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FERC Issues Another Natural Gas Order; Bay Dissents Again

On September 19, the Federal Energy Regulatory Commission (FERC or the Commission) issued the latest in its series of declaratory orders that disclaimed jurisdiction over nonpipeline gas transportation operations.¹ In our [recent client alert](#), issued on September 12, we discussed recent responses of the Commission to similar requests for findings of nonjurisdictional status concerning planned natural gas operations.² In this case, FERC was asked to rule on the planned operations of Emera CNG, LLC (Emera). Although the outcome of the declaratory order was as requested by the filing parties, the real news once again was Commissioner Bay's dissent, in which he continued to express a more expansive view of FERC jurisdiction under the Natural Gas Act (NGA).

Following a pattern adopted previously by others, Emera filed a petition for a declaratory order, requesting that the Commission declare that Emera's construction and operation of facilities to produce compressed natural gas (CNG) will not be subject to FERC jurisdiction under the NGA. Emera plans to receive natural gas at a facility in Palm Beach, Florida, from the Riviera Lateral, a Hinshaw pipeline exempt from FERC jurisdiction. Emera would then compress and truck the gas in International Standards Organization containers a distance of approximately a quarter mile to a berth at the Port of Palm Beach, where the containers would be loaded onto roll-on/roll-off oceangoing carriers. The CNG would then be shipped from Florida to Grand Bahama Island, decompressed, and injected into a pipeline for transport to electric generation plants owned and operated by Grand Bahama Power Company, an Emera affiliate.

In the Emera Order, the Commission explained its jurisdiction under Section 3 of the NGA would apply only if Emera's facility were deemed to be an "export facility." FERC has traditionally only exercised its authority under Section 3 over import and export facilities to regulate (1) pipelines that transport natural gas to or from the United States' international borders; and (2) coastal liquefied natural gas (LNG) terminals that are accessible to oceangoing LNG tankers and connected to pipelines that deliver gas to or take gas away from the terminal. Emera's facility will not include a pipeline to deliver gas to an international border or be capable of transferring CNG directly into an oceangoing carrier for export. The Commission therefore held that Emera's facilities are unlike the border-crossing pipelines and coastal LNG terminals that the Commission has traditionally regulated. Instead, the Commission likened Emera's facilities to existing unregulated facilities that deliver LNG onto trucks that are subsequently driven across the border into Canada or Mexico.

Once again displaying his independence, Commissioner Bay sharply disagreed with the majority's reasoning, finding instead that "Congress stated that the provisions of the [NGA] 'shall' apply to 'the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation.'"³ Based on this language, Bay reasoned, Emera's facilities clearly fall under Commission jurisdiction. Specifically, Bay took issue with the Commission conflating the limitations of Section 7 with those of Section 3, arguing that Section 3's regulation of "export facilities" applies to Emera's planned operations. The fact that the gas will be compressed onshore, then loaded onto shipping containers, cannot, Bay reasoned, provide the factual predicate for declaring that FERC jurisdiction does not attach.⁴

The majority's ruling in this case bodes well for developers of other CNG or LNG operations seeking to serve new markets, as the ruling potentially lessens the regulatory burden faced by similar projects. However, Commissioner Bay will be the Chairman next spring, and given his dissent in this order and in the recent Pivotal and Shell LNG orders, these matters are far from settled. Future Chairman Bay has again demonstrated he will take a more sweeping view of FERC jurisdiction over gas projects than his fellow Commissioners.

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