

151 FERC ¶ 61,006
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Pivotal LNG, Inc.

Docket No. RP15-259-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued April 2, 2015)

1. On December 10, 2014, Pivotal LNG, Inc. (Pivotal) filed a petition¹ requesting the Commission declare that liquefaction facilities operated by Pivotal and its affiliates that produce liquefied natural gas (LNG) that would ultimately be exported to foreign nations by a third party would not be subject to the Commission's jurisdiction pursuant to section 3 of the Natural Gas Act (NGA). For the reasons discussed herein, we find that the activities described in Pivotal's petition will not subject the liquefaction facilities to the Commission's NGA section 3 jurisdiction.

I. Background and Petition

2. Pivotal, a wholly-owned subsidiary of AGL Resources Inc., operates a natural gas liquefaction and storage facility in Trussville, Alabama, from which it makes sales of LNG. In addition to its own Trussville facility, Pivotal requests the Commission declare four other existing liquefaction and storage facilities, operated by its affiliates, will be nonjurisdictional. The affiliated facilities are the Riverdale LNG facility in Riverdale, Georgia; the Cherokee LNG facility in Ball Ground, Georgia; the Macon LNG facility in Macon, Georgia; and the Chattanooga LNG facility in Chattanooga, Tennessee.

3. The Commission has previously addressed the jurisdictional status of Pivotal's facilities on two occasions. First, in 2011, in anticipation of acquiring the Trussville facility from an NGA-exempt municipality, Pivotal submitted an application for NGA section 7 certificate authorization to operate the facility. The Director of the Office of Energy Projects dismissed the application, finding the facilities Pivotal proposed to

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

acquire and the activities Pivotal proposed to undertake would not be subject to the Commission's jurisdiction.² Second, in 2014, Pivotal submitted a petition requesting the Commission determine that Pivotal, as well as the same four above-identified affiliates, would not be subject to either NGA section 3 or section 7 jurisdiction if LNG produced at the LNG facilities was transported by waterborne vessel to end users in noncontiguous states and territories (e.g., Hawaii or Puerto Rico). On September 4, 2014, the Commission issued an order determining (1) that the transportation of LNG by non-pipeline means would not subject Pivotal and its affiliates to the Commission's jurisdiction and (2) that the LNG facilities owned by Pivotal and its affiliates would not be "LNG Terminals" as defined by NGA section 2(11).³ However, the September 2014 Declaratory Order was limited to transactions in which LNG was subsequently transported by waterborne vessel to end users in noncontiguous states and territories.⁴

4. Pivotal now seeks a declaratory order finding that the LNG facilities it identifies would not be deemed "LNG Terminals" subject to the Commission's NGA section 3 jurisdiction when engaging in transactions which ultimately result in any of the LNG they produce being exported. Specifically, Pivotal expects it or its affiliates to sell LNG that is (1) produced at the identified inland LNG facilities or supplied by a third party; (2) transported by Pivotal, an affiliate, or third party in interstate and intrastate commerce by means other than interstate pipeline; and (3) subsequently exported, or resold for ultimate export, by a third party.

5. Pivotal asserts that none of the named LNG facilities constitute an "LNG Terminal" as defined by NGA section 2(11), since they are all located inland, unlike the border-crossing pipelines and coastal LNG terminals that the Commission has traditionally regulated under NGA section 3. Pivotal further avers that there is no regulatory gap or public policy rationale that would justify exercise of the Commission's NGA section 3 jurisdiction.

² *Pivotal LNG, Inc.*, 137 FERC ¶ 62,108 (2011).

³ *Pivotal LNG, Inc.*, 148 FERC ¶ 61,164, at P 27 (2014) (September 2014 Declaratory Order). However, the Commission did find that certain of Pivotal's sales for resale may be subject to the Commission's jurisdiction, but, if so would be authorized under the automatic blanket certificate provided by section 284.402 of the Commission's regulations. *Id.* P 21.

⁴ *Id.* P 2.

II. Notice and Interventions

6. Notice of Pivotal's petition was published in the *Federal Register* on December 23, 2014.⁵ A timely, unopposed motion to intervene was filed by Exelon Corporation.⁶

III. Discussion

7. NGA section 3(e)(1) states that “[t]he Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”⁷ NGA section 2(11) defines “LNG terminal” to include:

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

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

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 7.⁸

⁵ 79 Fed. Reg. 76,996 (Dec. 23, 2014).

⁶ 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).

⁷ 15 U.S.C. § 717b(e)(1) (2012). Section 301 of the Department of Energy (DOE) 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.

⁸ 15 U.S.C. § 717a(11).

8. To date, the Commission has only exercised its authority under section 3 over import and export facilities to regulate (1) pipelines constructed at the place of entry for imports or exit for exports⁹ and (2) coastal LNG terminals that are accessible to ocean-going, bulk-carrier LNG tankers and that are connected to pipelines that deliver gas to or take gas away from the terminal.¹⁰ As discussed below, we find no cause to apply section 3 to the LNG facilities described in Pivotal's petition.

9. In *Shell U.S. Gas & Power, LLC*, the Commission determined that NGA section 2(11) did not redefine the term "natural gas facilities" as commonly understood for the purposes of Commission jurisdiction.¹¹ Specifically, the Commission noted that it had 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.¹² The Commission further found that a literal reading of section 2(11) 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.¹³

10. In *Emera CNG, LLC (Emera)*, the Commission held that a compressed natural gas (CNG) facility designed to fill International Standards Organization (ISO) containers with CNG and load the ISO containers onto trucks for transport to a ship for export was not an export facility subject to the Commission's NGA section 3 jurisdiction.¹⁴ The

⁹ Pipelines subject to section 3 are located at the international border with Canada and Mexico. The Commission granted section 3 authorization for two pipelines that were to be located at the offshore boundary demarcating the United States' and the Commonwealth of the Bahamas' Exclusive Economic Zone; however, 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).

¹⁰ *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163, at P 39 (2014).

¹¹ *Id.* P 43.

¹² *Id.* (citing *Order Terminating Proposed Rulemaking Proceeding*, 49 FPC 1078, 1081 (1973)).

¹³ *Id.* P 43 n.78.

¹⁴ *Emera*, 148 FERC ¶ 61,219 (2014).

Commission determined that although the CNG facility would receive gas via pipeline and be located one quarter of a mile from the berth where the ISO containers were to be loaded onto a ship for export, the CNG facility was not subject to the Commission's section 3 jurisdiction because it would not be an export facility capable of directly transferring CNG into an ocean-going ship for export.¹⁵ Additionally, we noted that the CNG facilities would not meet the section 2(11) definition of "LNG Terminal" because the facilities would be compressing and not liquefying gas.¹⁶

11. Thus, in determining whether an LNG import or export facility is subject to the Commission's NGA section 3 jurisdiction as an LNG terminal, we have held that the facility must be (1) connected to a pipeline that delivers gas to or sends gas from the facility and (2) located at the point of import or export such that LNG is directly transferred to or from an ocean-going, bulk-carrier LNG tanker.

12. Here, the LNG facilities owned by Pivotal and its affiliates are all located inland, and consequently are not capable of transferring LNG directly onto ocean-going, bulk-carrier LNG tankers. As Pivotal noted in its petition, LNG produced at the facilities or supplied by a third party would be transported, by means other than interstate pipeline, to the ultimate point of export. Thus, the LNG facilities described by Pivotal are unlike the LNG terminals that the Commission traditionally has regulated under section 3 as import/export facilities, and are more like unregulated LNG facilities that load LNG onto trucks that then drive the LNG across the border into Canada or Mexico.¹⁷

13. Moreover, there is no regulatory gap that would justify an over-expansive application of section 3 to the LNG facilities owned by Pivotal and its affiliates. As noted in the September 2014 Declaratory Order, these LNG facilities are regulated by various federal, state, and local agencies.¹⁸ Additionally, surface carriers of LNG are subject to the Department of Transportation's regulations, and ships carrying the LNG and docks where the LNG will be loaded on to the ships will be subject to the United States Coast Guard's requirements and restrictions. Lastly, any entity that wishes to

¹⁵ *Id.* P 13.

¹⁶ *Id.* P 14.

¹⁷ 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.

¹⁸ *See* September 2014 Declaratory Order at P 12, n.21.

export natural gas (the commodity) must receive authorization from the Department of Energy's Office of Fossil Energy.

14. In view of the above considerations, we find that the LNG facilities owned by Pivotal and its affiliates will not be subject to the Commission's NGA section 3 jurisdiction as a LNG Terminal.

The Commission orders:

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

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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Docket No. RP15-259-000

(Issued April 2, 2015)

BAY, Commissioner, *dissenting*:

One might well wonder how a natural gas facility that is used to export gas and that must obtain an export license from the Department of Energy is not, from FERC's perspective, an "export" facility within the meaning of the Natural Gas Act and thus not subject to FERC's jurisdiction. If this inconsistency seems puzzling, that's because it is. Logic, not to mention the plain language of the Act, compels a different result. Nevertheless, in *Emera CNG, LLC*,¹ over my dissent, the Commission held that a natural gas facility used to export gas to the Bahamas was not an "export" facility because the gas from the facility had to be trucked 440 yards to the docks. Relying on the reasoning of *Emera*, Pivotal, which operates five LNG facilities in three different states, seeks a similar declaratory order. For the reasons I stated in *Emera*, I would deny Pivotal's request as well.

The central flaw in the majority's reasoning is that it fails to address the plain language of the Natural Gas Act. The Act makes clear Congress's intent to regulate the import and export of gas. Section 1(a) declares that "[f]ederal regulation" of the "transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."² Section 1(b) similarly provides that the Act "shall" apply to "the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation."³ To that end, section 3 states that "no 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.*"⁴ To effectuate these congressional directives, the Department of Energy authorizes the export of the commodity natural gas, while 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.⁵

¹ 148 FERC ¶ 61,219 (2014).

² 15 U.S.C. § 717(a).

³ *Id.* § 717(b).

⁴ *Id.* § 717b(a) (emphasis added).

⁵ *See, e.g., NET Mex. Pipeline Partners, LLC*, 145 FERC ¶ 61,112, P 13 (2013).

Here, the majority acknowledges that “liquefaction facilities operated by Pivotal and its affiliate ... [will] produce liquefied natural gas that [will] ultimately be exported to foreign nations by a third party” and that such foreign sales must be made pursuant to an export license from DOE.⁶ There can be little doubt, therefore, that the facilities will be involved in the “exportation of natural gas in foreign commerce.”⁷

Instead of addressing the plain language of the statute, the majority simply ignores it – not once is section 1(a) or (b) or section 3(a) even acknowledged – and proceeds to create its own exemption by misreading and conflating section 3(e) and section 7 of the Act. Section 3(e) relates to “LNG terminals;” section 7 covers “transportation facilities.” First, the majority observes that Pivotal’s facilities are located inland and incapable of transferring LNG directly to tankers.⁸ These facts establish that the facilities do not constitute an “LNG terminal” as defined by section 2(11) of the Act.⁹ But the Commission’s jurisdiction under section 3 extends to export facilities, not merely “LNG terminals.” The two are not the same. Under section 2(11), “LNG terminal” is defined to include facilities used for import, export, or interstate commerce. An LNG terminal is simply one type of export facility. Indeed, the first commercial LNG facility was not built until 1941, three years after enactment of the Natural Gas Act.¹⁰ The first U.S. export terminal was completed in 1969.¹¹ There is no evidence to suggest that Congress sought to limit export facilities to “coastal LNG terminals that are accessible to ocean-going, bulk-carrier LNG tankers and that are connected to pipelines that deliver gas to or take gas away from the terminal.”¹²

Second, the majority notes that LNG “would be transported, by means other than interstate pipeline, to the ultimate point of export.”¹³ But nothing in section 3 conditions the Commission’s jurisdiction upon the existence of a pipeline running to the point of

⁶ See Order PP 1, 13.

⁷ 15 U.S.C. § 717(b).

⁸ See Order P 12.

⁹ See *Pivotal LNG*, 148 FERC P 61,164 (Bay, Comm’r, concurring).

¹⁰ See Henry F. Lippitt, *Regulatory Problems in the Development and Use of Liquid Methane*, 39 TEX. L. REV. 601, 603 (1961).

¹¹ See *Conocophillips Alaska Natural Gas Corp. & Marathon Oil Co.*, 126 FERC ¶ 61037, P 3 (2009).

¹² Order P 8.

¹³ *Id.* P 12.

export. The majority's view that a pipeline is a condition to jurisdiction stems from an inappropriate attempt to graft concepts developed under section 7 of the Act, which addresses the Commission's jurisdiction over interstate "transportation facilities," to section 3, which governs the exportation of natural gas.¹⁴ Congress has made clear that there is a distinction between domestic transportation or sales – which are only jurisdictional if they are interstate in character – and foreign imports or exports, all of which are covered.¹⁵ And the DOE Delegation Order, which provides the Commission with authority over export facilities, is equally bereft of language that would support the majority's view that jurisdictional export facilities must share the defining characteristics of interstate transportation facilities.¹⁶

The majority attempts to buttress its analysis with the claim that an "over-expansive application of section 3" is unnecessary here because Pivotal's "facilities are regulated by various federal, state and local agencies."¹⁷ Of course, the same is true with respect to the "traditional" LNG terminals and cross-border pipelines that the majority concedes are subject to the Commission's jurisdiction. More important, the Commission may not substitute its policies for those enacted by Congress. Section 3 is clear: "no 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."¹⁸

There are sound policy reasons in support of section 3's broad language, not the least of which is national uniformity. Under the majority's construct, gas export facilities will be subject to a patchwork of potentially conflicting state regulatory requirements. That result is contrary to the Commission's long-held view that "[t]he nation's energy needs

¹⁴ See, e.g., *Shell U.S. Gas & Power*, 148 FERC ¶ 61,163 (2014) (Bay, Comm'r, dissenting).

¹⁵ See 15 U.S.C. § 717(b) (applying the Act to "natural gas companies engaged in [interstate] transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation") (emphasis added).

¹⁶ 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").

¹⁷ Order P 13.

¹⁸ 15 U.S.C. § 717b(a).

are best served by a uniform national policy” with respect to gas in foreign commerce.¹⁹ The majority has also foreclosed the opportunity for some developers to affirmatively seek the benefit of federal jurisdiction, including FERC’s siting authority and established regulatory framework. Residents of a state in which the facility is located, or residents of surrounding states, may reasonably expect the facility to be subject to federal review of its operations and maintenance. While some states may have the staff and expertise to do this, others may not.

Unfortunately, the majority today ignores the plain language of the statute, substitutes its policy judgment for that of Congress, and undermines national uniformity with respect to the import or export of gas. While one might debate the relative policy arguments for or against a finding of non-jurisdiction, such a debate is not for us when Congress has spoken. It is not for us to call a congressional directive “over expansive.” While it is difficult to know what the unintended consequences of today’s order will be, one consequence is not: the Commission creates a significant and unnecessary gap in FERC’s jurisdiction.

For all those reasons, I respectfully dissent.

Norman C. Bay
Commissioner

¹⁹ *Sound Energy Solutions*, 106 FERC ¶ 61,279, P 27 (2004).