April 8, 2015

Once Again, Commission Disclaims Jurisdiction Over LNG Facilities

On April 2, the Federal Energy Regulatory Commission (FERC, or the Commission) issued another order regarding the Commission's regulation of liquefied natural gas (LNG) activities (the Recent Order).[1] We have previously described the Commission's responses to similar requests for findings of nonjurisdictional status concerning planned natural gas operations.[2] The Recent Order was not surprising, based on the Commission's responses to those prior requests. Again, the Commission disclaimed jurisdiction over operations contemplated by Pivotal LNG, Inc. (Pivotal), and again, Commissioner and soon-to-be Chairman Norman Bay issued a vigorous dissent expressing a more expansive view of FERC jurisdiction under the Natural Gas Act (NGA).

On December 10, 2014, Pivotal filed a declaratory order seeking a ruling that planned liquefaction and transportation facilities would not be deemed "LNG Terminals" subject to the Commission's NGA Section 3 jurisdiction. Pivotal explained that it plans to sell LNG that is (1) produced at inland LNG facilities or supplied by a third party; (2) transported by Pivotal, an affiliate, or third party in interstate and intrastate commerce by means other than interstate pipeline; and (3) subsequently exported, or resold for ultimate export, by a third party.

In its petition, Pivotal argued that its planned operations were similar to those that were the subject of the earlier declaratory orders issued by the Commission in response to similar requests by Pivotal,[3] Emera CNG, LLC,[4] and Shell U.S. Gas and Power, LLC.[5] Specifically, in *Emera*, the Commission held that a proposed CNG compression and truck-loading facility located approximately one quarter of a mile from where the CNG containers would be loaded onto waterborne vessels for export was not subject to the Commission's NGA Section 3 jurisdiction.[6] In *Shell*, the Commission noted that NGA Section 2(11) did not redefine the term "natural gas facilities," and, the Commission noted, it had only asserted NGA jurisdiction under either Section 3 or Section 7 over natural gas facilities, including LNG facilities, that receive and/or send out gas by pipeline.[7]

Based on *Shell* and *Emera*, and its analysis of the NGA Section 2(11) definition of "LNG Terminal," the Commission determined in the Recent Order that, in order to be subject to Commission jurisdiction under Section 3 of the NGA, a facility must be (1) connected to a pipeline that delivers gas to or sends gas from the facility and (2) located at the point of import or export such that LNG is directly transferred to or from an ocean-going, bulk-carrier LNG tanker.[8] Because Pivotal's facilities are located inland and are therefore not capable of transferring LNG directly onto ocean-going tankers, the Commission disclaimed NGA Section 3 jurisdiction.[9]

In his dissent, Commissioner Bay argued that the majority failed to address the plain language of the Natural Gas Act. Quite simply, according to Bay, the NGA requires any person engaged in the importation or exportation of natural gas in foreign commerce to first secure an order from the Commission authorizing it to do so. Bay argues that the majority conflates Section 3(e), which relates to "LNG terminals," and Section 7, which covers "transportation facilities." Just because Pivotal's facilities do not fall under the definition of an "LNG terminal" does not, Bay insists, mean they completely escape Commission regulation. Bay further argues that "nothing in Section 3 conditions the Commission's jurisdiction upon the existence of a pipeline running to the point of export."[10] In sum, Bay argues that the "majority . . . ignores the plain language of the [NGA], substitutes its policy judgment for that of Congress, and undermines national uniformity with respect to the import or export of gas."[11]

With Commissioner Bay assuming the Chairman's gavel on April 15, it remains to be seen whether, in his new leadership role, Bay's expansive view of FERC jurisdiction over LNG terminals and related facilities will be reflected in subsequent cases.

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[1] *Pivotal LNG, Inc.*, 151 FERC ? 61,006 (2015).

[2] *See* *Commission Disclaims Jurisdiction Over Two LNG Projects; Bay's Dissent: Sign of Things to Come?*, Day Pitney Client Alert (Sept. 12, 2014); *FERC Issues Another Natural Gas Order; Bay Dissents Again*, Day Pitney Client Alert (Sept. 23, 2014).

[3] *Pivotal LNG, Inc.*, 148 FERC ? 61,164 (2014).

[4] *Emera CNG, LLC*, 148 FERC ? 61,219 (2014) (*Emera*).

[5] *Shell U.S. Gas & Power, LLC*, 148 FERC ? 61,163 (2014) (*Shell*).

[6] *Emera* at P 13.

[7] *Shell* at P. 43.

[8] *Recent Order* at P 11.

[9] *Id.* at P 12.

[10] *Recent Order* (Bay, *dissenting*).

[11] *Id.*

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