pipeline, LLC,* 106 FERC ¶ 61,273 (2004); *Calypso U.S. Pipeline, LLC,* 118 FERC ¶ 61,051, *order on reh'g*, 119 FERC ¶ 61,119 (2007), *order vacating certificate,*137 FERC ¶ 61,098 (2011), and *AES Ocean Express, LLC,* 103 FERC ¶ 61,030, *order amending determination,* 103 FERC ¶ 61,326 (2003), *order issuing permit,* 106 FERC ¶ 61,090 (2004), *order amending permit,* 111 FERC ¶ 61,219 (2005).

[73] With the exception of one export facility in Alaska, all of the existing coastal LNG facilities in the United States and the territory of Puerto Rico were originally authorized for purposes of importing LNG. However, in 2012 the Commission granted authorization under NGA section 3 for Sabine Pass LNG, L.P. to construct and operate facilities to liquefy, store, and export domestic gas. *See Sabine Pass Liquefaction, LLC,* 139 FERC ¶ 61,039 (2012); s*ee also Cameron LNG, LLC,* 147 FERC ¶ 61,230 (2014). Operators of several other coastal LNG facilities built to import gas have pending applications for section 3 authorization to liquefy and store LNG for export. Except for the take-away pipeline from the Freeport LNG Development, L.P. (Freeport LNG) facility, the pipelines interconnecting with the existing facilities were authorized by the Commission under NGA section 7 to transport gas between the LNG facility and the interstate pipeline grid. Since the Freeport LNG import facility was constructed to serve the intrastate Texas market, and its 9.6-mile-long send-out pipeline interconnecting with the Texas intrastate grid would not be transporting any gas in interstate commerce, the Commission authorized that pipeline under section 3 as part of the LNG import facilities. *Freeport LNG Development, L.P.,* 107 FERC ¶ 61,278, at ordering para. (A) (2004);

(continued…)

40. To date, the Commission has not authorized any LNG facilities under either section 7 or section 3 that do not have pipelines connecting the facility with either the interstate or an intrastate grid.[74] While a number of existing LNG facilities, including facilities regulated under NGA section 3 and facilities regulated under NGA section 7, have received authorization to deliver LNG into trucks for transportation away from the facilities,[75] the Commission did not assert jurisdiction over the trucking. As discussed above, the Commission terminated a rulemaking proceeding in 1973 regarding the transportation of LNG by non-pipeline modes of transportation based on the NGA's legislative history which, as discussed by the Supreme Court in *Hope* and *Phillips*, indicates that Congress recognized pipelines as the only method of transporting gas in 1938 when it enacted the NGA, that Congress did not then foresee the transportation of gas by means other than pipeline, and that Congressional intent in the NGA was to regulate pipelines, not all modes of transporting gas in interstate commerce.[76] The Commission's 1973 order terminating the proposed rulemaking proceeding and the *Hope* and *Phillips* decisions addressed jurisdiction over the facilities used for the transportation of gas in interstate commerce under section 7, and we believe it is appropriate to apply the same reasoning with respect to the facilities used for the importation and exportation of gas under section 3.

41. Shell's imported Canadian LNG will enter the United States via waterborne vessel, truck, and/or train. None of the imported gas will enter the United States by pipeline. Further, while Shell contemplates an intermediate docking and storage facility near Detour, Michigan, and possibly similar facilities at other locations on the Great Lakes, to transfer the imported LNG directly from one moored ship to another ship or to transfer Canadian LNG from ship to shore for intermediate storage and subsequent transfer to ships, trucks, or trains, none of the docking or intermediate storage facilities

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Freeport LNG's section 3 authorization was recently modified in 148 FERC ¶ 61,076 (2014) .

[74] As is discussed below, The Gas Company of Hawaii did file an application for section 3 authorization for pier facilities that it planned to use to receive containers of domestic LNG. However, that application was dismissed by the Commission.

[75] *See, e.g., Distrigas of Massachusetts LLC*, 94 FERC ¶ 61,008, at 61,014 (2001), and *Southern LNG*, 131 FERC ¶ 61,155 at P 10. The Commission views an LNG facilities' truck-loading facilities as part of the import/export facility and the delivery of LNG to a tanker truck as a terminalling service. *Id.*, *Southern LNG*, 131 FERC ¶ 61,155 at P 11.

[76] *See* note 37.

will be connected to pipeline facilities connected to the interstate or an intrastate grid. As discussed above, Shell's only facility that will have a pipeline interconnection will be its planned liquefaction facility in Geismar, Louisiana, which will liquefy domestic gas for loading onto waterborne vessels at Shell's dock at its Geismar chemical plant and onto trucks and trains.

42. Since Shell will not use pipeline facilities to import Canadian LNG, and none of the facilities that it will use to import Canadian LNG will be connected to a pipeline, prior to enactment of EPAct 2005 we would not have found it necessary to consider whether any of the facilities receiving the LNG imports would be subject to our jurisdiction as an LNG import facility. However, EPAct 2005 amended the NGA to add section 2(11) to define the term "LNG Terminal." As defined in section 2(11) of the NGA:

> "LNG Terminal" includes 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.

In addition, EPAct 2005 added section 3(e)(1) to provide 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."[77] Thus, we must consider the ramifications of the addition of section 2(11) on the scope of the Commission's jurisdiction.

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[77] EPAct 2005 also established numerous requirements, set forth in NGA sections 3(e) and 3(A), applicable to the processing of applications for authorization to construct/operate LNG terminals. These conditions limit the Commission's ability to condition approval of a proposed LNG terminal on the applicant filing rates or agreeing to operate the LNG terminal on an open-access basis, as well as requirements to ensure that the decision-making process takes into account the views and interests of the state where the LNG terminal would be located. In particular, the conditions in section 3(e) and 3(A) of the NGA require notice of the application for new LNG terminal facilities be

(continued…)

43. As an initial matter, we find that while section 2(11) sets forth a very broad definition of an "LNG Terminal," that encompasses "all natural gas facilities that are used to receive, unload, load, store, transport, gasify, liquefy, or process gas,"[78] it does not seek to redefine the term "natural gas facilities" as commonly understood for purposes of Commission jurisdiction.[79] As discussed above, to date the Commission has only asserted NGA jurisdiction under either section 3 or 7 over natural gas pipeline and storage facilities, including LNG facilities, that receive and/or send out gas by pipeline.[80] We do not find that the waterborne vessels, trucks, and/or trains that Shell will use to import Canadian LNG will be "natural gas facilities." Further, there will be no pipeline interconnections at the mooring facilities that Shell may use to transfer its LNG imported by ship to other ships or to onshore facilities that will store the LNG until it is transferred to another ship or loaded onto trucks or trains for delivery to vehicular fueling stations or

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given to the state commission or the Governor-appointed state agency for purposes of consulting with the Commission regarding state and local safety considerations; opportunity for the state agency to furnish an advisory report on state and local safety considerations; a response by the Commission addressing the specific issues raised by the state agency in the advisory report; opportunity for the state commission to conduct its own safety inspections if the Commission approves the LNG terminal; development by the applicant of an Emergency Response Plan prepared in consultation with the United States Coast Guard and state and local agencies and approval by the Commission; and a cost-sharing plan including a description of any direct cost reimbursements that the applicant agrees to provide to any state and local agencies with responsibility for security and safety at the LNG terminal or in proximity to LNG tankers accessing the terminal.

[78] Indeed, a literal reading of section 2(11)'s definition of "LNG Terminal" would cause otherwise NGA-exempt gathering, intrastate pipeline, processing, and local distribution facilities to be jurisdictional under section 3 as LNG terminal facilities if they transport gas that was imported or gas that will be exported.

[79] As discussed above, the Commission dismissed The Gas Company's application for authorization of pier facilities as jurisdictional LNG terminal facilities under section 3 because "[w]e do not believe these pier facilities constitute 'natural gas facilities' as that term is used in the section 2(11) definition [of LNG terminal]." *The Gas Company* 142 FERC ¶ 61,036 at P 14.

[80] *See Order Terminating Proposed Rulemaking Proceeding*, 49 FPC 1078, 1079 (finding that the Commission has jurisdiction only over transportation of LNG by pipeline, and not transportation of LNG by motor carrier, barge, or rail.)

other end users.[81] Accordingly, we find that none of the facilities that Shell plans to use in LNG import operations will constitute an "LNG Terminal" subject to the Commission's jurisdiction under section 3.[82]

4. Shell's Geismar Facility will not be subject to the Commission's NGA Section 3 Jurisdiction as an LNG Terminal operating in interstate commerce

44. The only facility described in Shell's petition that would have an interconnecting pipeline is the planned liquefaction facility at its chemical plant on the Mississippi River in Geismar, Louisiana. Shell also acknowledges that while its initial plans at that location do not include any storage facilities to hold LNG when it commences liquefaction operations, it may want to install storage capacity in the future.[83] As was the case with

[81] We note that our conclusions are consistent with reports prepared by the Congressional Research Service (CRS), which assume that all LNG terminals subject to the Commission's jurisdiction following the enactment of EPAct 2005 would have an interconnecting pipeline: "LNG terminals may affect pipeline infrastructure in two ways. First, new terminals and terminal expansions must be connected to the interstate pipeline network through sufficient 'takeaway' pipeline capacity to handle the large volumes of imported natural gas. Depending upon the size, location, and proximity of a new terminal to existing pipelines, ensuring adequate takeaway capacity may require new pipeline construction." January 31, 2006 report by CRS on *LNG in U.S. Energy Policy: Infrastructure and Market Issues* at 12: "It is not clear, therefore, whether adding LNG supplies to traditional producing regions would be less costly for consumers than building in-market terminals and adding to regional pipeline capacity." *Id. See also* December 14, 2009 report by CRS on *LNG Import Terminals: Siting, Safety, and Regulation*: "This report also deals primarily with those parts of LNG terminals which transfer, store, and process LNG prior to injection to natural gas pipelines for transmission off site" (*id.* at 2), and "Onshore terminals consist of docks, LNG handling equipment, storage tanks, and interconnections to regional gas transmission pipelines." *Id.* at 3.

[82] While we have determined that Shell will not need to apply to the Commission for authorization under section 3 for the siting, construction, and operation of any its facilities to import LNG from Canada, DOE has retained the section 3 jurisdiction to approve or deny applications for import and export authority. Therefore, we do not address the issue of whether Shell will need authorization under section 3 jurisdiction to import Canadian LNG.

[83] Shell's *Petition* at 20.

the facilities Shell will use in conjunction with its importation of LNG, prior to the enactment of EPAct 2005, we would not have had cause to consider whether Shell's planned facilities to liquefy domestic gas and load LNG onto waterborne vessels at Geismar, Louisiana, would be subject to our section 3 jurisdiction, in this case because prior to EPAct 2005 section 3 only applied to facilities used to import or export gas. However, we must now examine whether section 2(11)'s inclusion of the phrase "transported in interstate commerce by waterborne vessel" might affect our jurisdictional determination. For the reasons discussed below, we conclude that the Geismar facility will not be an LNG terminal subject to section 3.

45. There is no significant functional difference between an inland LNG facility, commonly referred to as a "peaker" that liquefies and stores gas for subsequent revaporization (and may include facilities to load LNG onto trucks or trains for transport to a revaporization site) and a waterside facility, commonly referred to as a "terminal" that either receives gas as LNG from a waterborne vessel for revaporization or liquefies gas for delivery as LNG to a waterborne vessel. While the only waterside facilities the Commission has dealt with to date have been coastal facilities, i.e., terminals, which have been authorized under NGA section 3 because the facilities were to be used to import or export gas in foreign commerce, there is no question that the Commission's section 7 jurisdiction would encompass a waterside facility that would receive gas by jurisdictional pipeline which is liquefied, loaded onto a waterborne vessel, transported to a second state, then revaporized and injected into a jurisdictional pipeline.[84] Similarly, an LNG

[84] As noted above, in 1975 when Marathon and Phillips planned to use the existing Kenai LNG terminal to sell Alaska gas production to a Hinshaw pipeline in Oregon, the Commission was already regulating the exports of gas from the Kenai LNG terminal to Japan. The Commission found that if the Kenai facilities would also be used for interstate transportation, then the pipelines bringing gas from production fields to the Kenai LNG facilities would need section 7 certificate authorization before the facilities could be used to transport, liquefy, and load gas onto tankers that would take the LNG to Oregon. *Marathon*, 53 FPC 2164, 2173. In 1979, another proposed project (that never came to fruition) contemplated the construction of new LNG terminals at Nikiski, Alaska, and in California. The terminal in California would be used to receive LNG from both Alaska and Indonesia for distribution and use in California. The Commission found that "with respect to the gas from Alaska, no issues arise under Section 3 of the NGA; all issues arise under Section 7 of the NGA," and under section 7 the Commission had "exclusive jurisdiction to decide all Natural Gas Act issues" concerning the "construction and operation of facilities [in Alaska]… as well as the sale of that gas to the project sponsors' customers in California." *Pacific Alaska LNG Company*, 9 FERC ¶ 61,041, at 61,091 (1979) (*Pacific Alaska LNG*). Because both Alaskan and Indonesian gas would

(continued…)

terminal receiving LNG transported in interstate commerce by waterborne vessel would be subject to section 7 jurisdiction if any of the gas received at the terminal would be revaporized and injected into a jurisdictional pipeline. Such facilities would be links in an interstate chain, liquefying and regasifying in order to enable gas to be ferried across a stretch of water interrupting what would otherwise be a continual flow of gas by pipeline from one state to another.

46. The Geismar facility will not serve to bridge pipelines divided by water; rather, it will liquefy gas to transform it into a 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. Therefore, consistent with our above-discussed, long-standing precedent, because Geismar will not liquefy gas in order for it to be transported to a downstream pipeline, but will do so to provide LNG as a product for delivery to end-use consumers, Geismar will not be transporting gas in interstate commerce subject to the Commission's NGA section 7 jurisdiction.

47. As discussed above, the Commission has interpreted and exercised its delegated 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. Just as the Commission has determined that its section 7 jurisdiction does not extend to facilities used solely for the purpose of liquefying gas to supply LNG to end users, the same rationale would exempt Geismar from section 3 jurisdiction as long as, as Shell represents, all the LNG leaving Geismar is delivered in its liquid state to the ultimate end users in the United States.[85] Thus, Shell's proposed Geismar liquefaction facility will not be subject to Commission jurisdiction under section 3 as a section 2(11)

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be delivered to the same terminal in California, both section 3's foreign commerce and section 7's interstate commerce jurisdiction would apply to that proposed facility.

[85] Shell represents that all of its LNG supplies will leave its facilities, including the planned liquefaction facility in Geismar, Louisiana, by non-pipeline modes of transportation, which may include trucks and trains as well as waterborne vessels, and reach the ultimate end users of the gas without entering a pipeline. As noted above at note 77, the literal language of section 2(11) is extremely expansive. We do not, however, believe that Congress intended its adoption of section 2(11)'s definition of "LNG terminal" to expand the Commission's NGA jurisdiction to encompass facilities, including facilities that may be far inland, that do not receive gas from a jurisdictional interstate pipeline and which are constructed for the purpose of liquefying gas that can reach the ultimate end users of gas without ever entering a pipeline, simply because waterborne vessels will be one of the non-pipeline modes of transportation that will be used to deliver some of the gas liquefied at the facilities.

LNG terminal by virtue of the fact that Geismar will produce LNG which will be transported in interstate commerce by waterborne vessel. Consequently, Shell will not need to file an application under NGA section 3 for authorization to construct and operate this planned liquefaction facility.

48. As discussed above, there is no question that in the situation where a facility in one state receives gas by jurisdictional pipeline for liquefaction and send out, via waterborne vessel, to facilities in a second state where the gas is revaporized and injected into a jurisdictional pipeline, the Commission would have jurisdiction under NGA section 7 over the facilities in both states. However, there could be a regulatory gap with respect to the facilities in the second state if, instead of being injected into a jurisdictional pipeline for transportation to destinations outside the receiving state, all of the gas is to be consumed within that second state. In such an instance, the Commission would potentially have jurisdiction over only the upstream send-out end of the interstate transaction, since it could be argued that the receiving facilities, i.e., the terminal 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.[86] Thus, we find that the purpose of the section 2(11) definition of "LNG terminal," by including facilities used in relation to natural gas that is "transported in interstate commerce by waterborne vessel," while at the same time excluding facilities "subject to the jurisdiction of the Commission under section 7" is to provide the Commission with jurisdiction over the natural gas facilities on *both* ends of the *interstate* transportation of LNG when a facility receiving gas by pipeline will send out LNG by waterborne vessel to a facility in a second state that will revaporize the LNG and inject the gas into pipelines

[86] In *Pacific Alaska LNG*, the proposed LNG terminal in California would have been used for imported LNG as well as for Alaskan LNG, thus the Commission would have had jurisdiction under NGA section 3 regardless of whether the Hinshaw exemption in section 1(c) applied to exempt the LNG terminal from section 7 jurisdiction for interstate shipments from Alaska. Thus, the issue of the applicability of the Hinshaw exemption in *Pacific Alaska LNG* was limited primarily to the 112-mile take-away pipeline for the proposed LNG terminal, which the Presiding Administrative Law Judge found would be exempt from the Commission's section 7 jurisdiction as a Hinshaw pipeline under section 1(c). *Pacific Alaska LNG Co, et al.*, 8 FERC ¶ 63,032, at 65,299 (1979). However, as noted below, in 2004 when the Commission approved a proposed LNG terminal to be located in California, the California Public Utilities Commission (CPUC) argued that its state approval also was necessary before the project could go forward, and the CPUC did not drop its judicial challenge until EPAct 2005 clarified the Commission's exclusive jurisdiction. *Sound Energy Solutions*, 108 FERC ¶ 61,155 (2004).

for transportation to end users within that state. Similarly, section 2(11) operates, in conjunction with the language in section 3(e)(1), to clarify that the Commission has jurisdiction over LNG terminals importing gas which will all be consumed in the state in which the terminal is located.

49. The potential need for this jurisdictional clarification was highlighted at the time Congress was considering the legislation that became EPAct 2005 by pending proceedings in which the State of California challenged the Commission's exclusive jurisdiction over a proposed LNG terminal that would receive gas which would be consumed entirely within California.[87] While that proposed LNG facility would have been an import terminal, EPAct 2005's enactment of NGA section 3(e) and section 2(11)'s definition of "LNG terminal" clarified that the Commission had "exclusive jurisdiction" over the siting, construction, and operation of all LNG import and export terminals, including a proposed LNG terminal that would receive LNG that would be consumed entirely within the state where the terminal is located.[88] By including the "waterborne vessel in interstate commerce" language in the definition of LNG terminal, we believe Congress similarly clarified that when LNG supplies are delivered by waterborne vessels from one state to another state, the LNG terminal facilities receiving the waterborne vessels are not NGA-exempt local distribution or Hinshaw facilities as contemplated by the NGA's exemptions, and thereby ensured, albeit under section 3

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[87] *Sound Energy Solutions*, 106 FERC ¶ 61,279, *order denying reh'g and stay and clarifying prior order*, 107 FERC ¶ 61,263, *order clarifying prior order*, 108 FERC ¶ 61,155 (2004).

[88] The CRS's December 14, 2009 report titled *LNG Import Terminals: Siting, Safety, and Regulation* stated:

> Federal and state government agencies have had jurisdictional disagreements specifically relating to the siting of new LNG terminals. In February 2004, for example, the California Public Utilities Commission (CPUC) disputed FERC's jurisdiction over the siting of a proposed LNG terminal at Long Beach because, in the CPUC's opinion, the terminal would not be involved in interstate sales or transportation and therefore would not come under the Natural Gas Act. ... The Energy Policy Act of 2005 effectively codified FERC's jurisdictional rulings, however, leading the CPUC to drop its lawsuit challenging FERC's LNG siting authority in September 2005. Notwithstanding the CPUC case, other state challenges to FERC jurisdiction remain a possibility.
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> *Id*. at 16-17.

rather than section 7, that the Commission's jurisdiction encompasses LNG terminal facilities operating in interstate commerce.

50. Given that the Commission's jurisdiction under section 7 over existing or proposed facilities that would be used to send out LNG by waterborne vessel to another state where the LNG would be revaporized and injected into a jurisdictional pipeline has never been questioned, we do not view the "waterborne vessel in interstate commerce" language as encompassing those upstream send-out facilities.[89] Further, by explicitly excluding "any pipeline or storage facility" subject to section 7 from the section 2(11) definition, Congress preserved the Commission's ability to regulate the rates, terms, and conditions for service on facilities integral to the interstate grid.[90]

IV. Summary

51. For the reasons discussed herein, we find: (1) Shell's described transportation of LNG by non-pipeline modes of transportation will not be subject to our jurisdiction under section 7 of the NGA over the transportation of gas in interstate commerce; (2) Shell's facilities used to receive imported Canadian LNG transported by waterborne vessels and to liquefy and send out domestic LNG by waterborne vessels that will be delivered to the ultimate end users without entering a pipeline system will not be subject to our jurisdiction as LNG terminals under section 3 of the NGA; and (3) any of Shell's sales of LNG for resale that may be subject to our jurisdiction under section 7 of the NGA will be authorized under the automatic blanket certificate provided by section 284.402 of our regulations.

The Commission orders:

(A) Shell's petition for a declaratory order that it will not need to apply to the Commission for authorization under either section 3 or section 7 of the NGA for its facilities and activities is granted for the reasons discussed herein.

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[89] Such facilities, whether at a ship-accessible waterside quay or at a land-locked inland location, would be subject to section 7, and consequently, in accord with the section 2(11)(B) provision that exempts "any pipeline or storage facility" subject to section 7 from the definition of an "LNG terminal," would not be subject to section 3.

[90] As noted above, the conditions added by EPAct 2005 in NGA section 3(e) provide that, prior to January 1, 2015, the Commission may not condition authorization for a new LNG terminal or terminal expansion on the terminal operator offering open-access service or filing acceptable rates and other conditions of service.

(B) Clean Energy Fuels Corporation's motion to intervene out-of-time is granted.

By the Commission. Commissioner Bay is concurring in part and dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Shell U.S. Gas & Power, LLC Docket No. RP14-52-000

(Issued September 4, 2014)

BAY, Commissioner, *concurring in part and dissenting in part*:

I concur with the majority's determination that Shell U.S. Gas & Power LLC's proposed activities do not fall within the jurisdictional exemption created by section 1(d) of the Natural Gas Act. I disagree with the majority's conclusion regarding the scope of the Commission's jurisdiction under section 3 of the Act.

The Energy Policy Act of 2005 "explicitly provides the Commission with exclusive authority over LNG terminals subject to our section 3 jurisdiction." *The Gas Company*, 142 FERC ¶ 61,036, P 17 (2013). The majority acknowledges that, in doing so, Congress employed "a very broad definition of 'LNG Terminal'" (Order P 43); namely, "*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, or exported from, the United States, or "transported in interstate commerce by waterborne vessel." 15 U.S.C. § 717a(11) (emphasis added).

It is beyond dispute that Shell's proposed Canadian project will involve facilities that will "receive," "unload" and "store" "natural gas that is imported [from Canada] to the United States." Similarly, the proposed Geismar project would "receive" and "liquefy" natural gas and then load it on to "waterborne vessels" for "transport in interstate commerce." *See* Order PP 4-5. Nonetheless, the majority finds that neither involves an "LNG terminal" within the meaning of section 2(11) of the Natural Gas Act, 15 U.S.C. § 717a(11). That conclusion cannot be squared with the plain language of the Act.

The majority's determination is based, in part, on the fact that the Commission has generally limited its jurisdiction under section 7 of the Natural Gas Act to facilities that send or receive natural gas by pipeline. *See* Order P 43. But section 7 speaks of the Commission's jurisdiction over "transportation facilities." *See* 15 U.S.C. § 717f(a). Section 2(11) defines "LNG terminals" to include "all natural gas facilities," not merely natural gas "transportation facilities." *See* 15 U.S.C. § 717a(11) ("'LNG terminal' includes all natural gas facilities … that are used to receive, unload, load, store, [or] transport … natural gas"). The former is clearly broader than the latter, and had Congress intended a more limited approach it could have used the language of section 7 in section 3. The majority also argues that, although the projects – in particular, the Geismar project – will involve natural gas "transported in interstate commerce by

waterborne vessel," the only waterborne transportation that counts for purposes of section 2(11) is interstate delivery to a facility that is connected to a pipeline (whether intrastate or interstate). *See* Order PP 43, 48. In support, the majority points to a jurisdictional dispute between California and FERC involving this fact pattern that preceded the enactment of the Energy Policy Act of 2005. *Id*. If anything, that history suggests that Congress intended to pre-empt state action and used broad language to accomplish that result, providing "exclusive authority" to FERC with respect to LNG terminals, 15 U.S.C. § 717b(e)(1), including "all natural gas facilities" in which natural gas was "transported in interstate commerce by waterborne vessel," *id*. § 717a(11).

While one might debate the relative policy arguments for or against a finding of FERC jurisdiction, we are constrained, as we should be, by the language of the statute. Here, I believe the plain meaning of the statute compels a different result. Accordingly, I must respectfully dissent.

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Norman C. Bay
Commissioner