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Commission Disclaims Jurisdiction Over Two LNG Projects; Bay's Dissent: Sign of Things to Come?

On September 4, the Federal Energy Regulatory Commission (FERC, or the Commission) issued two orders concerning the Commission's regulation of liquefied natural gas (LNG) activities that were notable not for what the Commission ultimately decided, but rather for the views expressed by new Commissioner, and future Chairman, Norman Bay. In two separate orders involving petitions for declaratory orders filed by Shell U.S. Gas & Power LLC (Shell) and Pivotal LNG Inc. (Pivotal),[1] Commissioner Bay disagreed with his colleagues on the proper interpretation of the statutory language from the Energy Policy Act of 2005 (EPAct 2005) defining "LNG terminal." While in both cases the Commission held that the proposed LNG operations were not FERC-jurisdictional, the separate opinions written by Commissioner Bay signal a more expansive view of FERC jurisdiction over planned LNG activities. With Bay's ascension to the FERC chairmanship expected to take place in April 2015, the differing views concerning the breadth of Commission jurisdiction over LNG activities and projects will likely prompt the submission of more petitions seeking jurisdictional clarity.

With the recent increase in supplies of natural gas, there has been more focus on exporting natural gas to other countries, using natural gas as transportation fuel and transporting natural gas to markets inaccessible by natural gas pipelines. The pursuit of activities and projects that rely on LNG has become more prevalent as developers and investors seek to capitalize on such trends. Jurisdiction over small and midsize LNG projects remains an evolving question and, as a result, several parties, such as Shell and Pivotal, have come before the Commission seeking clarity.

Part of the uncertainty surrounding FERC jurisdiction of small- and mid-scale LNG facilities stems from the statutory definition of "LNG terminal," which was added by EPAct 2005. This is the same act that granted the Commission exclusive authority under Section 3 of the Natural Gas Act (NGA) to approve or deny an application for the siting, construction, expansion or operation of an LNG terminal.[2] The definition of LNG terminals includes:

> 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 . . . transported in interstate commerce by waterborne vessel.[3]

While the language has been understood to cover large-scale coastal liquefaction and regasification facilities for the import and export of LNG, its applicability to smaller-scale LNG facilities for domestic uses is less clear. Section 7 of the NGA also comes into play when determining FERC jurisdiction over natural gas facilities. This section, among other things, grants FERC jurisdiction over the transportation, and the sale for resale, of natural gas in interstate commerce, as well as the construction, acquisition and operation of facilities to transport natural gas in interstate commerce.

Shell and Pivotal both argued their proposed LNG operations and facilities would not be subject to Commission jurisdiction under Section 3 or Section 7 based on the "vehicular natural gas exemption" in Section 1(d) of the NGA. The Commission rejected that premise, concluding that the exemption is not relevant for determining jurisdiction if the party already engages in jurisdictional activities, separate and apart from vehicular use purposes. The Commission did find, however, that none of the planned activities fell within the jurisdiction of Sections 3 or 7. In the *Shell Order*, after a review of past precedent and an analysis of the definition of "LNG terminal" introduced by EPAct 2005, the Commission concluded that none of the waterborne vessels, trucks and/or trains that Shell will use to import Canadian LNG will be "natural gas facilities" that meet the definition of "LNG terminal." In addition, there will be no interconnected pipelines at any of Shell's proposed facilities.

Therefore, FERC concluded, none of the facilities involved in Shell's LNG operations will be LNG terminals subject to FERC's Section 3 authority. The Commission followed similar reasoning in the *Pivotal Order*, finding no jurisdiction under either Section 3 or Section 7.

By way of background, Shell's project would include LNG facilities that would receive, store, offload and retail LNG. These facilities would include a liquefaction unit located on the shore of Lake Huron in Ontario, along with a docking and storage facility in Michigan. The LNG produced in Ontario would be imported into the United States via truck, train and waterborne vessel to be used as vehicular and non-vehicular fuel. Shell also indicated it planned to construct a liquefaction unit on the Mississippi River, where LNG would be loaded onto waterborne vessels that would (1) transport LNG to other vessels to be used as fuel or (2) transport LNG to onshore storage facilities for subsequent use as transportation fuel. Shell argued these facilities should not be considered FERC-jurisdictional LNG terminals.

Pivotal's planned project would expand its production of LNG at its five inland facilities not currently subject to FERC jurisdiction. Pivotal anticipated that the LNG it produced may be transported via waterborne vessel to customers in the contiguous United States as well as non-contiguous states or territories (e.g., Hawaii and Puerto Rico). Pivotal further noted that none of the LNG would be regasified and injected into the FERC-jurisdictional interstate pipeline system.

Notably, in both orders, Commissioner Bay disagreed with the majority's interpretation of "LNG terminal" from EPAct 2005. In his dissent in the *Shell Order*, Commissioner Bay stated he would have found Shell's proposed LNG activities to be FERC-jurisdictional under Section 3 of the NGA. Bay based his reasoning on the statutory definition of "LNG terminal." He criticized FERC for trying to limit the plain meaning of the definition, and he argued that if the statute is read literally, it is clear Shell's facilities are "LNG terminals." According to Bay, Congress intended to preempt state action and used broad language to accomplish that result, thereby providing "exclusive authority" to FERC with respect to LNG terminals, including "all natural gas facilities" in which natural gas was "transported in interstate commerce by waterborne vessel."[4] In other words, Bay would have asserted jurisdiction over Shell's facilities regardless of the fact that no transportation via interstate pipeline was contemplated. In his concurrence in the *Pivotal Order*, Bay reiterated his disagreement with the majority's interpretation of "LNG terminals" but would not assert jurisdiction because Pivotal's plants are located well inland.

In both orders, the Commission based its rulings of non-jurisdictional status on the specific activities proposed by each applicant and noted instances where slight changes *could* subject the applicants to FERC jurisdiction. As such, the applicability of these orders to other parties is somewhat limited. FERC acknowledged as much in the *Pivotal Order* when it noted "[t]he reasoning set forth herein will be applicable only to other situations with the same underlying relevant characteristics."[5] Therefore, unless a company's proposed operations are directly on point with a similar proposal that has been ruled on by the Commission, an entity is well-served in filing a new petition with the FERC laying out the unique circumstances of its planned operations.

While the Commission's rulings in the Shell and Pivotal cases bode well for developers of small-scale LNG operations seeking to serve new markets as the rulings lower the regulatory barriers facing such projects, the fact that Commissioner Bay will be the Chairman in approximately six months suggests that these matters are far from settled. Clearly, on the basis of these two orders, Chairman Bay will have a more expansive view of FERC jurisdiction over LNG projects than his fellow Commissioners. The fact-specific nature of these orders, coupled with the uncertainty over the breadth of FERC's regulatory approach, enhances the need and urgency for parties to seek Commission guidance on the jurisdictional aspects of their proposals.

[1] *Shell U.S. Gas & Power, LLC*, 148 FERC ? 61,163 (2014) (*Shell Order*); *Pivotal LNG, Inc.*, 148 FERC ? 61,164 (2014) (*Pivotal Order*).

[2] 15 U.S.C. ? 717b(e).

[3] Pub. L. No. 109-58, ? 311(b), 119 Stat. 594, 685 (2005) (codified at 15 U.S.C. ? 717a(11)).

[4] 15 U.S.C. ? 717b(e)(1).

[5] *Pivotal Order* at P 26.

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