

106 FERC ¶ 61,279  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeen G. Kelly.

Sound Energy Solutions

Docket No. CP04-58-000

DECLARATORY ORDER ASSERTING EXCLUSIVE JURISDICTION

(Issued March 24, 2004)

1. On January 26, 2004, Sound Energy Solutions (SES) filed an application for authority under Section 3 of the Natural Gas Act (NGA) to site, construct, and operate a liquefied natural gas (LNG) terminal in the Port of Long Beach, California, for the purpose of importing LNG from foreign nations into the U.S. The Public Utilities Commission of the State of California (CPUC) contends that jurisdiction over the siting and operation of the proposed LNG terminal rests with the CPUC, not this Commission.
2. The Commission acknowledges the role the CPUC plays in ensuring safe and reliable utility services for California residents, guarding consumers against market power abuses, and minimizing adverse environmental impacts of energy projects. The Commission further understands the CPUC's efforts to enforce its statutory mandates. Here, the agencies' regulatory duties are divided: the Commission is concerned with activities that involve foreign and interstate commerce, and the CPUC is responsible for intrastate activities.
3. With respect to the proposed SES project, the CPUC and the Commission disagree on jurisdictional bounds; both agencies believe the proposed LNG import terminal to be under their authority. In this order, the Commission asserts exclusive jurisdiction over the proposed project. However, the Commission believes that cooperation among State and Federal authorities is needed to assess the SES proposal adequately and to expedite access to LNG supplies to meet our nation's critical energy needs. In this declaratory order, we act in advance of our decision on the merits of the SES proposal in order to resolve the State and Federal jurisdictional conflict by providing a vehicle for expedited court review of this determination.

4. For the reasons discussed below, we find that SES has properly submitted its request for authorization for its proposed LNG import terminal project to this Commission and that our authorization, if issued, will be sufficient to enable SES to build and operate its proposed project.

### **BACKGROUND AND ISSUES PRESENTED**

5. SES proposes to construct an LNG import terminal at the Port of Long Beach. LNG will be imported by ship and stored in liquid phase. The proposed terminal will consist of an LNG ship berth, two storage tanks, an LNG truck loading facility, an LNG vehicle fuel storage tank, and associated facilities. LNG will be vaporized and delivered to Southern California Gas Company (SoCalGas). A new 2.3-mile pipe will carry regassified volumes to SoCalGas' existing Line 765 at its Salt Works Station.<sup>1</sup> SES states that the project will provide a new supply of natural gas "primarily to markets in the [Los Angeles] Basin and Southern California." In addition to these regassified volumes, a small portion of the imported LNG will be sold as liquid fuel and either be delivered by truck to an LNG fueling station or delivered directly to a mobile fueling vehicle.

6. SES has filed an application with this Commission, pursuant to NGA Section 3, for authorization to site, construct, and operate facilities to import LNG.<sup>2</sup> The CPUC protests the scope of the SES application, arguing that the Commission's Section 3

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<sup>1</sup>We note that although the SES application itemizes certain facilities it proposes to construct and operate in order to move LNG from ships to storage and then to market, the 2.3-mile pipe required to link the LNG terminal to the existing SoCalGas line is not among these itemized facilities. SES states that this segment will be "constructed, owned, and operated by others." Regardless of which entity builds, owns, or operates this interconnect, this portion of pipe is an essential component of the LNG terminal. Its only purpose will be to deliver gas imported in foreign commerce to the state-regulated facilities of SoCalGas. Consequently, the 2.3-mile segment, along with the other facilities essential to the proposed importation, is subject to our exclusive jurisdiction. An amendment to the SES application or a separate application pursuant to NGA Section 3, specifically requesting authorization for this portion of the proposed project, must be filed with the Commission.

<sup>2</sup>LNG is natural gas within the meaning of Section 2(5) of the NGA. See, e.g., *Columbia LNG Corporation*, 47 FPC 1624, at 1630 (1972). SES states that it will shortly file an application with the Department of Energy's Office of Fossil Energy for approval to import LNG.

jurisdiction is limited to authorizing SES' request to import LNG, but does not extend to the regulation of SES' proposed facilities or services. The CPUC seeks to assert jurisdiction to regulate the siting and safety of the proposed LNG facilities, to dictate curtailment priorities, and to protect against any exercise of market power by SES.

7. The CPUC reasons that because the imported LNG will be transported and consumed within the State of California, the proposed project has no interstate component, but involves only importing and intrastate commerce. In view of this, the CPUC contends the Commission's NGA Section 7 authority over interstate natural gas companies' facilities and services is inapplicable to SES.

8. The CPUC also notes that the SES application to the Commission for authority to site, construct, and operate LNG facilities was filed under NGA Section 3. The CPUC points out that nothing in Section 3 expressly addresses the siting, construction, or operation of facilities. To the extent the Commission relies on the conditioning authority of Section 3, the CPUC argues that the Energy Policy Act of 1992 removed that authority. Accordingly, the CPUC concludes that the Commission lacks a statutory basis for jurisdiction over the siting, construction, or operation of the proposed LNG import terminal. Consequently, the CPUC believes that the Commission lacks the authority needed to exercise meaningful regulatory control over the proposed terminal.

9. The CPUC insists that SES is a California public utility and thereby subject to State law. To ensure public safety, protect the environment, and prevent market power abuses, the CPUC declares that SES must submit to State authority and obtain a CPUC certificate of public convenience and necessity to construct and operate its proposed terminal.

### **NOTICE AND INTERVENTIONS**

10. Notice of the SES Application was published in the Federal Register on February 10, 2004.<sup>3</sup> Timely, unopposed motions to intervene have been filed by 21 parties.<sup>4</sup> Untimely motions to intervene have been filed by BP Energy Company, Crystal Energy LLC, and

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<sup>3</sup>69 FR 6277 (2004).

<sup>4</sup>Timely unopposed motions to intervene are granted by operation of Rule 214.18 of the Commission's Rules of Practice and Procedure. 18 CFR § 385.214 (2003). Parties to this proceeding are listed in the appendix to this order.

ChevronTexaco Global Gas, which we will grant, as we find that to do so will not delay, disrupt, or otherwise prejudice this proceeding or the parties to this proceeding.

11. The CPUC filed a protest to the SES application and SES submitted a response to the protest. Section 385.213(a)(2) of our Rules of Practice and Procedure does not permit answers to protests. However, we may waive this rule for good cause shown, and do so in this instance to help clarify the issues under consideration.

### **COMMISSION RESPONSE**

12. The Commission, the CPUC, and SES are in accord that the SES proposal will not involve interstate commerce.<sup>5</sup> However, there is disagreement regarding the extent to which the Commission can rely on NGA Section 3 to regulate the siting, construction, and operation of import facilities.

#### **Commission Jurisdiction under NGA Section 3**

13. NGA Section 3(a) states:

[N]o person shall . . . import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed . . . importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.

14. In 1977, the regulatory functions of NGA Section 3 were transferred from the Commission to the Secretary of Energy under Section 301(b) of the Department of Energy (DOE) Organization Act. However, the Secretary of Energy then delegated back to the Commission the authority to approve or disapprove (1) the construction, modification, and operation of particular facilities, (2) the site at which such facilities

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<sup>5</sup>Provided the SES imports stay within California (and that import volumes are not used to offset out-of-state deliveries by displacement, by backward- or forward-haul transactions), there will be no interstate activity, and SES will not require NGA Section 7 certificate authorization for its facilities or services.

shall be located, and (3) with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports.<sup>6</sup>

15. Approximately 30 years ago the U.S. Court of Appeals for the District of Columbia Circuit addressed the extent of the Commission's NGA Section 3 authority to grant applications "in whole or in part, with such modification and upon such terms and conditions," and concluded:

[W]hile imports of natural gas are a useful source of supply, their potentially detrimental effect on domestic commerce can be avoided and the interest of consumers protected only if . . . the Commission exercises with respect to them the same detailed regulatory authority that it exercises with respect to interstate commerce in natural gas. In short, we find it fully within the Commission's power, so long as that power is responsibly exercised, to impose on imports of natural gas the equivalent of Section 7 certification requirements both as to facilities and . . . as to sales within and without the state of importation. Indeed, we think that Section 3 supplies the Commission not only with the power necessary to prevent gaps in regulation, but also with flexibility in exercising that power.<sup>7</sup>

Since that decision, in acting under Section 3, the Commission has imposed "the equivalent of Section 7 certification requirements . . . as to facilities" when exercising its delegated authority over the siting, construction, and operation of facilities used to import or export gas. In 1997, in Order No. 595, the Commission reviewed its responsibilities over facilities under Section 3, updating and clarifying its regulations governing the siting, construction, modification, and operation of import and export facilities.<sup>8</sup>

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<sup>6</sup>See DOE Delegation Orders Nos. 0204-112 (1984) and 00-04.000 (2002). Currently, DOE's Office of Fossil Energy authorizes imports and exports of gas, while the Commission authorizes the siting and facilities used for imports and exports. See DOE Delegation Order Nos. 0204-111 (1984) and 0204-127 (1989).

<sup>7</sup>*Distrigas Corp. v. FPC (Distrigas)*, 495 F. 2d 1057, 1064 (D.C. Cir. 1974), cert. denied, 419 U.S. 834 (1974).

<sup>8</sup>Applications for Authorizations to Construct, Operate or Modify Facilities Used for the Export or Import of Natural Gas, 62 FR 30,435 (June 4, 1997), FERC Stats. & Regs., Regs. Preambles 1996-2000 ¶ 31,054 (1997).

16. In 2001, for the first time, the Commission's routine exercise of authority over natural gas and LNG import/export facilities was challenged -- on grounds similar to those presented by the CPUC -- in Dynegy LNG Production Terminal L.P. (Dynegy).<sup>9</sup> Dynegy argued that (1) the Energy Policy Act of 1992 amended NGA Section 3 to provide that the importation of natural gas and LNG shall be treated as a first sale<sup>10</sup> and (2) first sales are outside NGA jurisdiction pursuant to Section 601(a)(1)(A) of the Natural Gas Policy Act of 1978 (NGPA).<sup>11</sup> Because the Commission's authority over import facilities derives from its conditioning authority over imports, Dynegy claimed

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<sup>9</sup> 97 FERC ¶ 61,231 (2001).

<sup>10</sup>Section 3 of the Natural Gas Act was amended to add the following new subsections:

(b) With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to liquefied natural gas –

(1) the importation of such natural gas shall be treated as a "first sale" within the meaning of section 2(21) of the Natural Gas Policy A 1978; and

(2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.

(c) For purposes of subsection (a), the importation of the natural gas referred to in subsection (b), or the exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

<sup>11</sup>The Wellhead Decontrol Act of 1989 amended Section 601(a)(1)(A) of the NGPA to read: "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."

that the Commission did not retain siting jurisdiction over LNG import facilities, since the imports, as first sales, were no longer subject to the NGA. The Commission rejected this argument.<sup>12</sup>

17. The CPUC argues, as Dynegy did, that the Energy Policy Act of 1992 effectively removed what authority the Commission had to condition Section 3 authorizations by deeming LNG imports “to be consistent with the public interest” and directing that applications for such imports be “granted without modification or delay.”

18. The Dynegy order discusses the expressed legislative intent underlying the Energy Policy Act of 1992, as well as the Commission’s history of regulating LNG facilities, and finds no indication that Congress intended to remove Commission jurisdiction over the siting, construction, and operation of LNG import facilities.<sup>13</sup> The order states:

[I]n 1992, Congress was well aware that the Commission had been authorizing the siting, construction, and operation of import and export facilities under "the terms and conditions" language in Section 3. Yet, when Congress made the importation of natural gas and LNG a first sale outside of Commission jurisdiction in the Energy Policy Act, the statute was silent about Commission jurisdiction over the facilities associated with imports and exports. In fact, examination of the language in the Energy Policy Act, the legislative history of the Act, and statements by members of the House of Representatives and Senate in support or opposition to the Act reveals no intent by Congress to remove Commission jurisdiction in these matters.<sup>14</sup>

19. Although the Energy Policy Act of 1992 did modify the language in Section 3(b) and (c) “to ensure that Canadian gas imports and LNG imports were treated more like domestic natural gas production,”<sup>15</sup> there was no change in the Section 3(a) text that is

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<sup>12</sup>97 FERC ¶ 61,231, at 62,055-56.

<sup>13</sup>See also EcoElectrica L.P., 75 FERC ¶ 61,157, at 61,157, n. 10 (1996) (granting section 3 authority to site and construct LNG facilities and rejecting applicant’s claim that the Energy Policy Act of 1992 eliminated the Commission’s section 3 jurisdiction).

<sup>14</sup>97 FERC ¶ 61,231, at 62,054.

<sup>15</sup>Id. at 62,053.

the statutory source of the Commission's authority to condition import facilities. The CPUC's assertion that "there is nothing in" Section 3 that "expressly governs or addresses the siting, construction or operation of facilities" overlooks the Section 3(a) provision that the Commission is to grant import/export applications "with such modification and upon such terms and conditions as the Commission may find necessary and appropriate." As mentioned, in 1974 the United States Court of Appeals for the District of Columbia Circuit, acting in the Distrigas case, specifically interpreted this conditioning authority to include authority over facilities used for imports. Had Congress intended the Energy Policy Act of 1992 to eliminate siting authority that the Commission had exercised without question for the previous 18 years, we believe it would have done so expressly, in addition to expressly treating the importation of gas as a first sale.<sup>16</sup>

20. Following the transfer of Section 3 implementation to the Department of Energy in 1977, the Secretary of Energy specifically delegated responsibility to the Commission to approve or disapprove applications for the siting, construction, and operation of import/export facilities.<sup>17</sup> The Commission's exercise of this jurisdiction over import/export facilities has been routinely accepted by Congress, the industry, and State and Federal regulatory bodies. In view of this, we cannot accept the CPUC's assertion that the Commission lacks sufficient authority to regulate SES' proposed import facilities.<sup>18</sup>

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<sup>16</sup>See, e.g., Lorillard v. Pons, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . . So too, where . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." (citations omitted)). See also Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974))).

<sup>17</sup>See DOE Delegation Order No. 00-04.000 (2002) (reissuing authorities contained in previous delegation orders).

<sup>18</sup>Objections to the extent of the Commission's Section 3 authority, as opposed to the exercise of that authority, are in fact challenges to the Secretary of Energy's delegation orders delineating Commission responsibilities over import/export facilities' siting, construction, and operation.

### **Jurisdictional Demarcations**

21. In exercising jurisdiction over SES' proposal to construct and operate facilities to import LNG, the Commission has no intent of intruding on California's clear jurisdiction over SoCalGas' facilities, which are subject to CPUC regulation pursuant to the exemption for local facilities from Federal regulation pursuant to Section 7 of the NGA, which is found in Section 1(c) of the NGA. To the extent California's assertion of State authority proves inconsistent or incompatible with our Federal mandate, however, State authority must give way.

22. Conflicts between the Commission's NGA jurisdiction and State law have been considered before. Indeed, in CPUC v. FERC, the court commented that "[c]ases are legion affirming the exclusive character of FERC jurisdiction where it applies."<sup>19</sup> For example, in National Fuel Gas Supply Corp. v. Public Service Commission of New York (National Fuel Gas Supply), National Fuel asked a Federal District Court for a declaratory judgment that the NGA and Natural Gas Pipeline Safety Act preempted the application of Article VII of New York's Public Service Law to interstate gas pipelines.<sup>20</sup> New York's Public Service Law required anyone proposing to construct a natural gas pipeline over a certain size to obtain a certificate of environmental compatibility and public need from the Public Service Commission. Although the District Court ruled against preemption, that judgment was reversed by the U.S. Court of Appeals for the Second Circuit, which held that the Commission has exclusive authority over the rates and facilities of interstate pipelines and that Congress had "occupied the field of regulation regarding interstate gas transmission facilities."<sup>21</sup> The court noted the substantial overlap between the State and Federal statutes, both of which required consideration of the public interest and environmental factors. The court also declined to allow New York to apply Article VII piecemeal to substantive areas that it viewed as unregulated by the Federal government.

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<sup>19</sup>900 F.2d 269, 274 (D.C. Cir. 1990) (citations omitted).

<sup>20</sup>894 F. 2d 571 (2nd Cir. 1990).

<sup>21</sup>Id. at 576 and 577.

23. In Schneidewind v. ANR Pipeline Co. (Schneidewind), the Supreme Court reviewed a Michigan law that required a pipeline transporting gas in Michigan to obtain approval from the State commission before issuing long-term securities.<sup>22</sup> Even though the Commission was not expressly authorized to regulate the issuance of securities by natural gas companies, nevertheless, the Court ruled that through the NGA, Congress had “occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce.”<sup>23</sup> Because the State securities law as applied to ANR amounted to “regulation of the rates and facilities of natural gas companies used in transportation and sale for resale of natural gas in interstate commerce,” the court ruled that the State law was preempted by the NGA.<sup>24</sup>

24. The legion of cases affirming the exclusive character of our jurisdiction lies principally in cases of interstate commerce, whereas here the proposal concerns foreign commerce. However, we find no difference in the principle of preemption in foreign commerce cases.<sup>25</sup>

25. The CPUC cites Energy Terminal Services Corp. v. New York State Department of Environmental Conservation (Energy Terminal Services), for the proposition that the Commission’s NGA Section 3 jurisdiction over an LNG terminal need not preempt State law controlling siting of the terminal.<sup>26</sup> In that case, the sponsor of an LNG import terminal on Staten Island argued that issuance of Commission NGA Section 3 authorization for a proposed import terminal preempted New York land use laws regulating LNG terminals. The U.S District Court for the Eastern District of New York found no evidence that the NGA was intended to supersede the State law in question and took note of the fact that Distrigas did not declare exclusive Federal jurisdiction over siting of LNG facilities. The court added that a “more fatal blow” against Federal preemption is “the fact that the FERC has never issued guidelines pursuant to the [NGA] for the regulation of LNG facilities.”<sup>27</sup> Even if this reasoning was sound in 1981, it no

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<sup>22</sup>485 U.S. 293 (1988).

<sup>23</sup>Id. at 305

<sup>24</sup>Id. at 306.

<sup>25</sup>See, e.g., Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979), noting that foreign commerce “is pre-eminently a matter of national concern.”

<sup>26</sup>11 Environmental Law Reporter 20871 (1981).

<sup>27</sup>Id. slip op. at 27.

longer is, since Federal guidelines have since been issued regulating LNG facilities.<sup>28</sup> Further, the same issue has subsequently been reviewed and effectively reversed by National Fuel Gas Supply, which held that:

Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review. Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need, with the increased costs or lack of gas to be borne by utility consumers in other states.<sup>29</sup>

26. The Distrigas decision clarifies Congress' intent and the Federal role in overseeing foreign commerce: "Section 3 supplies the Commission not only with the power necessary to prevent gaps in regulation, but also with flexibility in exercising that power – flexibility far greater than would be the case were we to hold that imports are interstate commerce."<sup>30</sup> In this case, the Commission will exercise its flexibility under NGA Section 3 to regulate the LNG import terminal as well as the pipeline facilities that will deliver gas into state regulated facilities downstream. Federal regulation is necessary to avoid the regulatory gap identified in Distrigas, because the facilities at issue will have no other function than to receive and deliver imported gas from the terminal directly into local facilities. As explained above, the exemption contained in NGA Section 1(c) removes NGA jurisdiction over interstate commerce, but not over foreign commerce. Thus, the LNG facilities proposed by SES cannot be regulated by the State.

27. Exclusive Federal regulation of the SES' facilities also serves an important public policy goal. The nation's energy needs are best served by a uniform national policy applicable to LNG imports. It is in the country's best interest that each state not have to develop and maintain the regulatory resources necessary for effective regulation of LNG imports and facilities.

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<sup>28</sup>See, e.g., Order No. 595 and Section 380.12 of the Commission's regulations, specifying the resource report requirements for LNG terminal applications.

<sup>29</sup>894 F.2d 571, 578 (2d Cir. 1990), cert. denied, Public Service Commission v. National Fuel Gas Supply Corp., 497 U.S. 1004 (1990).

<sup>30</sup>495 F.2d 1057, 1064.

### **The CPUC's Safety and Market Power Concerns**

28. The CPUC expresses concern that even though SES has applied for Commission approval to site, construct, and operate an LNG facility under Section 3 of the NGA, nonetheless, SES might refuse to adhere to conditions of a Commission order modifying the proposal. We find this concern unwarranted. We have already explained why the Energy Policy Act of 1992 did not limit the Commission's conditioning authority over the construction, operation, and siting of facilities. Having submitted itself to that authority by applying for Commission approval under Section 3, SES cannot now make a credible argument that it would not be bound by the conditions of a Commission order under that provision. In any event, the NGA, in particular Section 20 thereof, gives the Commission ample authority to enforce its orders.

29. The CPUC seeks to direct SES curtailment priorities in order to protect core residential customers or electric generation units in an emergency. With respect to SES' LNG imports, this authority rests with the Secretary of Energy.<sup>31</sup> The CPUC can, however, continue to direct gas flows on intrastate and local distribution lines. Given that the additional gas supplies that SES will provide are destined for the intrastate market, the proposed project should expand gas volumes subject to the CPUC's direction in an emergency.

30. The CPUC also is concerned that the SES facilities, once in service, might be transferred to another party, or SES might merge with or acquire another company, and that such changes could diminish competition and pave the way to market power abuses. While the Commission shares these same concerns, at this time such concerns are premature and speculative. Further, we expect that the introduction of additional gas supplies from heretofore untapped sources can only serve to enhance gas-on-gas competition in the California market area. Finally, we are confident that the Federal regulatory scheme can prevent and rectify market power abuses. Any transfer of a Section 3 authorization is subject to Commission review and approval. Any merger or acquisition that might give rise to excessive market power would be subject to Federal antitrust constraints. Thus, Federal authority is adequate to monitor, prevent, and redress anticompetitive actions.

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<sup>31</sup>See Section 302 of the NGPA and Sections 101(a) and (c) of the Defense Production Act.

31. The CPUC stresses its regulatory responsibility to ensure the physical and economic safety of California residents and businesses. The Commission has the same regulatory responsibility.<sup>32</sup> We are sensitive to safety and security issues, and as an indication of our commitment in this regard, in February the Commission, the U.S. Coast Guard, and DOT's Office of Pipeline Safety signed an interagency agreement. This agreement seeks to ensure that:

[The agencies will] work in a coordinated manner to address issues regarding safety and security at waterfront LNG facilities, including the terminal facilities and tanker operations, to avoid duplication of effort, and to maximize the exchange of relevant information related to the safety and security aspects of LNG facilities and the related marine concerns.<sup>33</sup>

32. The interagency agreement describes the roles of DOT's Research and Special Programs Administration (RSPA), the Coast Guard, and the Commission. RSPA promulgates and enforces safety regulations for the transportation and storage of LNG under 49 U.S.C. Ch. 601, including aspects of the siting, design, installation,

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<sup>32</sup>The CPUC notes that in the 1970s, the last time LNG import facilities were proposed for the coast of California, the Commission and the CPUC conducted concurrent evidentiary hearings on seismic issues (citing Pacific Alaska LNG Company, (...continued)

15 FERC ¶ 61,087 (1981)) and proposes the two agencies similarly cooperate in considering the issues raised by the SES proposal. The unique circumstances in that case are not duplicated here; further the expansion of Federal authority over energy project proposals since LNG import terminals were last contemplated for California precludes any such parallel State-Federal project assessment. See Kern River Gas Transmission v. Clark County, Nevada, 757 F. Supp. 1110, 1114 (D. Nev. 1990) (local government safety standards can not be applied to interstate pipeline if they conflict with FERC requirements or unduly delay or encumber its construction), and ANR Pipeline Co. v. Iowa State Commerce Commission, 828 F.2d 465, 470 (8th Cir. 1987) ("The NGPA leaves nothing to the states in terms of substantive safety regulation of interstate pipelines, regardless of whether the local regulation is more restrictive, less restrictive, or identical to the federal standards.")

<sup>33</sup>The interagency agreement supplements a 1985 agreement between the Commission and the Department of Transportation (DOT) regarding the safety and design of LNG facilities affecting interstate or foreign commerce. Notice of Agreement Regarding Liquefied Natural Gas, 31 FERC ¶ 61,232 (1985).

construction, inspection, and maintenance of LNG facilities.<sup>34</sup> The Coast Guard is concerned with navigation safety, vessel engineering, the safety of facilities in or adjacent to navigable waters up to the last valve before the receiving tanks, and the security plan review and siting as it affects vessel traffic in and around LNG facilities.

33. Under this agreement, the Commission will be the lead agency in conducting National Environmental Policy Act (NEPA) review and be responsible for preparing the environmental analysis of new project proposals. This environmental analysis includes, among other things, consideration of tanker operation, marine facilities, safety and terminal siting, construction and operation, and environmental and cultural impacts. The CPUC is expected to participate in the NEPA review process, along with State and local agencies with specific safety jurisdiction and other interested persons.<sup>35</sup> We believe the NEPA review, in conjunction with the actions of the other Federal agencies as outlined in the recent agreement, will preclude the authorization of all projects that present imprudent risks to health and safety or are inconsistent with the public interest.

34. The Commission spends considerable resources on LNG safety matters, both site specific as well as the general safety of LNG in the U.S. and abroad. For the proposed SES LNG terminal site, the Commission will perform a detailed review of the plant design, the operating procedures, and the various active and passive safety systems. We apply the Federal siting criteria for exclusion zones around the terminal site and conduct a detailed review of the potential marine hazards of LNG vessel traffic in close cooperation with the Coast Guard and RSPA. Further, we have considered the safety implications of the LNG trade and recently initiated an independent assessment of the hazards of potential cargo releases from LNG vessels. On a more global basis, shortly after the January 2004 incident at the liquefaction terminal in Skikda, Algeria, we focused our attention on the nature of the accident and on the potential safety implications for LNG facilities in the U.S. At the invitation of the Algerian Ministry of Energy and Mines, a team composed of Commission LNG technical staff and DOE headquarters and laboratory personnel visited the site in March 2004 to gain an understanding of the accident and to review the investigation of the accident, which is currently being conducted by the reinsurers in cooperation with Sonatrach.

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<sup>34</sup>49 C.F.R. Part 193 (2003).

<sup>35</sup>In its protest, the CPUC specifies several factors – set forth in the Pipeline Safety Act of 1979’s amendments to the Natural Gas Pipeline Safety Act – that it insists must be taken into account when considering LNG facilities. All of the stated factors will be included for consideration as part of our environmental review of the SES proposal, along with consideration of alternatives to the proposed project.

35. On July 11, 2003, the Director of the Commission's Office of Energy Projects (OEP) issued a letter granting SES' request to use our NEPA Pre-Filing process, during which Commission staff worked in coordination with the Port of Long Beach to prepare a joint Environmental Impact Statement/Environmental Impact Report (EIS/EIR) for the project. The joint document is expected to satisfy the requirements of both NEPA and the California Environmental Quality Act. The Commission serves as the lead Federal agency and the Port of Long Beach serves as the lead State agency. As the lead State agency, the Port of Long Beach will coordinate the review of the EIS/EIR with other responsible and trustee agencies. The EIR/EIS will be made available for public comment.

36. The Commission and the Port of Long Beach have worked with SES to develop a public outreach plan for issue identification and stakeholder involvement. On September 4, 2003, both agencies participated in two public workshops in Long Beach to inform State and local agencies and the general public about the project. The workshops provided an opportunity for interested persons to express concerns or ask questions regarding the project in general and the environmental review process. On September 22, 2003, the Commission and the Port of Long Beach issued a public notice of their intent to prepare a joint EIS/EIR. On October 9, 2003, the agencies held a joint public scoping meeting in Long Beach.

37. In conjunction with the EIR/EIS assessment, the Commission and the Port of Long Beach will hold technical conferences and will make site visits to identify and evaluate issues of safety and security. The CPUC and other interested parties are invited to participate, make their concerns known, and propose means to resolve issues raised. The Commission is particularly interested in the CPUC's experience in the areas of safety and security and looks forward to the CPUC's input and assistance. The public record for the project contains comments submitted to the Commission and to the Port of Long Beach, and all comments will be considered in the preparing the EIS/EIR. As the EIS/EIR process continues, the Commission and the Port of Long Beach will hold joint public comment meetings in the project area to solicit comments on the document to aid in the decision making in this proceeding.

38. In the event the project is approved, prior to commencing operation, SES is required to prepare emergency procedures manuals that provide for: (a) responding to controllable emergencies and recognizing an uncontrollable emergency; (b) taking action to minimize harm to the public including the possible need to evacuate the public; and (c) coordination and cooperation with appropriate local officials.<sup>36</sup> We encourage the CPUC

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<sup>36</sup>See 49 CFR Part 193.2509 (2003).

and other State and local agencies to participate in the development of these manuals. In addition, if the SES proposal is authorized, we will require that an Emergency Response Plan be developed in coordination with local emergency planning groups, fire departments, State and local and law enforcement agencies, and the Coast Guard. During construction of the facilities, Commission staff will coordinate its inspections with State agencies, including the CPUC. To the extent that the CPUC may have an inspection role during operation of the facility as an agent for the DOT, our staff will coordinate its operation reliability inspections with both DOT and the CPUC. This may include the sharing of information as well as conducting simultaneous site visits. In these ways, the local expertise of the CPUC and others can help to ensure high levels of safety and security.

39. We conclude, for the reasons discussed above, that the proposed SES LNG import project, including both the terminal and the outlet pipe, is properly within the Commission's exclusive jurisdiction. We acknowledge the legitimate concerns of the CPUC regarding matters of safety and security and give our assurance that the evaluation of the proposed project will include thorough and rigorous review of these issues.

The Commission orders:

(A) The CPUC protest is denied for the reasons described in the body of this order.

(B) BP Energy Company's, Crystal Energy LLC's, and ChevronTexaco Global Gas' motions to intervene out-of-time are granted.

(C) This order constitutes final agency action. Requests for rehearing by the Commission of this declaratory order must be filed within 30 days of the date of issuance pursuant to 18 CFR § 385.713 (2003).

By the Commission.

( S E A L )

Magalie R. Salas  
Secretary.

**APPENDIX**  
**Intervening Parties in Docket No. CP04-58-000**

Laurie C. Angel  
Bixby Ranch Company  
Border Power Plant Working Group  
BP Energy Company\*  
California Energy Commission  
Calpine Corporation  
Cheniere LNG, Inc.  
Citizens Advocating Responsible Development  
Crystal Energy LLC\*  
International Longshore and Warehouse Union  
International Longshore and Warehouse Union, Local 63  
Hollister Ranch Owners' Association  
Kern River Transmission Company  
City of Long Beach, California  
Long Beach Citizens for Utility Reform  
North Baja Pipeline, LLC  
Pacific Gas & Electric Company  
Public Utilities Commission of California  
Questar Southern Trails Pipeline Company  
Sierra Club  
Southern California Generation Coalition  
Union Oil Company of California  
Williams Power Company

\* Motion to Intervene filed out-of-time.