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In Case of "First Impression" FERC Dismisses Application To Operate Facilities in Hawaii to Receive LNG from Continental U.S.

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On January 17, 2013, the Federal Energy Regulatory Commission ("Commission" or "FERC"), in what it determined was a "case of first impression", issued an order[1] dismissing an application submitted by The Gas Company, LLC ("The Gas Company"), a local distribution company in Hawaii, for authorization to operate certain facilities to bring in liquefied natural gas ("LNG") from the Continental U.S. as an additional energy source for its distribution customers. The Gas Company maintained that the Commission had exclusive jurisdiction under section 3 of the Natural Gas Act ("NGA") to regulate the operation of the facilities because they fell within the definition of "LNG terminal" that was added to the NGA by the Energy Policy Act of 2005 ("EPAct 2005"). The definition was expanded to include natural gas facilities located onshore or in state waters used to receive, load, unload, store, transport, gasify, liquefy, or process natural gas "transported in interstate commerce by waterborne vessel". Based on the facts presented in the application, the Commission determined that the proposed facilities and operations did not constitute an LNG terminal within the meaning of the NGA, and found "no cause" to assert jurisdiction under NGA section 3. The Commission also determined that although the project would involve the interstate transportation of gas, there was no basis to assert jurisdiction under section 7 of the NGA because The Gas Company would be exempt from regulation under the NGA as either a local distribution company under section 1(b) of the NGA or a Hinshaw company under section 1(c) of the NGA. The decision has potential implications for future LNG projects involving the transportation of LNG in interstate commerce by means of "waterborne vessel".

BACKGROUND

On August 9, 2012, The Gas Company submitted an application for authorization under Section 3 of the NGA to operate an LNG terminal in Hawaii which would be comprised of cryogenic International Shipping Organization ("ISO") containers, ISO container storage facilities, and mobile vaporization and regasification units to deliver LNG or natural gas to its customers. The project contemplates the use of ISO containers that would be filled with LNG from domestic sources in the Continental U.S. and transported aboard ocean-going container ships and delivered to Pier 38 in Honolulu Harbor, a point of interconnection with eight of The Gas Company's synthetic natural gas ("SNG") distribution systems. Upon arrival, the ISO containers would either be stored or attached to a mobile regasification unit which would inject re-vaporized LNG into The Gas Company's existing pipeline facilities at Pier 38 or moved by truck and/or inter-island barge to various locations on the distribution system.

ISSUES OF FIRST IMPRESSION

In its application, The Gas Company argued that, together, the ISO containers, storage facilities, mobile vaporization/regasification units, and other related facilities should be considered an "LNG terminal" as defined

[1] *The Gas Company, LLC*, 142 FERC ¶ 61,036 (Jan. 17, 2013).

under Section 3(e) of the Natural Gas Act which provides that:

[A]ll 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 waterborne vessel, but does not include –

(A) waterborne vessels used to deliver natural gas to or from any such facilities; or
(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.[2]

The Gas Company noted that the Commission had historically regulated LNG terminal facilities under NGA section 3 that were used to import or export LNG, but that EPAct 2005 had expanded the definition of LNG terminal to include facilities used for natural gas transported in interstate commerce by "waterborne vessel". Since the LNG involved in the project would be transported from the Continental U.S. to Hawaii on ocean-going cargo ships, The Gas Company argued that the facilities proposed in its application should be considered an LNG terminal subject to the Commission's jurisdiction under NGA section 3. The Gas Company acknowledged that the Commission had never addressed its jurisdiction with respect to the "waterborne vessel" prong of the LNG terminal definition, but urged the Commission to assert NGA section 3 jurisdiction and approve its application even though the proposed facilities did not resemble the typical LNG import/export terminals that are generally the subject of NGA section 3 applications.

FERC ORDER

The Commission acknowledged that EPAct 2005 had expanded its NGA section 3 authority to include not only LNG terminal facilities used to import or export LNG, but also LNG terminal facilities used for natural gas transported in interstate commerce by "waterborne vessel". The Commission determined, however, that the expanded definition of LNG terminal did not apply to the specific facilities proposed in the application because they were not "natural gas facilities" within the meaning of the definition since the existing pier facilities which would receive, load, and unload the vessels carrying the ISO containers of LNG were currently being used to receive, load, and unload containers filled with other products. The Commission also declined to assert jurisdiction under section7 of the NGA over The Gas Company's proposed operations because The Gas Company would qualify either as a local distribution company or a Hinshaw company exempt from the Commission's NGA section 7 jurisdiction. The Commission concluded that there was no "regulatory gap" to fill since the facilities and operations would be subject to safety and environmental regulation by other federal entities, including the Department of Transportation and the U.S. Coast Guard.

IMPLICATIONS

The Commission's decision is the first interpretation of the definition of "LNG terminal" added by EPAct 2005, and recognizes that the definition expands its NGA section 3 authority to regulate LNG terminals involved in the transportation of natural gas by "waterborne vessel" in interstate commerce. While the decision resolves The Gas

[2] 15 U.S.C. § 717a(11) (2006).

Company application, it may be of limited precedential value to other companies contemplating LNG projects involving the interstate transportation of natural gas by "waterborne vessel" because of its unique facts. The decision hinges on the Commission's finding that the pier facilities that would be used to receive, load, and unload the vessels carrying the ISO containers are also used for these same purposes involving other "products". The decision determines that the multi-use pier facilities are not "natural gas facilities", but does not appear to address the specific facilities that The Gas Company sought to include within the proposed "LNG Terminal" – the ISO containers, ISO storage facilities, and the mobile re-gasification units – located on the pier at a point where eight of the Gas Company's existing SNG distribution systems are located. Also left unanswered is whether the Commission would reach the same decision if an applicant proposed to construct new facilities that would be used exclusively in connection with LNG-related activities.

The dismissal also avoids the need to reconcile the Commission's "expanded" NGA section 3 authority over LNG terminals involved in interstate commerce with existing and explicit exemptions from the Commission's authority to regulate interstate transportation of natural gas found elsewhere in the NGA. The Commission dismissed the application because it had no jurisdiction under NGA section 3 or NGA section 7. However, if the facilities proposed by a future applicant could be viewed as "natural gas facilities" within the meaning of the NGA, would the exemptions in sections 1(b) and 1(c) nevertheless take precedence and "trump" the Commission's jurisdiction under NGA section 3, or would the Commission's expanded interstate LNG terminal authority in NGA section 3 prevail?

In addition, the Commission was only asked to determine its jurisdiction over proposed facilities in the state where the LNG would be received. Thus, it did not need to discuss the scope of its jurisdiction under either NGA section 3 or section 7 over any mainland facilities that would also be involved in the transportation of LNG by "waterborne vessel".

These and other questions are left unanswered, and significant legal and regulatory issues remain that must be fully understood and carefully managed as a wider variety of LNG transportation projects are developed.

FOR ADDITIONAL INFORMATION

Van Ness Feldman's nationally recognized Natural Gas and LNG Practice is experienced in addressing complex legal and federal policy questions that often arise in the development of natural gas projects, including LNG import and export projects. The firm's professionals have been at the forefront of every major development in the LNG industry since the 1970's. For additional information regarding this order, or any other energy-related federal activity, please contact John Burnes, John Buchovecky, Lisa Epifani, Lawrence Acker, Brian O'Neill, Janna Chesno, or any member of the firm's Natural Gas or LNG Practice Groups at (202) 298-1800.

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