

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Emera CNG, LLC

Docket No. CP14-114-000

MOTION FOR LEAVE TO INTERVENE AND COMMENTS OF
FLORIDIAN NATURAL GAS STORAGE COMPANY, LLC

On March 19, 2014, Emera CNG, LLC (Emera) filed a Petition for a Declaratory Order (Petition), requesting that the Federal Energy Regulatory Commission (Commission or FERC) issue an order declaring that Emera's proposed construction of a new compressed natural gas (CNG) compression and loading facility and its planned export of CNG via truck and trailer and ocean-going carrier are not subject to the jurisdiction of the Commission under the Natural Gas Act (NGA). Floridian Natural Gas Storage Company, LLC (FGS) hereby moves for leave to intervene in this proceeding and submits its comments on Emera's Petition pursuant to the Commission's March 24, 2014 Notice of the Petition and Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.214.

All communications with respect to this matter should be served on the following persons:

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Motion for Leave to Intervene

Floridian Natural Gas Storage Company, LLC, a Delaware limited liability company, has its principal place of business located at 1000 Louisiana Street, Suite 4300, Houston, TX 77002. FGS holds a certificate of public convenience and necessity under NGA Section 7(c) issued in FERC Docket No. 08-13-000 on August 29, 2008 and amended in Docket No. CP12-100-000 on August 31, 2012. That certificate authorizes FGS to construct and operate a new natural gas liquefaction, storage, vaporization and truck loading facility near Indiantown in Martin County, Florida.

FGS, as the developer of a FERC-regulated natural gas liquefaction facility located in Florida approximately 35 miles from the location of Emera's proposed natural gas compression facility, has a substantial interest that may be affected by the outcome of this proceeding. FGS's interest cannot be adequately represented or protected by any other party. FGS's participation in this proceeding is therefore in the public interest.

Comments

In FGS's view, a disclaimer of Commission NGA jurisdiction over Emera's exports of CNG, and over Emera's Port facility that compresses natural gas to facilitate its export, would be inconsistent with the Commission's longstanding assertion of its jurisdiction over exports and export facilities and Congress's confirmation of that jurisdiction in the Energy Policy Act of 2005 (EPAAct). If operations like those Emera proposes are not subject to the jurisdiction of the Commission, a regulatory gap would result. The public interest requires that FERC exercise its jurisdiction to conduct its typically rigorous and protective environmental and safety review of such operations.

The Commission long ago took the position that “jurisdictional determination[s] concerning LNG projects are made on a case-by-case basis.”¹ The Petition itself is a good illustration of the wisdom of the Commission’s approach as Emera cites a number of Commission precedents on jurisdiction inapposite to the whole of Emera’s proposal.

Emera’s case as a whole is simple. Emera proposes to compress natural gas and then export the CNG to customers outside the U.S. To do so, it proposes to build a compression and truck loading facility located at the Port of Palm Beach only a quarter mile from the berth where trailers mounted with pressure vessels containing the CNG will be loaded on ocean-going carriers. There is no doubt that Emera is subject to jurisdiction under the NGA. EPCRA modified NGA §1(b) to confirm explicitly that the NGA applies “to the importation and exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation.” Indeed, Emera has applied to the U.S. Department of Energy Office of Fossil Energy (DOE/FE) for authority to export natural gas in the form of CNG.² As such, Emera will be a person engaged in exportation of natural gas in foreign commerce. Nevertheless, Emera is resisting FERC asserting its NGA jurisdiction over Emera and Emera’s export facilities.

Although Emera proposes to construct its compression and loading facility for the explicit purpose of exporting natural gas – more particularly, to compress natural gas to facilitate its transportation in foreign commerce -- it claims that that facility is neither an LNG terminal nor a natural gas facility at the point of export. These claims ignore that the Commission’s

¹ *Marathon Oil Company*, 53 FPC 2164, 2172 (1975). The Commission’s reasons for treating LNG projects on a case-by-case basis are equally applicable to CNG projects.

² Application of Emera CNG, LLC for Long-Term Authorization to Export Compressed Natural Gas, DOE/FE Docket No. 13-157-CNG (Emera DOE/FE Application). The Emera DOE/FE Application, filed on November 20, 2013, remains pending.

authority over natural gas exports under NGA § 3 “is at once plenary and elastic”³ and encompasses export facilities like those proposed by Emera. As the Commission has explained:

The intent to import or export gas and the physical capability to convey the gas are two halves of a whole transaction. Siting, construction, and operation are means to the [export] end. Hence, section 3 has traditionally required authorization of both a plan on paper to move gas and a proposal to put facilities in place to make that happen.⁴

In fact, FERC has been unambiguously delegated the authority under NGA § 3 to “[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of ... exit for exports.”⁵

Emera’s argument that its Port of Palm Beach compression and loading facility is not a natural gas facility at the point of export mistakenly focuses on the quarter-mile distance between the facility and the marine berth and the truck transport and roll on loading methods to be used over that segment. Neither the distance nor the non-regulated methods of transport and loading change the nature of Emera’s compression and loading facility as a natural gas facility at the point of export subject to FERC’s jurisdiction under NGA § 3.

As to distance, the cases cited by Emera are inapposite.⁶ The *Yukon*⁷ and *Oasis*⁸ orders are not pertinent to the question whether a compression and loading facility located in the same Port from which the export of the compressed natural gas will occur is jurisdictional. While in *Yukon* the Commission declined to exercise NGA § 3 jurisdiction over a lengthy pipeline entirely

³ *Distrigas Corporation v. Federal Power Commission*, 495 F.2d 1057, 1064 (D.C. Cir. 1974).

⁴ *Sound Energy Solutions*, 107 FERC ¶ 61,263 at P 35 (2004).

⁵ Delegation Order No. 00-004.00A at Paragraph 1.21 A.

⁶ Petition at 6.

⁷ *Yukon Pacific Corporation*, 39 FERC ¶ 61,216 (1987) (*Yukon I*).

⁸ *Oasis Pipeline, LP*, 127 FERC ¶ 61,263 (2009).

in the state of Alaska, it did assert its jurisdiction under NGA § 3 to authorize the place of export;⁹ ultimately, the Commission exercised that latter jurisdiction with respect to the LNG facility located in Port Valdez.¹⁰ And, in *Oasis*, the Commission exercised jurisdiction over Oasis’s export/border-crossing facilities, acknowledging that Oasis’s pipeline expansion in conjunction with the export/border crossing facilities would be operated as part of Oasis’s entire intrastate pipeline system.¹¹ Neither case supports the Commission disclaiming all jurisdiction with respect to Emera’s proposed operations because in both cases the Commission did exercise such jurisdiction.¹² Moreover, neither case turned on the pipeline’s distance from the place of export. That distance is not determinative is confirmed by FERC’s determination that it had NGA § 3 jurisdiction over the 9.6-mile, 36-inch pipeline that would transport re-vaporized gas away from the Freeport LNG import terminal.¹³ Freeport’s pipeline is not measured in fraction of a mile nor is it “at or immediately adjacent to the import/export location.”¹⁴ The *Freeport* case is but one example of the how the Commission determines NGA § 3 jurisdiction on a case-by-case basis and is demonstrative of its ability to broadly assert its “plenary and elastic” authority over export facilities, as opposed to being constrained to assert that authority only narrowly as claimed by Emera.

That Emera will transport CNG on truck trailers over the quarter-mile at issue does not deprive FERC of NGA § 3 jurisdiction over the compression and loading facility. The

⁹ *Yukon* at 33.

¹⁰ *Yukon Pacific Company L.P.*, 71 FERC ¶ 61,197 (1995) (*Yukon II*).

¹¹ *Oasis* at P 4 and P 17.

¹² The upstream intrastate pipelines over which the Commission declined to exercise its NGA § 3 jurisdiction are only analogous to the Hinshaw pipeline that Emera states will serve its facility, not to Emera’s facility itself.

¹³ *Freeport LNG Development, L.P.*, 107 FERC 61,278 at P 7 and P 20 (2004).

¹⁴ Petition at 6.

Commission’s holding in *Southern LNG Inc.*¹⁵ – that its “NGA section 3 jurisdiction over LNG import facilities and services [at the Elba Island LNG terminal] 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”¹⁶ – does not mean, as Emera suggests,¹⁷ that the Commission should not regulate a Port-located facility compressing gas to facilitate its export because the CNG will move the quarter mile from that facility to the marine berth by truck. In contrast to the truck movements in the inland direction from a facility over which the Commission exercises its NGA § 3 jurisdiction in *Southern*, Emera’s truck movements would be in the offshore direction from a facility over which, Emera claims, the Commission should exercise no jurisdiction at all. In addition, Emera’s movement of CNG from compression facility to marine berth by truck does not break the continuum of its engagement in the exportation of natural gas,¹⁸ or put its facility outside the ambit of FERC’s NGA § 3 jurisdiction.¹⁹

¹⁵ 131 FERC ¶ 61,155 (2010).

¹⁶ *Id.* at P 17.

¹⁷ Petition at 6.

¹⁸ It was long ago recognized that, although the Commission does not regulate transportation of natural gas by truck, train or marine vessel, interim movements by an exempt mode of transport do not break the continuum of interstate commerce. *Marathon Oil*, 53 FPC at 2168-69, 2172-73 and 2177 (asserting jurisdiction over two producers’ Alaskan facilities (an LNG plant leased by them and their field-to-plant pipelines) and an Oregon LDC’s LNG receipt facilities, finding that interstate commerce was not severed by the intervening non-jurisdictional ocean tanker transportation; *Cape Cod Gas Company*, 52 FPC 294 at 295-96 (1974) (asserting jurisdiction over two storage facility operators, finding that, notwithstanding the exempt truck transport between the two storage facilities, the movement of gas is in interstate commerce and subject to jurisdiction).

¹⁹ Emera’s additional to citation to *Pivotal LNG, Inc.*, 137 FERC ¶ 62,108 (2011) (Petition at 7 n.7) is also not relevant. First, it was NGA § 7 jurisdiction that the Commission disclaimed because no gas from the LNG facility would be re-introduced into a non-LDC pipeline system. Second, the Commission also observed that no gas leaving the LNG facility would be exported from the U.S. *Id.* at note 4. The letter order says nothing about how the Commission would address its NGA § 3 jurisdiction were there to be such exports.

Emera’s focus on a single instant – when the truck boards a roll on / roll off freighter ship – as the “point of export” is likewise misguided. The only case it cites in this regard,²⁰ *The Gas Company, LLC*,²¹ is inapposite to Emera’s proposal. First, the case is not about the Commission’s NGA § 3 jurisdiction because The Gas Company’s proposal concerned receiving domestically-sourced gas moving in interstate commerce from the Continental U.S. to Hawaii.²² Second, The Gas Company is Hawaii’s only government-franchised gas company and it is regulated by the Hawaii Public Utilities Commission; as such, its facilities and operations are exempt from FERC jurisdiction under either NGA § 1(b) or § 1(c).²³ Third, The Gas Company’s proposal was not a request to site or construct any facility at all at the Port as it planned to use only a mobile regasification unit to inject revaporized volumes into existing pipeline facilities.²⁴ It is against this background that the Commission found that pier facilities that also receive, load and unload containers filled with products other than LNG are not “natural gas facilities” within the meaning of the NGA definition of LNG terminal.²⁵ But that conclusion regarding the pier facilities does not mean that Emera’s non-state-regulated natural gas compression facility pre-loading an export for movement in foreign commerce should be treated the same as The Gas Company’s state-regulated mobile natural gas revaporization unit post-unloading a movement in interstate commerce. The former calls out for the Commission’s exercise of its “plenary and elastic” authority under over export facilities under NGA § 3, whereas the latter does not even raise the issue.

²⁰ Petition at 7.

²¹ 142 FERC ¶ 61,036 (2013).

²² *Id.* at P 5.

²³ *Id.* at P 15 and P 17.

²⁴ *Id.* at P 5 and P 7.

²⁵ *Id.* at P 14.

EPAct confirmed FERC’s jurisdiction over export facilities by adding NGA § 3(e)(1), which grants the Commission “exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.” While Emera claims that “the Facility will handle compressed natural gas rather than LNG and thus naturally falls outside the definition of ‘LNG terminal,’”²⁶ the NGA § 2(11) definition of “LNG terminal” suggests otherwise because it includes:

- all natural gas facilities
- located onshore
- used to receive, unload, load, store, transport, gasify, liquefy, or process
- natural gas that is exported to a foreign country from the United States
- but not a facility subject to FERC jurisdiction under NGA § 7.

Emera’s compression and loading facility is:

- a natural gas facility
- located onshore
- used to receive, process (by compression) and load
- natural gas that leaves the facility for no purpose other than to be exported as CNG to a foreign country from the United States
- and, according to Emera, not a facility subject to FERC jurisdiction under NGA § 7.²⁷

In short, Emera’s focus on “LNG” in the term “LNG terminal” is misplaced²⁸ as Emera’s proposed compression and loading facility plainly meets the NGA definition of LNG terminal.

²⁶ Petition at 5.

²⁷ Petition at 9-11.

The bottom line of the Petition is that Emera would be in a regulatory gap where FERC would not conduct its environmental and safety review, including its determination whether the facility would meet the requirements of the U.S. Department of Transportation’s Pipeline and Hazardous Materials Administration (PHMSA). Emera never states that it will be regulated by the Florida Public Service Commission (FPSC).²⁹ And, while the Petition makes a vague reference to LNG and CNG facilities being covered by state and local regulations,³⁰ the Emera DOE/FE Application illustrates the regulatory gap. Stating that the facility is not subject to FERC jurisdiction, Emera requests that DOE/FE conduct the NEPA review; tacitly recognizing that DOE/FE does not conduct such reviews itself, Emera goes on to state that “[s]hould the DOE/FE determine that another agency should conduct the NEPA review, Emera will comply with the designated agency’s NEPA regulations.”³¹ Attached to the Emera DOE/FE Application is a Preliminary Environmental Report which includes Table 2 listing anticipated permits and approvals; there is no reference to FPSC regulation and the only reference to PHMSA regulation is a DOT Special Permit, which is related to the truck transportation of CNG and not to PHMSA’s pipeline safety regulation relevant to compressing gas.

The Court opined in *Distrigas* “that Section 3 supplies the Commission not only with the power necessary to prevent gaps in regulation, but also with flexibility in exercising that

²⁸ Natural gas in all its forms is subject to FERC’s NGA jurisdiction. The NGA provides no basis for distinctions among conventional natural gas, liquefied natural gas and compressed natural gas. *K N Energy, Inc.*, 24 FERC ¶61,200 at P 2, denying rehearing of 22 FERC ¶ 61,176 (1983).

²⁹ In contrast, the April 11, 2014 Petition for a Declaratory Order of Pivotal LNG, Inc. filed under FERC Docket No. RP14-732-000 makes an affirmative statement regarding each of the facilities at issue in that petition that it is subject to regulation by the Public Service Commission of the respective State (except the one facility that is regulated by FERC under NGA § 7).

³⁰ Petition at 8.

³¹ Emera DOE/FE Application at 13.

power.”³² The *Yukon* case is an interesting illustration of the Commission acting to preclude a regulatory gap. Recognizing that it had NGA § 3 jurisdiction to approve or disapprove the place of export independent of any jurisdiction to approve or disapprove the siting, construction and operation of new gas pipeline facilities necessary to implement the export,³³ the Commission observed that that determination would require access to an EIS and that the EIS process would afford it “ample opportunity to consider the environmental and safety aspect of the pipeline and its liquefaction plant.”³⁴ The place of export was later approved subject to safety and environmental mitigation measures, including applicant coordination and compliance with PHMSA and the U.S. Coast Guard.³⁵ At a minimum, the Commission should exercise such NGA § 3 jurisdiction over Emera’s place of export to prevent a regulatory gap. Not to exercise that jurisdiction effectively gives operators like Emera an unfair competitive advantage, and does so to the detriment of the public interest in determining that such proposed natural gas facilities and operations would be environmentally-sound, as well as safe and secure.

Finally, Emera cautions the Commission against creating the potential for overly expansive jurisdiction, referring to a number of other facilities over which it claims FERC has not asserted jurisdiction, but from which it claims exports are made.³⁶ It is evident that the circumstances of Emera’s facility are not identical to the circumstances of those other facilities.³⁷

³² 495 F.2d. at 1064.

³³ The Delegation Order discussed at p. 4 and note 5 above addresses this independent authority.

³⁴ *Yukon I*, 39 FERC at Section VII.

³⁵ *Yukon II*, 71 FERC at Section IV and Environmental Condition/Mitigation Measure 38.

³⁶ Petition at 7-9.

³⁷ One distinction is that Emera is seeking export authority from DOE/FE for exports to nations with which the U.S. does not have a Free Trade Agreement, whereas the examples cited by Emera involve only exports to FTA nations. Different NGA standards apply. See NGA §§ 3(a) and 3(c).

Moreover, the complete facts for each of those facilities are not before the Commission. Even if they were, the Commission would determine jurisdiction in each instance on a case-by-case basis.³⁸ What is important here is that the facts of Emera’s case warrant a determination that Emera’s exports of CNG, and its Port facility that compresses natural gas to facilitate its export, are subject to the Commission’s NGA § 3 jurisdiction.

For the reasons stated, Emera’s petition for a declaratory order disclaiming Commission jurisdiction should be denied.

Dated: April 18, 2014

Respectfully submitted,

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³⁸ On a separate note, the Petition (at 2) refers to the possibility that “Emera may source CNG from other facilities and transport such CNG to the Port or to another general use port facility (including Port Everglades, Port of Miami, Port Canaveral or Port of Jacksonville) for export.” The Commission is not in the position to make any jurisdictional determination with respect to such operations because complete information on these alternative export points and associated gas sources is not in the record.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to Intervene and Comments of Floridian Natural Gas Storage Company, LLC has been served by email this 18th day of April, 2014 on the Petitioner Emera CNG, LLC (dan.muldoon@emera.com; paul.laberge@emera.com; awilson@velaw.com).

/s/ Joan M. Darby _____