148 FERC ¶ 61,219
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Emera CNG, LLC Docket No. CP14-114-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued September 19, 2014)

1. On March 20, 2014, Emera CNG, LLC (Emera) filed a petition[1] requesting that the Commission declare that Emera's construction and operation of facilities to produce compressed natural gas (CNG) that will be transported by trucks to ships for export to the Commonwealth of the Bahamas will not be subject to the Commission's jurisdiction under the Natural Gas Act (NGA).[2]

2. For the reasons discussed herein, we grant the petition for a declaratory finding that Emera's proposed facilities and operations will not be subject to the Commission's jurisdiction under the NGA.

I. Notice, Intervention, and Protest

3. Notice of Emera's petition was published in the *Federal Register* on March 28, 2014.[3] Timely motions to intervene were filed by Floridian Natural Gas Storage Co., LLC (Floridian) and Pivotal LNG, Inc.[4] Floridian filed a protest, to which Emera submitted an answer. Although the Commission's Rules of Practice and Procedure do

[1] Emera'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] 79 Fed. Reg. 17,528 (Mar. 28, 2014).

[4] Pivotal LNG's timely, unopposed motion to intervene was granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214 (2014).

not permit answers to protests,[5] we find good cause to waive this rule to admit the answer, as doing so will not cause undue delay at this stage of the proceeding and information in the pleading will assist in the decision-making process.

4. Floridian has been granted certificate authorization under NGA section 7 to construct storage, liquefaction, revaporization, and liquefied natural gas (LNG) truck-loading facilities in Florida at a location approximately 35 miles from the contemplated site for Emera's planned CNG and truck-loading facilities.[6] Floridian argues that the Commission's assertion of jurisdiction over Emera's CNG facilities is necessary to ensure that Emera's operations are "environmentally-sound, as well as safe and secure," and to prevent a regulatory gap that would give Emera an unfair competitive advantage.[7] Emera argues that Floridian does not have an interest justifying its participation in this proceeding, since it will not be a consumer of CNG or a customer of Emera, and Floridian's LNG operations will not be in direct competition with Emera's CNG operations, since LNG is not a substitute for CNG.[8]

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[5] Rule 213(a)(2), 18 C.F.R. § 385.213(a)(2) (2014).

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

[7] Floridian's April 18, 2014 Motion to Intervene at 10.

[8] Rule 214 provides the right to participate in a proceeding to a person that "has or represents an interest which may be directly affected by the outcome of the proceeding." 18 C.F.R. § 385.214(b)(ii) (2014).

5. We find that Floridian has demonstrated an interest sufficient to allow its participation as a party in this proceeding. Accordingly, Floridian's motion to intervene is granted.

II. Emera's Petition for a Declaratory Order

6. Emera[9] proposes to construct a CNG compression and truck-loading facility at the existing Port of Palm Beach in Riviera Beach, Florida, in order to export CNG to the Commonwealth of the Bahamas. Emera states that it has filed an application with the Department of Energy (DOE) for authorization to export CNG.[10] Emera plans to receive natural gas at its planned compression facility from the Riviera Lateral, a pipeline owned and operated by Peninsula Pipeline Company.[11] Emera comments that although the

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[9] Emera is a limited liability company, formed under the laws of Delaware, with its primary place of business in West Palm Beach, Florida. Emera is a wholly owned, indirect subsidiary of Emera Inc., which is a Canadian corporation.

[10] Emera filed its application for export authorization with DOE's Office of Fossil Energy (FE) on November 20, 2013, seeking long-term authorization to export CNG to both free trade and non-free trade countries, which was granted on June 13, 2014, in DOE/FE Order No. 3447. The Department of Energy issued a notice of the application in the *Federal Register* on July 3, 2014. 79 Fed. Reg. 38,017. Section 301 of the Department of Energy Organization Act of 1977 transferred the regulatory functions of NGA section 3 from the Federal Power Commission (this Commission's predecessor) to the Secretary of Energy. DOE Organization Act, 42 U.S.C. § 7151 (2012). The Secretary subsequently delegated back to the Commission the authority over the siting, construction, and operation of gas import and export facilities. 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." 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. Applications for authorization to import or export natural gas (the commodity) must be submitted to DOE.

[11] Emera's petition indicates that Peninsula Pipeline Company operates as a "Hinshaw pipeline company," exempt pursuant to NGA section 1(c) from the Commission's jurisdiction over the interstate transportation and sale for resale of natural gas. NGA section 1(c), added in 1954, Pub. L. 323, 83rd Cong., 2nd. Sess. (1954), is referred to as the "Hinshaw amendment" 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*

(continued…)

described CNG facility would be the principal source of its CNG for export, during maintenance at its facility or at the Port of Palm Beach, Emera may obtain CNG from other sources and/or export CNG via other general-use Florida port facilities.

7. Emera's CNG plant would include facilities to receive, dehydrate, and compress gas to fill International Standards Organization (ISO) containers and load the ISO containers onto trucks. Emera states that the proposed CNG facility would initially be capable of loading 6 million cubic feet per day (MMcf/d) of CNG into ISO containers and would be capable of expanding to load up to 25 MMcf/d. Emera plans to truck the ISO containers a distance of approximately a quarter mile from its proposed CNG facility to a berth at the Port of Palm Beach where the containers will be loaded onto a roll-on/roll-off ocean-going carrier.

8. Emera states that it intends to send CNG containers from Florida to Freeport, Grand Bahama Island, where the containers would be unloaded, the CNG decompressed and injected into a pipeline for transport to electric generation plants owned and operated by Grand Bahama Power Company (Bahama Power), an Emera affiliate.[12] Bahama Power's electric generation plants currently are powered by heavy fuel oil and diesel. In addition to diversifying Bahama Power's fuel sources, Emera expects that retrofitting the plants to burn natural gas will reduce and stabilize customer electricity rates and stimulate economic growth in the Bahamas. Emera also plans to market its CNG to other customers that are able to access the pipeline on Grand Bahama Island.

III. Response

9. As discussed below, we find that the construction and operation of the CNG facility described by Emera will not be subject to our authority under the NGA.

A. NGA Section 3 Authority over Emera's Facility

10. While the stated purpose of Emera's CNG facility will be to compress gas so that it can be exported in ISO containers, the facility will be subject to our section 3 jurisdiction only if we find it will be an "export facility." Floridian argues that Emera's

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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). The Hinshaw amendment exempts from Commission jurisdiction a qualifying pipeline company's transportation and sales for resale of interstate gas supplies that will be consumed within the state but that do not qualify as local distribution – e.g., deliveries of system supplies to a local distribution company.

[12] Emera owns 80.4 percent of Bahama Power.

facility will constitute a jurisdictional natural gas export facility, and thus, its siting, construction, and operation are subject to the Commission's jurisdiction.

11. In support of its position, Floridian emphasizes that section 1(b) provides that the NGA applies not only "to the importation and exportation of natural gas in foreign commerce" but also to "persons engaged in such importation or exportation," pointing to the fact that Emera will be operating its CNG facility to implement its exports. While Floridian acknowledges that the Commission has no jurisdiction over the truck traffic between the CNG facility and the site where ISO containers will be transferred to and from ocean-going carriers, Floridian disputes Emera's position that this quarter-mile transit by truck should prevent section 3 jurisdiction from attaching to Emera's CNG facility as an export facility, given Floridian's point of view that the point of export is the Port of Palm Beach. Floridian further asserts that Emera's facility will be subject to the Commission's exclusive jurisdiction under section 3 as an "LNG terminal," as that term was defined by the Energy Policy Act of 2005 (EPAct 2005).[13]

12. Floridian asserts that failure by the Commission to assert jurisdiction over Emera's facility will give operators like Emera an unfair competitive advantage over companies subject to the Commission's jurisdiction. Floridian also charges that the public interest

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[13] Pub. L. No. 109-58, 119 Stat. 594 (2005). EPAct 2005 added NGA section 2(11) to define "LNG Terminal" as follows:

> "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 –
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> (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."

requires that the Commission ensure that natural gas facilities are constructed and operated in an environmentally-sound, safe and secure manner.[14]

13. The Commission has interpreted and exercised its delegated section 3 jurisdiction over import and export facilities consistent with its interpretation and exercise of its section 7 jurisdiction over facilities used to transport gas in interstate commerce. The Commission has found that its section 7 jurisdiction over interstate transportation is limited to the transportation of gas by pipeline.[15] Similarly, to date, the Commission has only exercised its authority under section 3 over import and export facilities to regulate: (1) pipelines that transport natural gas to or from the United States' international borders; and (2) coastal LNG terminals that are accessible to ocean-going LNG tankers and connected to pipelines that deliver gas to or take gas away from the terminal. Emera's facility will not include a pipeline to deliver gas to an international border or be capable of transferring CNG directly into an ocean-going carrier for export. Thus, we find that Emera's facilities to compress and load CNG onto trucks are unlike the border-crossing pipelines and coastal LNG terminals that the Commission traditionally has regulated

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[14] Floridian's *Motion for Leave to Intervene and Comments* at 10.

[15] *See Exemption of Certain Transp. and/or Sales of LNG from the Requirements of Section 7(c) of the NGA*, 49 F.P.C. 1078, at 1079 (1973). In this order terminating a rulemaking proceeding, the Commission concluded from legislative history and statutory construction that the Commission does not have section 7 jurisdiction over gas being moved by non-pipeline modes of transportation because Congress enacted the NGA specifically to address *pipeline*-related abuses. However, the Commission has asserted jurisdiction over facilities used to liquefy or compress gas for delivery by non-pipeline modes of transportation where necessary to prevent circumvention of the Commission's jurisdiction over the interstate transportation of gas by pipeline. For example, 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), the Commission asserted section 7 jurisdiction over an exchange arrangement where 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. In both these cases, although the Commission found that trucking LNG effectively substituted for flowing gas by pipeline, the Commission did not seek to assert jurisdiction over the trucking operations.

under section 3 as import/export facilities, and more like existing, unregulated facilities that deliver LNG into trucks which are subsequently driven across the border into Canada or Mexico. [16]

14. Further, we reject Floridian's contention that we should interpret NGA section 2(11)'s definition of LNG terminal to include Emera's planned CNG facility. While it is true that Emera's facility will be "located onshore" and "used to receive, . . . load, . . . transport, . . . or process natural gas that is . . . exported to a foreign country," Floridian would have us read "LNG" out of the term "LNG terminal." Floridian's efforts to draw parallels between Emera's proposed CNG facility and LNG terminals are unavailing, as the capabilities of Emera's CNG facility will be confined to compressing, and not liquefying, natural gas. Floridian provides no evidence of any expression of Congressional intent that the EPAct 2005 revisions to NGA section 3 should apply to facilities that produce or transport natural gas in other than a liquid state.

15. Floridian argues that the Commission's failure to assert jurisdiction over Emera's facilities and services will result in a regulatory gap that will give Emera and other companies engaged in similar operations an unfair competitive advantage over companies like Floridian, whose facilities and services, including their LNG truck-loading services, are subject to the Commission's regulatory authority. Floridian argues that this regulatory gap would be contrary to the public interest because Emera will be able to construct and operate its CNG facility without being subject to the Commission's prior environmental and safety review.

16. We observe, as the court explained in *ExxonMobil Gas Marketing Company v. FERC*, the "need for regulation cannot alone create authority to regulate," and "jurisdiction may not be presumed based solely on the fact that there is not an express withholding of jurisdiction."[17] We further note that the fact that this Commission does

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[16] For example, Xpress Natural Gas (XNG) has a CNG plant in Maine that receives gas from an interstate pipeline and loads CNG containers onto trucks for delivery to customers in Canada and in New England. The Commission does not regulate the CNG facility under either section 3 or 7, nor does it exercise jurisdiction over the trucks' passage across the border under section 3. Further, the Commission has never issued authorization under section 3 to designate points of import or export for gas carried by truck, train, or waterborne vessel or authorized the site of, or construction and operation of, any complementary facility, such as a road, bridge, railway, or stand-alone pier, needed to import or export gas by a non-pipeline mode of transportation. However, regardless how natural gas is transported, all imports and exports of natural gas require section 3 authorization from the DOE's Office of Fossil Energy.

[17] 297 F.3d 1071, 1088 (D.C. Cir. 2002).

not have NGA jurisdiction over Emera's CNG facility does not mean that other federal, state, and local regulatory agencies lack the authority to impose environmental and safety conditions on the construction and operation of Emera's CNG facility. Emera's facility, the pipeline delivering the gas, and the trucking operations will be subject to the U.S. Department of Transportation's (DOT) regulations and requirements addressing the transportation and storage of hazardous materials.[18] The ships carrying the CNG containers and docks at the ports where the containers will be loaded on to the ships will be subject to the U. S. Coast Guard's requirements and restrictions. The port authorities also will exercise oversight. In addition, the facilities and activities involved in Emera's export operations will be 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.

17. We have found that Emera's planned facilities and operations will not be subject to our NGA jurisdiction. Therefore, we have no more ability to address Floridian's perceived unfair competition to its jurisdictional LNG trucking-loading operations for its storage customers than we would if Floridian were facing competition from a distributor of propane or fuel oil over which we similarly have no jurisdiction.[19]

18. Given this, we reject Floridian's claim that Emera will inhabit a regulatory gap; rather, we view Floridian and Emera as operating different types of facilities, each subject to different (and in part, overlapping) regulatory regimes.[20]

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[18] 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.

[19] We note that in issuing Floridian's section 7 certificate, Floridian sought and the Commission granted market-based rate authority, based in part on the existence of numerous competitors serving the same region, which should preclude Floridian from wielding significant market power. 124 FERC ¶ 61,214 at PP 24-33.

[20] While Emera will not be subject to our oversight, it may need to comply with requirements imposed by, among others, the United States Department of Transportation's Pipeline and Hazardous Materials Administration and Federal Motor Carrier Safety Administration, the United States Coast Guard, the Florida Public Service Commission, the Florida Bureau of Fire Prevention, and the Port of Palm Beach District.

B. NGA Section 7 Authority over Gas in Interstate Commerce

19. Emera also requests that the Commission declare that the proposed facilities will not be subject to its authority under section 7 of the NGA. As presented in its petition, all of the natural gas to be compressed at Emera's planned facility will be exported in foreign commerce to the Commonwealth of the Bahamas. Thus, on its face it seems that the Commission's section 7 jurisdiction over transportation and sales of gas for resale in interstate commerce would not be implicated by Emera's proposal. Further, gas compressed at Emera's facility will not be loaded directly onto ships for export. Rather, Emera will compress gas into containers which will be moved by truck to a dock where the containers will be loaded onto a ship for export. It is well settled that the Commission's jurisdiction over transportation and sales in interstate commerce only applies to gas that is transported by pipeline.[21] Moreover, as noted above, Emera will be receiving its gas from a non-jurisdictional Hinshaw pipeline. Since the gas will have left jurisdictional interstate commerce before reaching Emera and will never re-enter interstate commerce (i.e., will not be transported from Florida to another state), our section 7 jurisdiction will not attach to the Emera facility.

20. In view of the above considerations, we find that Emera's CNG facilities and services will not be subject to the Commission's jurisdiction under NGA section 3 as a

[21] *See Order Terminating Proposed Rulemaking Proceeding*, 49 FPC 1078, 1081 (1973). 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) 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.

natural gas export facility or as an LNG terminal, or under section 7 as a facility used to transport gas or as an entity making sales for resale of gas in interstate commerce. [22]

The Commission orders:

(A) Emera's petition for a declaratory finding that its proposed CNG facilities and export operations will not be subject to the Commission's jurisdiction under the NGA is granted.

(B) Floridian's motion to intervene is granted.

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[22] Emera states that during periods of maintenance at either its CNG facility or the Port of Palm Beach, it may have CNG from other sources delivered by trucks to the Port of Palm Beach or to general-use docks at other Florida ports. To the extent that these alternative arrangements conform to Emera's description of its planned facilities and services at the Port of Palm Beach – e.g., gas will be received in state from an NGA-exempt facility, compressed and transported exclusively by truck in state, sold once to a foreign entity, and exported from a general-use dock – then the conclusions we reach with respect to Emera's planned CNG operations will apply to its potential alternative CNG operations. With respect to using other ports as points of export (Emera identifies Port Everglades, the Port of Miami, Port Canaveral, and the Port of Jacksonville as possible candidates), doing so will not subject these general-use facilities to our jurisdiction under NGA section 3. We found in *The Gas Company, LLC*, 142 FERC ¶ 61,036, at P 14 (2013), that general-use pier facilities would not become section 3 jurisdictional LNG terminal facilities if used for ISO containers of LNG 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]." We similarly find that using general purpose ports to handle ISO containers of CNG will not cause the port facilities to become jurisdictional natural gas export facilities subject to our section 3 jurisdiction.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Emera CNG, Inc. Docket No. CP14-114-000

(Issued September 19, 2014)

BAY, Commissioner, *dissenting*:

In enacting the Natural Gas Act, Congress emphasized the importance of regulating the sale of gas in foreign commerce. In section 1(a), Congress declared that "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a). In section 1(b), Congress stated that the provisions of the Act "shall" apply to "the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation." *Id*. § 717(b). If there were any lingering doubt over congressional intent, section 3 removes it when the Act refers to foreign commerce a third time: "[N]o person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so." *Id*. § 717b(a). As a result, the Commission exercises authority over the siting, construction, operation, and maintenance of export facilities in order to ensure that any authorized exports will serve the public interest. *See, e.g.*, *NET Mex. Pipeline Partners, LLC*, 145 FERC ¶ 61,112, P 13 (2013).

Here, Emera's facilities fall within the four corners of the statute. They are facilities involving natural gas intended for export to a foreign country. As the majority acknowledges, "the stated purpose of Emera's CNG facility will be to compress gas so that it can be exported in ISO containers" to the Commonwealth of the Bahamas. Order P 10. Not surprisingly, perhaps, Emera has applied to the Department of Energy– under section 3 of the Natural Gas Act – "for long-term authorization to export CNG from" its proposed facility, and properly so. *See* 79 Fed. Reg. 38,017, 38,018 (July 3, 2014). Yet, in the majority's view, that very same facility is not an "export facility" under section 3.

Of course, this raises the question of how what would plainly appear to be a gas export facility is not, in fact, an export facility. The majority's argument seems to be that because the CNG will leave Emera's facility by truck and travel a quarter of mile before being loaded onto ocean-going carriers for export – rather than by a pipeline running across a border or to a tanker – the facility is not an "export facility" under section 3 of the Natural Gas Act. *Id*. P 13. It cannot be that the Commission's jurisdiction turns on this 440-yard truck journey.

The majority suggests that the scope of the Commission's jurisdiction under section 3 must be consistent with section 7 of the Natural Gas Act. Jurisdictional export facilities – other than "LNG terminals" – thus must have the defining characteristic of interstate transportation facilities, namely a send-out pipeline. Order P 13. But conflating section 3 with section 7 is not supported by the language of the statute. Section 7 speaks of natural gas "transportation facilities," 15 U.S.C. § 717f; section 3 does not, *id*. § 717b. And none of the language which led the Commission to conclude that section 7 is limited to transportation by pipelines is present in section 3 (nor any of the related delegation and executive orders). *See, e.g., Exemption of Certain Transp. and/or Sales of LNG from the Requirements of Section 7(c) of the NGA*, 49 F.P.C. 1078, 1079-80 (1973) (discussing Commission's section 7 jurisdiction). Moreover, section 1(b) demonstrates the breadth of the Act by making a distinction between interstate transportation or sales on the one hand, and importation and exportation on the other, all of which are covered. *See* 15 U.S.C. § 717(b) (applying the Act to "natural gas companies engaged in such transportation or sale, <u>and</u> to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation") (emphasis added).

The result reached by the majority also suggests that, if the boundaries of a facility do not encompass the actual point of export, it cannot be an "export facility" under section 3. But the Department of Energy Delegation Order providing the Commission with authority over export facilities differentiates between the place of export and the facilities necessary to implement that export, and gives no indication that the former must be located within the latter. *See* DOE Delegation Order No. 00-004.00A, at ¶ 1.21.A (delegating to FERC, with respect to "the imports and exports of natural gas," the authority to "[a]pprove 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").

As a policy matter, one could certainly debate the merits of whether or not FERC should assert jurisdiction over Emera's export facility. But where Congress has spoken there is no room for such a debate. Here, Congress's intent is clear: federal regulation over the sale of gas in foreign commerce "is necessary in the public interest." 15 U.S.C. § 717(a).

That Congress might require federal oversight of foreign commerce should not be a surprise. *See, e.g.*, *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) ("the Federal Government must speak with one voice when regulating commercial relations with foreign governments"). The Commission itself has previously recognized that "[t]he nation's energy needs are best served by a uniform national policy" applicable to the export or import of natural gas in foreign commerce. *Sound Energy Solutions*, 106 FERC ¶ 61,279, P 27 (2004). The Commission's ability to implement any such national policy may now be subject to the vagaries of where an exporter chooses to put the fence around its facility or by the trucking of gas a short distance to the docks.

In my view, regardless of the manner in which the CNG leaves Emera's plant, the facility should be called what it is: a natural gas export facility. Accordingly, I respectfully dissent from the determination that Emera's facilities are not subject to the Commission's jurisdiction under section 3 of the Natural Gas Act.

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Norman C. Bay
Commissioner