

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

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Southern LNG Inc.

Docket No. RP10-173-000

DECLARATORY ORDER

(Issued May 20, 2010)

1. On November 23, 2009, Southern LNG Inc. (Southern LNG)¹ filed a petition for a declaratory order, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,² requesting that the Commission find that if Southern LNG obtains authorization to reactivate existing truck loading facilities at its liquefied natural gas (LNG) terminal at Elba Island, Georgia, and then leases the facilities' capacity to an affiliate (Newco):³ (1) the Commission would not regulate the rates, charges, terms, or conditions of Southern LNG's lease agreement or regulate Newco's LNG sales services; and (2) Newco's LNG sales activities would not invoke the Commission's Part 358 Standards of Conduct and thereby place restrictions on interactions between Southern LNG and Newco and their employees.

2. For the reasons discussed below, we grant, in part, and deny, in part, Southern LNG's request for a declaratory order, finding that (1) the Commission would not regulate the terms of Southern LNG's lease agreement with Newco; (2) the Commission would not have jurisdiction over the rates, charges, terms, or conditions of Newco's sales of gas directly to end users, but would have jurisdiction over Newco's sales of gas for resale in interstate commerce; and (3) Newco's LNG sales activities would not require

¹ Southern LNG is a subsidiary of Southern Natural Gas Company, which is a division of El Paso Corporation.

² 18 C.F.R. § 385.207 (2009).

³ Newco is the name Southern LNG has elected to identify this affiliate, which it has yet to create.

Southern LNG's compliance with the Part 358 Standards of Conduct with respect to its interactions with Newco.

I. INTERVENTIONS

3. Notice of Southern LNG's petition for a declaratory order was issued by the Commission on November 24, 2009, and published in the *Federal Register* on December 7, 2009.⁴ Interventions, comments, and protests were due by December 7, 2009.

4. BG LNG Services, LLC, an importer of LNG, filed a motion to intervene. Its motion was timely and unopposed and therefore is granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.⁵

5. On December 10, 2009, AGL Resources Inc. (AGL Resources) filed a late motion to intervene in support of Southern LNG's petition for declaratory order. AGL Resources states that it will be directly affected by the outcome of this proceeding as it is currently in discussions with Southern LNG regarding the possibility of entering into a joint venture to create the new trucking affiliate that would make sales of LNG obtained from Southern LNG's terminal. It states that its motion to intervene was late due to an administrative oversight. AGL Resources is an interested party, and granting its motion to intervene at this stage of the proceeding will not cause undue delay or prejudice the rights of any party. AGL Resources' motion to intervene was filed three days after publication of the Commission's notice of Southern LNG's petition in the *Federal Register*. For good cause shown, the Commission will grant the motion to intervene.

II. BACKGROUND

6. The LNG import terminal located at Elba Island near Savannah, Georgia, was initially authorized in 1972 under sections 3 and 7 of the Natural Gas Act (NGA), and included two stations to fill trucks with LNG.⁶ The truck loading facilities have a sendout capacity of 32 MMcf/d (approximately two percent of the terminal's currently authorized sendout capacity of 2,100 MMcf/d).

⁴ 74 FR 64,066.

⁵ 18 C.F.R. § 385.214 (2009).

⁶ *Columbia LNG Corp.*, Opinion No. 622, 47 FPC 1624 (1972), *modified*, Opinion No. 622-A, 48 FPC 723 (1972), *vacated and remanded on other grounds*, 491 F.2d 651 (5th Cir. 1974).

7. The Elba Island terminal was placed in service in 1978, taken out of service in 1980, and reactivated in 2001.⁷ When Southern LNG applied for authorization to reactivate the terminal, it did not seek authorization to reactivate the terminal's truck loading facilities.⁸ If the Commission grants the requested declaratory order, Southern LNG states that it will then submit an application for authorization under NGA section 3 to recommission the truck loading facilities. Southern LNG emphasizes that significant upgrades will be necessary if the truck facilities are reactivated. However, Southern LNG avers that none of the terminal's current services for existing customers would be affected by reactivating the long dormant truck facilities.⁹

8. Southern LNG states that Newco will probably be established as a joint venture between Southern LNG (or one of its affiliates) and AGL Resources (or one of its affiliates). Southern LNG and the newly created Newco would enter into an agreement under which Southern LNG would operate the truck loading facilities on behalf of Newco and Newco would make lease payments to Southern LNG for the refurbished truck facilities and ancillary terminal facilities. Southern LNG anticipates Newco would initiate its LNG sales and trucking operations with eight to ten tanker trucks and in time Newco may acquire as many as 60 trucks to deliver and sell LNG to peak shaving facilities and as an alternative to diesel fuel for heavy-duty vehicles (e.g., trucks, transit buses, and refuse haulers). Southern LNG expects Newco to construct refueling stations, each for use by a specific LNG customer, to supply the customer's own vehicle fleet and, if demand warrants, to also construct retail refueling stations for public use.

III. REQUESTED COMMISSION DECLARATIONS

9. Southern LNG asks the Commission to declare that if it applies for and receives authorization to reactivate its Elba Island LNG truck loading facilities, then both Southern LNG's lease agreement with Newco for all of the truck loading facilities' capacity and Newco's LNG sales will be exempt from the Commission's jurisdiction. In addition, Southern LNG asks the Commission to declare that Newco's LNG sales

⁷ *Southern LNG*, 90 FERC ¶ 61,257 (2000). Since reactivation, the Commission has authorized expansions of the terminal. See *Southern LNG*, 94 FERC ¶ 61,188 and 96 FERC ¶ 61,083 (2001); 101 FERC ¶ 61,187 (2002), *order on reh'g*, 103 FERC ¶ 61,029 (2003); 120 FERC ¶ 61,258 (2007), *order denying reh'g and granting reconsideration*, 122 FERC ¶ 61,137 (2008), *aff'd sub nom. Anderson v. FERC*, 33 F. App'x 575 (D.C. Cir. 2009).

⁸ See *Southern LNG's Response to Data Request No. 21* (Sept. 29, 1999) in the Docket No. CP99-579-000 proceeding. 90 FERC ¶ 61,257 (2000).

⁹ The terminal's existing primary pumps would be used to load LNG to tanker trucks, with truck vapors returned to the terminal's boil-off gas recovery system.

activities will not cause the Commission's Standards of Conduct in Part 358 of its regulations to place restrictions on interactions between Southern LNG and Newco and their employees.

A. Southern LNG's Reactivation and Operation of the LNG Truck Loading Facilities, the Lease Agreement, and Newco's Activities

10. The Commission has jurisdiction under NGA section 3 over the siting, construction, expansion, and operation of LNG import and export terminals. The truck loading facilities at Southern LNG's Elba Island terminal are part of the terminal. Therefore, Commission authorization will be necessary to reactivate, upgrade, and operate the truck loading facilities.¹⁰ However, section 311(e) of the Energy Policy Act of 2005 (EPA 2005)¹¹ amended the NGA by the addition of section 3(e), which provides that (at least until 2015) the Commission may not deny an application for a new LNG import or export terminal or terminal expansion "solely on the basis that the applicant proposes to use the LNG terminal exclusively or partially for gas that the applicant or an affiliate of the applicant will supply to the facilities."¹² NGA section 3(e)(3)(B) further states that the Commission may not condition an order addressing an application for a new terminal or expansion on "any regulation of the rates, charges, terms, or conditions of service of the LNG terminal."¹³

¹⁰ Such authorization would be subject to the pre-filing procedures described in section 157.21 of the Commission's regulations unless the Director of the Office of Energy Projects finds that the reactivation and upgrading of the truck loading facilities are not "modifications that involve significant state and local safety considerations that have not been previously addressed." *See* 18 C.F.R. § 157.21(a) (2009).

¹¹ Pub. L. No. 109-58, 199 Stat. 594 (2005).

¹² NGA section 3(e)(3)(B)(ii)(I).

¹³ NGA section 3(e)(3)(B)(ii)(II). NGA section 3A, added by EPA 2005 section 311(d), includes a definition of "LNG terminal." As defined therein and codified in section 153.2 of the Commission's regulations:

(d) LNG Terminal means 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 a waterborne vessel, but does not include:

11. While Elba Island's LNG truck loading facilities have always been treated as a part of the terminal, with the delivery of LNG to a tanker truck viewed as a terminalling service, the truck loading facilities have been inactive for many years. Further, Southern LNG states that "significant upgrades" to these facilities will be needed. Under the circumstances, the Commission finds it would be appropriate to treat a proposal by Southern LNG to upgrade and reactivate the truck loading facilities as an expansion project for purposes of NGA section 3(e). As such, our current jurisdiction under section 3 would not allow us to require that Southern LNG offer truck loading service on an open-access basis or to regulate the rates, charges, terms, and conditions of service in a lease agreement entitling Newco to all of the truck loading facilities' capacity and service.

12. However, we emphasize that the truck loading facilities are an integral part of the Elba Island LNG import terminal, and these facilities and their operation are subject to our NGA jurisdiction. At issue is how we assert this jurisdiction. As noted, if reactivated as planned under NGA section 3, we could not require that Southern LNG offer truck loading service for anyone other than Newco. Nor could we regulate the rates, charges, terms, or conditions of service of Southern LNG's truck loading service for Newco.

13. In addition, while Southern LNG's lease of the trucking loading facilities or their capacity would be subject to the Commission's approval, and would be considered by the Commission in determining whether to grant NGA section 3 authority for Southern LNG to reactivate and operate the facilities, we would not prescribe the provisions of the lease agreement. However, the lease could not contain provisions that would be inconsistent with our findings regarding the design, operation, safety, and security of the LNG import terminal. If asked to authorize the reactivation (or subsequent modification or expansion) of the truck loading facilities, we will review the facilities' design, operation, safety, and security, as well as evaluate the environmental impacts associated with Newco's prospective trucking and sales of LNG. As a result, we may find it appropriate to impose certain constraints on the truck loading facilities or operations (e.g., specifying a schedule for truck traffic).¹⁴

(1) Waterborne vessels used to deliver natural gas to or from any such facility; or

(2) Any pipeline or storage facility subject to the jurisdiction of the Commission under Section 7 of the Natural Gas Act.

¹⁴ Although NGA section 3(e)(3)(B)(ii)(II) states that the Commission may not condition an order authorizing the construction or expansion of an LNG import terminal on "any regulation of the rates, charges, terms, or conditions of service of the LNG terminal," we do not interpret this limitation as applicable to provisions concerning the physical operation of the LNG terminal facilities.

14. Although the truck loading facilities were initially authorized under both NGA sections 3 and 7, Southern LNG states that it plans to apply for authorization to reactivate and upgrade the truck loading facilities only under section 3.¹⁵ This would be consistent with Southern LNG's applications for its most recent expansions of the LNG storage capacity at its terminal and the Commission's authorization of those expansion projects only under section 3.¹⁶

15. Although Southern LNG would not provide truck loading service under its Part 284 blanket certificate and would have no existing rate schedule for such service, we would not require that Southern LNG apply for separate authorization to provide the truck loading service. Any grant of authorization for Southern LNG to reactivate and upgrade the terminal's truck loading facilities will be under NGA section 3 and will include authorization for Southern LNG to operate the truck loading facilities.¹⁷

¹⁵ Southern LNG's *Petition for Declaratory Order* at n. 28.

¹⁶ See *Southern LNG*, 103 FERC ¶ 61,029, at Ordering Paragraph (A) (2003) and *Southern LNG*, 120 FERC ¶ 61,258, at Ordering Paragraph (A) (2007). Note that Southern LNG elected to charge incremental cost-based rates under its open-access tariff for certain services provided pursuant to its expansion project authorized under NGA section 3. We do not read section 3(e)(3)(B) as precluding the Commission from authorizing and enforcing such services when proposed by the applicant. See *Southern LNG*, 120 FERC ¶ 61,258 at P 52 and *Trunkline LNG Co.*, 117 FERC ¶ 61,339, at P 20 (2006).

¹⁷ The Commission has much greater discretion in how to assert its jurisdiction under NGA section 3 as opposed to section 7, which entails very specific requirements, such as having a tariff, rate schedules, and approved rates on file. The section 3 authorization for Southern LNG to reactivate and upgrade the terminal's truck loading facilities can be similar to the Commission's grants of authorization under section 3 to construct and operate facilities at the international borders with Canada and Mexico to import or export gas. When companies construct a pipeline to transport import or export volumes, only a small segment of the pipeline close to the border is deemed to be the import or export facility for which section 3 authorization is necessary; the rest of the pipeline may be jurisdictional under section 7 because it will be used to transport gas in interstate commerce or NGA-exempt because it will be used to gather gas or for intrastate transportation service. The Commission does not impose requirements governing service through the portion of the pipeline that is the import or export facility subject to section 3. See, e.g., *New Mexico Gas Company, Inc. and Public Service Company of New Mexico*, 127 FERC ¶ 61,160 (2009); *Sword Energy Limited and Eagle Rock Exploration*, 124 FERC ¶ 61,143 (2008); *Sonora Pipeline, LLC*, 120 FERC ¶ 61,032 (2007); and *Regent Resources Ltd. and Sword Energy Limited*, 117 FERC ¶ 61,036 (2006).

16. We note that when the truck loading facilities were mothballed in 1980 along with the other Elba Island facilities, none of the facilities were abandoned under NGA section 7(b).¹⁸ Therefore, if Southern LNG files an application for authority to reactivate the truck loading facilities exclusively under section 3, Southern LNG should also file an application under section 7(b) to abandon its certificate authority for the truck loading facilities.

17. With regard to Newco's trucking and LNG sales operations, the Commission notes that it has previously stated that "jurisdictional determinations concerning LNG projects are made on a case-by-case basis."¹⁹ In any event, our NGA section 3 jurisdiction over LNG import facilities and services would not follow the LNG tanker trucks after they exit the boundary of the terminal, as the LNG would at that point be moving in either interstate or intrastate commerce, rather than in foreign commerce. Further, as a general rule, our jurisdiction over the transportation of natural gas in either gaseous or liquefied state in interstate commerce is limited to transportation by pipeline, i.e., our jurisdiction does not extend to deliveries of natural gas by truck, train, or barge.²⁰ However, we note that the NGA is remedial in nature and Congress could not have intended to permit a transportation innovation essentially unknown in 1938 to defeat the statutory scheme devised.²¹ Thus, the Commission has explained that the interstate transportation of natural gas is a continuum that cannot be "broken" by a party liquefying and transporting gas as LNG as a means of circumventing the NGA.²² However, there is nothing to indicate that Southern LNG's plans for Newco to truck LNG is in any way motivated by a desire to circumvent the Commission's NGA jurisdiction over the transportation of gas in interstate commerce by pipeline; rather, it appears that the plans are based on a desire to reach markets that can only be served by truck.

18. To the extent Newco's sales are sales for resale in interstate commerce, the NGA's exemption for local distribution would not apply to the sales or the delivery of those sales

¹⁸ We note that it was 1992 before a settlement was reached among Southern LNG's predecessor and other parties to resolve issues concerning the Elba Island LNG facilities. The settlement provided for the maintenance of the terminal until the year 2000. *Southern Energy Company*, 60 FERC ¶ 61,057, at 61,202 (1992).

¹⁹ *Air Products and Chemicals, Inc.*, 58 FERC ¶ 61,199, at 61,618 (1992), quoting *Marathon Oil Company*, 53 FPC 2164, at 2172 (1975).

²⁰ See *Exemption of Certain Transport and /or Sales of Liquefied Natural Gas from the Requirements of Section 7(c) of the NGA*, 49 FPC 1078, at 1079 (1973).

²¹ See *Air Products and Chemicals, Inc.*, 58 FERC ¶ 61,199 (1992).

²² *Id.* at 61,619.

volumes by truck.²³ Further, while a pipeline company that makes sales for resale can qualify for the Hinshaw exemption in NGA section 1(c), the Commission does not believe that exemption can be reasonably construed to cover a trucking company. Even if section 1(b) can be interpreted to apply to a trucking company, it is not clear that Newco could satisfy section 1(c)'s criteria requiring that the rates and services of a company claiming Hinshaw status be subject to regulation by the Georgia state commission and that all of the gas it transports be consumed within Georgia.²⁴

19. In view of the above, we declare that under our NGA jurisdiction, the Commission would not regulate the rates, charges, terms, or conditions of Newco's initial LNG purchases or its sales directly to end users. However, as discussed below, Newco's sales of gas for resale in interstate commerce would be subject to the Commission's NGA jurisdiction.

B. The Commission's Standards of Conduct

20. Southern LNG seeks assurance that Newco would not be viewed by the Commission as an affiliate engaging in marketing functions that would cause Southern

²³ *KN Energy, Inc. (KN Energy)*, 24 FERC ¶ 61,200 (1983), citing *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672 (1954) (*Phillips*), in which the Supreme Court rejected the argument that the NGA's exemption for production in section 1(b) shielded sales in interstate commerce for resale from the Commission's jurisdiction pursuant to section 7. In *KN Energy*, the Commission relied on the Court's reasoning in *Phillips* to assert jurisdiction over sales for resale by local distribution companies (LDCs). 24 FERC ¶ 61,200 at 61,474-76. The Court in *Phillips* reasoned that a significant part of the regulatory gap which the NGA was intended to fill was created by prior cases holding that the regulation of wholesale rates of gas and electric energy moving in interstate commerce is not within the constitutional powers of the states. 347 U.S. at 683-684. The Court concluded that with respect to the NGA, "we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of *all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company.*" *KN Energy*, 24 FERC ¶ 61,200 (1983), quoting *Phillips*, 347 U.S. at 682 (emphasis added).

²⁴ See *Northern Illinois Gas Company (NI-Gas)*, 20 FERC ¶ 61,267 (1982). The Commission found that NI-Gas's NGA section 1(c) Hinshaw exemption would not be affected by its selling gas to customers which, in turn, would compress such gas and use the compressed natural gas (CNG) as fuel in their own motor vehicle fleet operations or sell it to others for such use, provided that all the CNG was injected into the vehicles' fuel tanks in Illinois, which was deemed to satisfy the requirement that all of the gas transported by a Hinshaw-exempt natural gas company be consumed in its state.

LNG's interactions with Newco to be subject to the Commission's Standards of Conduct for Transmission Providers set forth in Part 358 of the Commission's regulations.

21. Our Part 358 Standards of Conduct apply "to any interstate natural gas pipeline that transports gas for others pursuant to subpart B or G of Part 284 of the Commission's regulations and conducts transmission transactions with an affiliate that engages in marketing functions." Southern LNG provides its terminal services under an open-access transportation certificate granted by the Commission under NGA section 7 and subpart G of Part 284 of the regulations.²⁵ Thus, Southern LNG is an interstate pipeline for purposes of the Commission's Standards of Conduct.

22. As discussed above, Southern LNG states that Newco will probably be established as a joint venture between Southern LNG or one of its affiliates and an affiliate of another company. Although Newco has not yet been created, Southern LNG's petition assumes it will be an affiliate as defined in the Commission's Part 358 regulations.²⁶ As pertinent here, marketing functions of an affiliate include, subject to certain exclusions, "the sale

²⁵ As previously noted, Southern LNG's Elba Island terminal was initially authorized, removed from service, and returned to service under both NGA sections 3 and 7. *See* 47 FPC 1624 (1972), Ordering Paragraphs (E) and (F) and 90 FERC ¶ 61,257 (2000), Ordering Paragraphs (B), (C), and (D).

²⁶ In order for the Commission's Standards of Conduct to apply to Southern LNG's dealings with Newco, Newco would have to be an affiliate as defined in section 358.3 of our regulations.

As defined in section 358.3(a)(1):

(a) Affiliate of a specified entity [here, Southern LNG] means:

(1) Another person that controls, is controlled by or is under common control with, the specified entity. An affiliate includes a division of the specified entity that operates as a functional unit.

As defined in section 358.3(a)(3):

(2) "Control" as used in this definition means the direct or indirect authority, whether acting alone or in conjunction with others, to direct or cause to direct the management policies of an entity. A voting interest of 10 percent or more creates a rebuttable presumption of control.

for resale in interstate commerce, or the submission of offers to sell in interstate commerce, [of] natural gas.”²⁷

23. As described by Southern LNG, Newco’s operations may include sales of LNG as peak shaving supplies to LDCs for resale to their customers and sales of LNG to companies that might resell the LNG at the retail level for use in vehicles. In any event, Southern LNG does not indicate that Newco would limit its sales to end users, nor does Southern LNG indicate that all the LNG sold by Newco will be consumed within Georgia. Newco would be engaging in a marketing function as contemplated by the Standards of Conduct if it offers to sell any LNG for resale in interstate commerce.

24. We do not agree with Southern LNG that its interactions with Newco would be exempt from compliance with the Commission’s Part 358 Standards of Conduct because Newco’s LNG sales would qualify as “first sales” as defined by the Natural Gas Policy Act of 1978 (NGPA). While we further discuss the NGPA’s definition of first sales below, first-sale status only exempts a sale from the Commission’s NGA jurisdiction over sales for resale in interstate commerce.²⁸ The same sale that qualifies as a first sale under the NGPA, and is thereby exempt from our NGA jurisdiction over sales for resale in interstate commerce, may nevertheless qualify as a marketing function that would subject an interstate pipeline’s interactions with its marketing affiliate to the limitations set forth in the Standards of Conduct.

25. Southern LNG cites *Distrigas of Massachusetts LLC (DOMAC)*.²⁹ DOMAC, the owner and operator of an LNG terminal, purchases LNG from its affiliate, Distrigas LLC (Distrigas) which imports the LNG stored in DOMAC’s terminal. DOMAC only provides LNG sales service, which service, for both regasified LNG and LNG in liquid state, includes bundled storage and transportation; DOMAC does not offer any unbundled storage and transportation services. In *DOMAC*, we found that there was no need for

²⁷ 18 C.F.R. § 358.3(c)(2) (2009). The definition of marketing functions includes several exemptions, which Southern LNG acknowledges are inapplicable here:

(i) bundled retail sales (i.e., sales of gas by companies that use reserved capacity on affiliated interstate pipelines to deliver the gas); (ii) incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities; (iii) sales of natural gas solely from a seller’s own production; (iv) sales of natural gas solely from a seller’s own gathering or processing facilities; and (v) sales by an intrastate pipeline, Hinshaw pipeline, or local distribution company making on-system sales.

²⁸ NGPA section 3431(a)(1)(A) provides that the jurisdiction of the Commission under the NGA “shall not apply to any natural gas solely by reason of any first sale of such natural gas.”

²⁹ 124 FERC ¶ 61,039 (2008).

continued NGA section 7 oversight of the terminal facilities and operations, since we would be able to continue to exercise adequate, equivalent regulatory authority under our section 3 jurisdiction. We further found that it was appropriate to grant DOMAC's proposal to abandon its rate schedules and FERC tariff for its sales for resale services.

26. However, while we observed that DOMAC's terminal facilities' operations are in foreign, not interstate, commerce,³⁰ Southern LNG is incorrect that we found that DOMAC's sales for resale were in foreign commerce and exempt for that reason from the Commission's NGA jurisdiction over sales for resale in interstate commerce. Rather, we found that DOMAC's sales for resale in interstate commerce were exempt from NGA jurisdiction because they qualify as "first sales" as defined by NGPA section 2(21)(A).³¹ A first sale, as defined in NGPA section 2(21)(A),³² is a sale of gas *to* an interstate or intrastate pipeline, LDC, or any person for use by such person, as well as any sale which precedes such a sale. However, NGPA section 2(21)(B) provides that a first sale shall not include a sale of gas *by* an interstate pipeline, intrastate pipeline, LDC or any

³⁰ See 124 FERC ¶ 61,039 at 17.

³¹ See NGPA section 601(a). We note that the Commission's order in *DOMAC* incorrectly stated that DOMAC is not an interstate pipeline as contemplated by the NGPA. 124 FERC ¶ 61,039 at P 19. NGPA section 2(15) provides that "[t]he term 'interstate pipeline' means any person engaged in natural gas transportation subject to the jurisdiction of the Commission under the Natural Gas Act." DOMAC's LNG sales services include transportation as defined by section 284.1(a) of the Commission's regulations. 18 C.F.R. § 284.1(a) (2009). Although we found no need to do so in the proceeding in which we allowed DOMAC to cancel its NGA section 7 rate schedules and tariff, we specifically noted that we could transpose each of the old section 7 regulatory requirements to section 3 if we thought such action was needed. 124 FERC ¶ 61,039 at P 19. Under NGA section 3, "the Commission's authority over imports of natural gas is at once plenary and elastic" such that "it is 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 certificate requirements both as to facilities and ... sales within and without the state of importation." *Distrigas Corporation v. FPC*, 495 F.2d 1057, 1064 (D.C. 1974), *cert. denied*, 419 U.S. 834 (1974). Since DOMAC's natural gas transportation services remain *subject to* our regulatory oversight and jurisdiction under NGA section 3, it is an interstate pipeline as defined in the NGPA. However, DOMAC's sales are of LNG purchased from its affiliate Distrigas, which imports the LNG. Thus, although DOMAC is an interstate pipeline, its sales are nevertheless of gas that is deemed to be its own production and therefore entitled to first-sale status, as discussed herein.

³² 15 U.S.C. § 3301(21)(A) (2006).

affiliate³³ of such a company *unless* the gas was produced by such company or any affiliate thereof.³⁴ Thus, if gas is produced by an interstate pipeline or an affiliate of the interstate pipeline, a sale of that gas by the interstate pipeline or any other affiliated entity qualifies as a first sale and is exempt from the Commission's NGA jurisdiction over sales for resale in interstate commerce. The sale does not have to be made by the affiliate that actually produced the gas.³⁵

27. Further, the Energy Policy Act of 1992³⁶ added section 3(b)(1) to the NGA to provide that the importation of LNG "shall be treated as a 'first sale' within the meaning of section 3301(21) of [the NGPA]." Southern LNG is correct that the Commission

³³ NGPA section 2(27) states that "[t]he term 'affiliate,' when used in relation to a person, means another person which controls, is controlled by, or is under common control with, such person."

³⁴ As the Commission explained in Order No. 644, *Amendments to Blanket Sales Certificates*, FERC Stats., Regulations Preambles 2001-2005 ¶ 31,153, at P 14 (2003):

Thus, NGPA Section 2(21)(A) sets forth a general rule that all sales in the chain from the producer to the ultimate consumer are first sales until the gas is purchased by an interstate pipeline, intrastate pipeline, or LDC. Once gas is sold to a pipeline, LDC, or retail customer, the chain is broken and no subsequent sale, whether the sale is by the pipeline, or LDC, or by a subsequent purchaser of gas that has passed through the hands of a pipeline or LDC, can qualify under the general rule as a first sale of natural gas. In addition to the general rule, NGPA Section 2(21)(B) expressly excludes from first sale status any sale of natural gas by a pipeline, LDC, or their affiliates, except when the pipeline, LDC, or affiliate is selling its own production.

³⁵ See *In the Matter of Amendments to Blanket Sales Certificates*, 107 FERC ¶ 61,174, at P 22 (2004) (denying reh'g of Order No. 644, FERC Stats. & Regs., Regulations Preambles 2001-2008 ¶ 31,153(2003)). See also *City of Farmington, New Mexico v. FERC*, 820 F.2d 1308 (D.C. Cir. 1987), where the court held:

More generally, a seller (whether an "interstate pipeline," an "intrastate pipeline," a "local distribution company," or an "affiliate thereof") is engaged in a "first sale" if it is selling gas produced *either* by the seller itself ("such" seller) *or* by its affiliate ("any affiliate thereof")." *Id.* at 1315 (italics in original).

³⁶ Pub. L. No. 102-486, 106 Stat. 2776 (1992).

found that DOMAC's LNG sales volumes leaving its import terminal should be viewed as the equivalent to the domestic production of gas at the wellhead.³⁷ However, Southern LNG uses its terminal's capacity to store LNG and provide other terminalling services for its customers, not for its own sales gas. Further, as discussed below, we do not believe that NGA section 3(b)(1) renders every sale of LNG at or from an import terminal a first sale. However, we find it is appropriate that the initial sale of LNG by a customer holding reserved capacity in an import terminal be viewed as equivalent to a domestic producer selling its own gas at the wellhead. Therefore, even if a customer with reserved capacity at the Elba Island terminal that makes the initial sale to Newco is an interstate or intrastate pipeline, LDC, or an affiliate thereof, that sale would qualify as a first sale. While a subsequent sale – whether at the terminal, at the tailgate of the terminal, or further downstream – by an interstate or intrastate pipeline, LDC, or an affiliate thereof may also qualify as a first sale (provided it meets the definition set forth in NGPA section 2(21)), we do not view that subsequent sale as equivalent to production at the wellhead.

28. Southern LNG does not reserve for its own use any of the LNG in its import terminal and does not purchase and sell any of the gas in its terminal. Further, its petition does not indicate that any of its terminal's capacity is presently reserved for an affiliate. Therefore, as represented in Southern LNG's petition, neither it nor an affiliate will be making sales of LNG to Newco. Rather, Newco will be purchasing LNG from Southern LNG's unaffiliated customers that hold reserved capacity in the terminal. While a sale of LNG from the terminal by one of Southern LNG's unaffiliated customers may qualify both as a first sale and as the seller's own production, Newco's subsequent sale of the LNG will be a sale by an affiliate (i.e. Newco) of an interstate pipeline (i.e., Southern LNG). Nothing in the petition for declaratory order suggests an affiliate of Southern LNG and Newco will be the producer of the gas.

29. Thus, it does not appear that any of Newco's sales will qualify as first sales as defined by the NGPA and, to the extent they are sales for resale in interstate commerce, they would be subject to the Commission's NGA jurisdiction. Given this, we do not agree with Southern LNG that "Newco may charge unregulated, market based rates"³⁸ either because its sales will be first sales or because they will be sales in foreign commerce. As discussed above, our observation that DOMAC's terminal facilities' operations are in foreign, not interstate, commerce did not mean that we view all sales of LNG supplies that occur within an import terminal's boundary site as sales in foreign commerce and thereby exempt from the Commission's NGA jurisdiction over sales for resale in interstate commerce even if they do not qualify as first sales. Indeed, if we viewed all sales at an import terminal as sales in foreign commerce, there would have

³⁷ See *DOMAC*, 124 FERC ¶ 61,039 at P 17.

³⁸ Southern LNG's *Petition for a Declaratory Order* at 11.

been no need to undertake the analysis that led to our conclusion that DOMAC's sales qualify as NGA-exempt first sales consistent with the intent of NGA section 3(b)(1), which provides that "the importation of such gas shall be treated as a 'first sale' within the meaning of [NGPA] section 3301(21)." However, whereas DOMAC owns the LNG throughout the time that it is in storage in its terminal and at the time it sells the gas either in gaseous or liquid state, and uses its terminal's truck loading facilities for its own sales volumes, Newco will not own the LNG at any time it is stored in Southern LNG's import terminal.

30. As the Commission stated in *Pacific Interstate Transmission Company*:

[I]t is clear that Congress did not intend to afford [imported] gas freedom from regulatory constraints still applicable to domestic gas. The statute expressly proscribes according such imports "preferential treatment." Adoption of the [petitioner's] wellhead (international border)-to-the-burnertip approach in classifying imports as "first sales" would dichotomize the sale-for-resale market of natural gas. On the one hand, sales of domestic gas which are not "first sales" under the NGPA would remain regulated, while sales-for resale in interstate commerce of [imported] gas would avoid comparable regulation.³⁹

31. Although the Commission stated in *DOMAC* that the "transportation of natural gas in interstate commerce subject to NGA section 7 only begins when liquid loaded onto a truck leaves an LNG import terminal or when regasified LNG is delivered to a pipeline at the tailgate of a terminal,"⁴⁰ an NGA-jurisdictional sale for resale in interstate commerce can occur, and is likely to occur, at a point upstream of where NGA-jurisdictional transportation of the gas begins. Historically, all sales of gas at the wellhead were NGA-jurisdictional to the extent they were sales for resale in interstate commerce, notwithstanding that the NGA has always exempted production activities and transportation of gas in interstate commerce that qualifies as gathering. If Newco's sales for resale include any gas that ultimately will move in interstate commerce, those sales will be NGA-jurisdictional, notwithstanding that they may be transacted so that title transfers at the point the gas enters the terminal's truck loading facilities.

32. However, we note that marketing affiliates of interstate pipelines, as well as other companies that are not themselves interstate pipelines, are automatically authorized by subpart L of the Commission's regulations to make NGA-jurisdictional sales for resale that do not qualify as first sales at negotiated rates.⁴¹ In view of this consideration, we do

³⁹ 66 FERC ¶ 61,369, at 61,228 (1994).

⁴⁰ 124 FERC ¶ 61,039 at P 15.

⁴¹ 18 C.F.R. § 284.401 *et seq.* (2009).

not agree with Southern LNG's assertion⁴² that a finding that Newco's sales qualify as first sales is necessary to prevent it from experiencing the same competitive disadvantage from which DOMAC sought relief.

33. In considering whether the Part 358 Standards of Conduct will apply to Southern LNG's interactions with Newco, we have thus far determined that Southern LNG is subject to those regulations as an interstate pipeline that provides service under subpart G of Part 284, and that Newco's activities will constitute affiliated marketing functions as contemplated by those regulations if Newco makes any sales for resale, regardless of whether the sales qualify as first sales.⁴³ The remaining question in our analysis is whether Southern LNG will be "*conducting transmission transactions with*" its affiliate Newco as contemplated by the Standards of Conduct. As defined in section 358.3(f) of our regulations, "transmission" means "natural gas transportation, storage exchange, backhaul, or displacement service provided pursuant to subpart B or G of part 284 of this chapter." As discussed above, if Southern LNG reactivates its truck loading facilities and operates them under NGA section 3 authority, Southern LNG would not be providing any service under its Part 284 blanket certificate for Newco. Further, Newco would not become a customer with storage capacity reserved in Southern LNG's terminal; rather, Newco would purchase its LNG volumes from a customer that holds capacity in the terminal. In view of these considerations, we find that if Southern LNG operates its truck loading facilities on behalf of Newco, Southern LNG would not be conducting transmission transactions with an affiliate as contemplated by the Standards of Conduct.

34. Based on Southern LNG's plans as described in its petition, we are not concerned that the Standards of Conduct would not apply to Southern LNG's interactions with Newco. As discussed above, the Commission currently does not have the discretion to deny an application by Southern LNG to reactivate the truck loading facilities based on its plans to dedicate all of their capacity to an affiliate. Further, as long as Newco does not also seek storage capacity in the terminal, there would be no potential for Southern

⁴² Southern LNG's *Petition for a Declaratory Order* at 8.

⁴³ As noted above, one of the exceptions provided for under the Part 358 regulations operates to prevent an interstate pipeline's interactions with a marketing affiliate from becoming subject to the restrictions established in those regulations solely by reason of the marketing affiliate making sales for resale in interstate commerce of gas from its own gathering or processing facilities. Southern LNG acknowledges in its petition that this exemption in the Standards of Conduct regulations is not the same as that provided in the NGPA, since the exemption in the Standards of Conduct is inapplicable if the gas sold by the marketing affiliate was produced by another affiliate. See 18 C.F.R. § 358.3(c)(2)(iii) (2009).

LNG to discriminate in favor of Newco in the provision of such service. If in the future Newco reserves capacity in the terminal, Southern LNG would be subject at that time to the limitations established by the Standards of Conduct in dealing with Newco. In addition, if Newco purchases gas from one of Southern LNG's terminalling service customers that is also a marketing affiliate of Southern LNG, Southern LNG's dealings with that customer-affiliate would already be subject to the Standards of Conduct's restrictions.

The Commission orders:

Southern LNG's petition for declaratory order is granted, in part, and denied, in part.

(S E A L)

Kimberly D. Bose,
Secretary.