

108 FERC ¶ 61,155
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Sound Energy Solutions

Docket No. CP04-58-002

ORDER CLARIFYING PRIOR ORDER

(Issued August 5, 2004)

1. On July 7, 2004, the California Coastal Commission filed a pleading styled as a request for rehearing of a June 9, 2004 Order¹ in which the Commission affirmed its determination in a March 24, 2004 order² that it has exclusive jurisdiction under section 3 of the Natural Gas Act (NGA) over a liquefied natural gas (LNG) import terminal that Sound Energy Solutions (SES) proposes to build and operate in Long Beach, California. The California Coastal Commission contends that in these previous orders, the Commission sought to assume authority that properly belongs with the California Coastal Commission.³

2. As discussed below, we affirm our exclusive jurisdiction over SES' proposed project and clarify that federal, state, and local agencies share regulatory responsibilities to assess and authorize the proposed project. This order serves the public interest by providing uniform federal oversight of siting, construction, operation, and safety of facilities to be used to import natural gas to meet the nation's critical energy needs.

¹ Sound Energy Solutions, 107 FERC ¶ 61,263 (2004).

² Sound Energy Solutions, 106 FERC ¶ 61,279 (2004).

³Section 385.713 of our Rules of Practice and Procedure does not provide for requests for rehearing of an order denying rehearing. In this case, we accept the petition as a request for clarification of our June 9 Order denying rehearing.

Background

3. On January 26, 2004, SES filed an application for NGA section 3 authority to site, construct, and operate a terminal to import foreign LNG at the Port of Long Beach, California. Our March 24, 2004 order was issued in response to a claim by the California Public Utilities Commission (CPUC) that SES would need to obtain a certificate of public convenience and necessity from the CPUC for its proposed project. In response, we stated that SES will not need dual federal and state authorizations.

4. We found that the proposed SES project will not be a California public utility subject to CPUC jurisdiction, but will be a natural gas import facility, the authorization of which is subject exclusively to the Commission's NGA section 3 jurisdiction. As we sought to stress, this assertion of exclusive jurisdiction over the authorization of the proposed project does not usurp "the CPUC's role in ensuring safe and reliable utility services for California customers, guarding California customers against market power abuses, and minimizing adverse environmental impacts of in-state energy projects."⁴ We also acknowledged that our jurisdiction over the proposed project did not alter the need for SES to obtain "certain permits, approvals, and licenses [that] are the responsibility of other federal agencies and state and local authorities."⁵

The California Coastal Commission's Request for Clarification

5. The California Coastal Commission requests clarification of the impact of the Commission's assertion of exclusive jurisdiction over SES' proposed project on the California Coastal Commission's regulatory authority under state law. The California Coastal Commission declares that under state law, it must approve an amendment to the Port Master Plan for the Port of Long Beach to allow the proposed LNG import terminal to be considered by the Port of Long Beach. Once the Port Master Plan has been amended to take into account the SES proposal, the California Coastal Commission states that the Port of Long Beach will be able to consider an application for a Harbor Development Permit, which if approved, may be appealed to the California Coastal Commission.

6. The California Coastal Commission also requests clarification of the impact of the Commission's assertion of jurisdiction over SES on the California Coastal Commission's

⁴ 107 FERC ¶ 61,263 at P 4 (2004).

⁵ *Id.* at P 5.

regulatory authority under federal law. The California Coastal Commission states that under the federal Coastal Zone Management Act (CZMA),⁶ it is responsible for insuring that the SES proposal is consistent with the state's federally approved coastal management program. The California Coastal Commission asks the Commission to clarify that the SES project cannot go forward unless it meets the requirements of the CZMA and that the Commission does not have authority to waive compliance with or preempt the provisions of the CZMA.

7. Finally, the California Coastal Commission objects to the Commission's use of the term "exclusive jurisdiction," claiming that this "implies that the Commission has the power to decide this matter to the exclusion of all other entities."

Commission Response

8. Our March 24 and June 9 orders have no effect on the status of the California Coastal Commission's state-delegated authority to approve modification of the Port Master Plan for the Port of Long Beach to accommodate the proposed LNG import terminal. We pointed out in our June 9 Order that "a Commission grant of section 3 authority – as opposed to section 7 certificate authorization – does not confer upon the project sponsor any power to acquire necessary land rights by means of eminent domain."⁷ Accordingly, we clarify that to the extent the provisions of the existing Port Master Plan are incompatible with SES's proposal, SES will have to seek amendment of the Port Master Plan, a matter involving the California Coastal Commission and the Port of Long Beach, not this Commission.

9. Our previous orders similarly have no effect on the status of the California Coastal Commission's federally-delegated CZMA authority. As stated in our June 9 Order, "[w]e clarify that the outcome in this proceeding will not impact state agencies that have been delegated authority to act pursuant to federal law, including state agencies that have been delegated duties with respect to the CZMA, Clean Water Act, and Clean Air Act, and we anticipate relying on these state agencies' efforts to confirm compliance with federal statutory requirements."⁸ Under CZMA section 307(c)(3)(A), the Commission cannot authorize a proposed project within or affecting a state's coastal zone unless the

⁶ 16 U.S.C. §§ 1451 *et seq.* (2004).

⁷ 107 FERC ¶ 61,263 at P 66 (2004).

⁸ *Id.* at P 90.

state CZMA agency (here the California Coastal Commission) determines that the proposed project is consistent with state's Coastal Zone Management Program.⁹

10. In our June 9 Order, we stated that then “to the extent state and local requirements undermine the force and effect of [the Commission’s] authorization, such requirements may be preempted.”¹⁰ The California Coastal Commission takes this to imply that we might attempt to rely on federal preemption to override its CZMA consistency finding. This is not the case. We concur with the California Coastal Commission’s comment that “the CZMA and the NGA are laws of equal dignity and should be read to complement rather than preempt one another.” Our reference to “state and local requirements” is intended to refer to those non-federal requirements that might be subject to federal preemption. With respect to the California Coastal Commission’s CZMA consistency finding, Commission preemption is inapplicable; objections are properly appealed to the Secretary of the U.S. Department of Commerce.

11. Finally, we clarify that our claim to exclusive jurisdiction is intended as a declaration that SES need not apply to the CPUC for a state certificate of public convenience and necessity for its proposed project; our federal authorization, if issued, will constitute the only, *i.e.*, the exclusive, authorization for SES’ construction and operation of its proposed LNG import facilities and, in the absence of our federal authorization, the CPUC could not authorize SES’ project. However, as indicated in our previous orders, SES’s NGA authorization by this Commission, if issued, will not relieve SES of its obligation to comply with all applicable federal requirements, *e.g.*, the CZMA mandate highlighted herein. Our authorization will also be subject to any appropriate conditions, restrictions, requirements, and mitigation measures developed as a result of ongoing consultation with interested persons.¹¹

⁹ We routinely issue orders conditioning authorization of projects on the applicant’s obtaining a CZMA consistency determination. *See, e.g.*, AES Ocean Express LLC, 106 FERC ¶ 61,090 at P 11 (2004).

¹⁰ 107 FERC ¶ 61,263 at P 95 (2004), *citing* Iroquois Gas Transmission System, L.P., 59 FERC ¶ 61,094 at 61,360 (1992).

¹¹ In our June 9 Order, we noted the fact “that a state or local authority requires something more or different than the Commission does not make it unreasonable for an applicant to comply with both the Commission’s and another agency’s requirements. It is true that additional state and local procedures or requirements can impose more costs on an applicant or cause some delays in constructing a pipeline. However, not all additional costs or delays are unreasonable in light of the Commission’s goal to include state and
(continued...)

12. Since our June 9 Order, the California Electricity Oversight Board (CEOB) has filed an untimely motion to intervene. When late intervention is sought after the issuance of a Commission order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.

13. We recognize the unique interest of the CEOB as a state agency charged with representing California consumers in proceedings affecting electric markets along with the role it plays in developing and implementing state policy on LNG projects. In this case, we have yet to act on the merits of the SES application, as our prior orders have been limited to the discussion of jurisdictional issues. The CEOB states that it does not intend to participate in the consideration of jurisdictional issues. Accordingly, we believe that the public interest is served by allowing the CEOB to intervene, as we find that to do so will not delay, disrupt, or otherwise prejudice this proceeding or the parties to this proceeding.

The Commission orders:

(A) The June 9, 2004 Order in this proceeding is clarified as discussed in the body of this order.

(B) The motion to intervene out-of-time filed by the California Electricity Oversight Board is granted.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.