

UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
FEDERAL ENERGY REGULATORY COMMISSION

IN THE MATTER OF)
)
Bradford County Real Estate Partners LLC) Docket No. CP20-524-000
Petition for a Declaratory Order)

Protest and Motion to Intervene of Sierra Club and PennFuture

On September 18, 2020, Bradford County Real Estate Partners LLC (“Bradford”) filed a Petition for a Declaratory Order seeking an order by FERC that it did not have jurisdiction to regulate Bradford’s natural gas liquefaction and truck and rail loading facility in Wyalusing Township, Pennsylvania (“Wyalusing LNG facility”) under either Section 3 or Section 7 of the Natural Gas Act (“NGA”). FERC created a docket for that petition labeled CP20-524.

Sierra Club and Citizens for Pennsylvania’s Future (“PennFuture”) hereby move to intervene in this docket and protest this proposed declaratory order. Intervenors and their members will be harmed by construction and operation of the Wyalusing LNG liquification facility and associated transport of LNG from that facility to Delaware River Partners, LLC’s (“DRP”) Gibbstown Logistics Center (“DRP Gibbstown facility”). We ask for FERC to first consolidate this petition with a similar petition filed by DRP arguing its Gibbstown facility is not subject to FERC jurisdiction. Second, we ask FERC to issue a declaratory order that the Wyalusing LNG facility is within FERC’s jurisdiction under both Section 3 and Section 7 of the NGA. The Wyalusing LNG facility is a “LNG terminal” subject to FERC’s jurisdiction under Section 3 of the NGA, and it is transporting gas in interstate commerce as well as exporting gas in foreign commerce and so is subject to FERC’s

jurisdiction under Section 7 of the NGA. FERC precedent does not argue otherwise, and if FERC were not to exercise jurisdiction it would create a regulatory loophole. Movants argue these points in detail in our protest petition, and we hereby incorporate all aspects of our protest petition into our motion to intervene.

I. Motion to Intervene

FERC regulations permit intervention upon a showing that “the movant has or represents an interest which may be directly affected by the outcome of the proceeding” or that “the movant’s intervention is in the public interest.”¹ These low hurdles rightly reflect FERC’s Natural Gas Act responsibilities: FERC is seeking to determine the public interest on matters which have weighty implications for the country, and so naturally benefits from hearing views from many perspectives as it weighs export applications. Movant-intervenors here easily satisfy both of these alternative standards for intervention.

A. Sierra Club

Sierra Club and its members have interests that will be affected by the Wyalusing LNG facility, and by the proposed declaratory order specifically. Sierra Club members will be impacted on local, regional, and national scales.

Sierra Club has 134 active members in Bradford County, Pennsylvania, where the Wyalusing LNG facility is located. Sierra Club also has 425 active members in Lackawanna County, where trucks would pass through on local roads transporting LNG to Gibbstown and which is thus at risk if a spill occurs. More broadly, Sierra Club has 29,224 active members in Pennsylvania, many of whom live and recreate

¹ FERC Rule 214, 18 C.F.R. § 385.214(b)(2).

within miles of the truck and rail paths the LNG would follow on its way to the Gibbstown facility. These members will be affected by, among other things:

- Air and water pollution from the gas liquefaction activities of this huge facility that is less than a mile away from a local school and a nursing home
- The facility being built next to a greenway which helps bring tourism dollars into the region; potentially reducing that tourism. In addition, the facility is built on the historical location of the Friedenshuetten Moravian mission, where indigenous people who had converted to Christianity lived²
- The possibility of spills while the LNG is being transported. The U.S. Department of Transportation wrote in an Environmental Impact Statement discussing the consequences of approving the transport of LNG via rail: “Immediate ignition with liquid still on the ground could cause the spill to develop into a pool fire and present a radiant heat hazard. . . Methane in vapor state can be an asphyxiant when it displaces oxygen in a confined space.”³
- Noise, light, and aesthetic impacts from construction and operation of the facility
- A potential increase in oil and gas well construction in the area, and all the environmental harms resulting from this, due to the presence of a large new buyer of natural gas in the community

Sierra Club members will be impacted by the proposed declaratory order specifically because it will allow the facility to be built without proper review by

² Karen Edelstein, *LNG Development Puts Wyalusing, Pennsylvania in the Cross-hairs*, Frackracker Alliance (Sept. 15, 2020), https://www.frackracker.org/2020/09/lng-development-puts-wyalusing-pennsylvania-in-the-cross-hairs/#_ftn1.

³ Pipeline and Hazardous Materials Safety Admin., Dep’t of Transp., *SP 20534 Special Permit to Transport LNG by Rail in DOT-113C120W Rail Tank Cars: Final Environmental Assessment* 10-11 (2019).

FERC to determine whether the facility is in the public interest and whether additional environmental controls must be imposed on it. Further, the proposed order may influence FERC decision-making when considering future requests to disclaim jurisdiction over LNG facilities, which would harm Sierra Club members where those future facilities are located.

Separately, the interests the Sierra Club represents here are shared by the public at large, such that Sierra Club's intervention is in the public interest as provided by 18 C.F.R. § 385.314(b)(2)(iii). Sierra Club has demonstrated the vitality of these interests in many ways. Sierra Club runs national advocacy and organizing campaigns dedicated to reducing American dependence on fossil fuels, including natural gas and LNG facilities, and to protecting public health. These campaigns, including its Beyond Coal and Dirty Fuels campaigns, are dedicated to promoting a swift transition away from fossil fuels and towards reducing global greenhouse gas emissions. Sierra Club has also extensively acted to advance these interests with respect to the Wyalusing LNG facility in particular,⁴ and with regard to other LNG export proposals and LNG liquefaction facilities.⁵

⁴ See, e.g., Andrew Maykuth, *Plan To Send LNG Trains through Philly to S. Jersey Port Sparks Outrage from Residents, Environmentalists*, Phila. Inquirer (Sept. 23, 2020, 6:45 AM), <https://www.post-gazette.com/business/powersource/2020/09/23/LNG-trains-Philadelphia-South-Jersey-port-plan-residents-environmentalists/stories/202009220023> (“The Delaware Riverkeeper Network and the New Jersey chapter of the Sierra Club have rallied more than a dozen environmental groups to oppose the dock-dredging plan before the Delaware River Basin Commission, including petitions containing more than 50,000 signatures. The public complaints cite public safety concerns about ‘bomb trains’ traveling through urban areas.”).

⁵ See, e.g., *Stop Jordan Cove!*, Sierra Club, <https://www.sierraclub.org/oregon/stop-jordan-cove> (last viewed Oct. 22, 2020) (“[I]t's a key priority of the Oregon Sierra Club to help defeat the Jordan Cove LNG terminal in Coos Bay . . .”); *Opposition to LNG in the Valley Now Spans Three Continents*, Sierra Club (Aug. 8, 2019), <https://www.sierraclub.org/texas/blog/2019/08/opposition-lng-valley-now-spans-three-continents>.

Sierra Club therefore satisfies the conditions for intervention both as representatives of interested consumers and because their participation is in the public interest.⁶

Pursuant to 18 C.F.R. § 385.203(b)(1)-(2), Sierra Club states that the exact name of the movant is the Sierra Club, and the movant's principal place of business is 2101 Webster Street, Suite 1300, Oakland, CA 94612. Pursuant to 18 C.F.R. § 385.203(b)(3), Sierra Club identifies the following persons for service of correspondence and communications regarding this application:

Ankit Jain
Associate Attorney
Sierra Club
50 F Street NW
Washington, DC 20001
(202) 495-3023 (tel)
ankit.jain@sierraclub.org

B. PennFuture

PennFuture and its members have interests that will be affected by the Wyalusing LNG facility and by the proposed declaratory order and PennFuture's participation as a party in this docket is in the public interest. PennFuture seeks to intervene on its own behalf and on behalf of its members.

PennFuture is a Pennsylvania-based statewide environmental organization dedicated to leading the transition to a clean energy economy in Pennsylvania and beyond. PennFuture's mission is to protect our air, water and land, and to empower citizens to build sustainable communities for future generations. One focus of

⁶ See 15 U.S.C. § 717n(e); 18 C.F.R. § 385.214(b)(2).

PennFuture's work is to halt the buildout of a widespread petrochemical industrial complex in Pennsylvania beyond existing facilities through public outreach and education, regulatory and legislative advocacy, and legal actions. PennFuture has been acting to advance these interests with respect to the Wyalusing LNG facility and the interconnected DRP Gibbstown facility, including working with community members and other organizations, educating the public on the dangers of LNG production and transportation, and providing regulatory comments on LNG issues. PennFuture is concerned that without the Commission's jurisdiction over the Wyalusing LNG facility (indeed, the entire interconnected LNG production/export process as proposed), the impacts from the facility will not be properly addressed. It is therefore in the public interest to have PennFuture participate in this proceeding as an intervenor.

Additionally, PennFuture members will be impacted on local and regional scales. PennFuture has at least one member in Bradford County, Pennsylvania, the pipeline terminus and site of the Wyalusing LNG facility. In total, PennFuture has over 700 members in Pennsylvania, including members who live, work, and/or recreate in areas impacted by the Wyalusing LNG facility, including not only the Susquehanna River but throughout the LNG pipeline and transport routes and the DRP Gibbstown facility on the Delaware River.

Specifically, PennFuture members' recreational, aesthetic, professional and commercial, ecological, and health and safety interests will be negatively impacted by the Wyalusing LNG facility and the proposed declaratory order specifically. PennFuture has an interest in supporting the Commission's regulatory authority over projects like the Wyalusing LNG facility on behalf of its members, many of whom

live in Pennsylvania and would be directly impacted by the construction and operation of the facility.

PennFuture therefore satisfies the conditions for intervention both as representatives of interested consumers and because the organization's participation is in the public interest.⁷

Pursuant to 18 C.F.R. § 385.203(b)(1)-(2), PennFuture states that the exact name of the movant is the Citizens for Pennsylvania's Future, and the movant's principal place of business is 610 North Third Street, Harrisburg, PA 17101. Pursuant to 18 C.F.R. § 385.203(b)(3), PennFuture identifies the following person for service of correspondence and communications regarding this application:

Abigail M. Jones
VP of Legal and Policy
PennFuture
425 Carlton Road, Suite 1
Mt. Pocono, PA 18344
(570) 216-3313
jones@pennfuture.org

II. Protest

A. This petition should be consolidated with the petition by Delaware River Partners

On September 18, 2020, Bradford County Real Estate Partners, LLC ("Bradford") filed a petition for declaratory order regarding the Wyalusing LNG facility.⁸ On September 11, 2020, Delaware River Partners, LLC ("DRP") filed a

⁷ See 15 U.S.C. § 717n(e); 18 C.F.R. § 385.214(b)(2).

⁸ Petition for Declaratory Order Disclaiming Jurisdiction and Motion for Expedited Action of Bradford County Real Estate Partners LLC, Docket No. CP20-524-000, Accession #: 20200918-5180 (Sept. 18, 2020) (hereinafter "Bradford Petition").

similar petition for declaratory order regarding its LNG export facility on the shore of the Delaware River in Gibbstown, NJ.⁹ As is explained below, Bradford and DRP are affiliates and their facilities are logistically and financially connected such that they must be considered together as one operation.

First, the companies are essentially managed by the same company and all steps in the process are run by affiliates of the same parent company. Bradford is a subsidiary of New Fortress Energy Inc.,¹⁰ which is majority owned by a private equity fund managed by an affiliate of Fortress Investment Group LLC.¹¹ DRP is a subsidiary of Fortress Transportation & Infrastructure Investors LLC,¹² which is also managed and run by an affiliate of Fortress Investment Group LLC.¹³ Fortress Investment Group LLC is a wholly-owned subsidiary of SoftBank Group Corp.¹⁴ Therefore, both the Wyalusing LNG facility and DRP Gibbstown facility are controlled by affiliates of SoftBank Group Corp. Moreover, in 2019, an affiliate of SoftBank Group Corp., Energy Transport Solutions, was granted a special permit from the federal Pipeline and Hazardous Materials Safety Administration to transport LNG from Bradford's Wyalusing LNG facility directly to DRP's

⁹ Petition for Declaratory Order Disclaiming Jurisdiction and Motion for Expedited Action of Delaware River Partners LLC, Docket No. CP20-522-000, Accession #:20200911-5331 (Sept. 11, 2020) (hereinafter "DRP Petition").

¹⁰ See *List of Subsidiaries of New Fortress Energy LLC*, SEC, https://www.sec.gov/Archives/edgar/data/1749723/000114036118042889/s002392x7_ex21-1.htm (last viewed Oct. 22, 2020). New Fortress Energy Inc. was formerly New Fortress Energy LLC. *New Fortress Energy, Inc.*, U.S. Sec. and Exchange Commission, <https://www.sec.gov/cgi-bin/own-disp?CIK=0001749723&action=getissuer> (last viewed Oct. 22, 2020).

¹¹ See New Fortress Energy LLC, *Form 10-K* (2019), available at <https://www.sec.gov/Archives/edgar/data/1749723/000114036120004834/form10k.htm>.

¹² See Fortress Transportation and Infrastructure Investors LLC, *Form 10-K* (2019), available at <https://www.sec.gov/ix?doc=/Archives/edgar/data/1590364/000159036420000002/ftai-20191231.htm>.

¹³ See *id.*

¹⁴ See *id.*

Gibbstown export facility (“with no intermediate stops”¹⁵) for the purpose of export of the LNG to foreign markets.¹⁶

Second, there can be no doubt that Bradford’s and DRP’s operations are part of the same project scheme that was designed for the sole purpose to liquify natural gas from Pennsylvania’s Marcellus Shale region at the Wyalusing LNG facility for export to foreign markets from the DRP Gibbstown facility. This interconnectedness is obvious from the above-explained financial, corporate, and logistical connections, but is also evident from Bradford’s and DRP’s own description of the process in their respective Petitions.¹⁷

Because the Wyalusing LNG facility and the Gibbstown facility are part of a comprehensive project to produce and export LNG and because the entities are affiliated and the projects are logistically and financially related, a comprehensive understanding of the entire operation is necessary for the Commission’s determination as to whether Sections 3 and 7 of the NGA confer jurisdiction of the facilities. Additionally, the environmental impacts of this LNG production, transportation, and export scheme, including these logistically connected and interrelated facilities must be considered together by the Commission. Consequently, docket CP20-524 and CP20-522 should be consolidated.

¹⁵ *Liquefied Natural Gas - Transportation by Rail*, Pipeline and Hazardous Materials Safety Admin., <https://www.phmsa.dot.gov/safe-transportation-energy-products/liquefied-natural-gas-transportation-rail> (last visited Oct. 21, 2020).

¹⁶ See Pipeline and Hazardous Materials Safety Admin., *supra* note 3.

¹⁷ See Bradford Petition, at 3; DRP Petition, at 2-3.

B. The plain language of Section 3 of the Natural Gas Act indicates that FERC has jurisdiction

The NGA clearly indicates that the Wyalusing LNG facility is an “LNG terminal” within FERC’s jurisdiction under 15 U.S.C. § 717b (Section 3 of the NGA). Section 717b states: “The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”¹⁸ The NGA defines “LNG terminals” as any “natural gas facilities . . . 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 . . .”¹⁹

In determining whether FERC has jurisdiction over the Wyalusing LNG facility, the first step must be to look at the statute, and the clear language of the statute indicates that the Wyalusing LNG facility is an LNG terminal that falls under FERC jurisdiction. All parties agree that the facility is liquefying natural gas. All parties recognize that the facility is then shipping that LNG to an export terminal that is controlled by an affiliate of itself, which is then exporting the LNG to other countries. Therefore, this facility is liquefying natural gas that is exported to a foreign country, and falls under FERC’s jurisdiction. Nowhere in the statute is there a requirement that the facility at issue directly load LNG onto an ocean-going tanker for it to be engaged in the process of export, as Bradford claims.²⁰ In fact, the statute applies to any facility liquefying natural gas “that is . . . exported.” The passive voice indicates that as long as the facility is connected to the eventual exporting of the gas,

¹⁸ 15 U.S.C. § 717b(e) (2018).

¹⁹ 15 U.S.C. § 717a(11) (2018). The Act goes on to list two exceptions to this definition that are not relevant here.

²⁰ Pet. for Declaratory Order 6-7.

it qualifies as an LNG terminal. If Congress wanted to require a more direct connection, it could have done so, but it did not. The main purpose of the Wyalusing LNG facility is to prepare natural gas for export – therefore, it qualifies as an LNG terminal.

Bradford seems to argue that even if the Commission were to hold that the facility is liquefying natural gas that is exported, the facility still is not a “natural gas facility” and thus is not an LNG terminal subject to FERC jurisdiction.²¹ Bradford seems to be referring to a previous FERC order holding that only facilities “that receive and/or send out gas by pipeline” qualify as natural gas facilities.²² However, there is nothing about the word “natural gas facility” that requires it to be connected to a gas pipeline. Merriam-Webster defines “natural gas” as “gas issuing from the earth's crust through natural openings or bored wells.” It defines “facility” as “something (such as a hospital) that is built, installed, or established to serve a particular purpose.” A plain reading of the term “natural gas facility” indicates that a plant that is built for the particular purpose of liquifying natural gas is a “natural gas facility,” and that the method that facility uses to transport natural gas once it has been liquified has no relevance.

It is true that in previous orders FERC has applied a restrictive definition of what qualifies as a “natural gas facility.” In *Shell U.S. Gas & Power*, the Commission seems to have confused Section 3 of the NGA (15 U.S.C. § 717b) with Section 7 of the NGA (15 U.S.C. § 717f) and mistakenly restricted the definition of a “natural gas facility” under Section 3 to what it views as a “transportation facility” under Section 7. But Section 3 of the NGA applies to all natural gas facilities, unlike

²¹ *Id.* at 6.

²² *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163, at *13 (Sept. 4, 2014).

Section 7, not just natural gas transportation facilities. Former Commissioner Norman Bay, in his dissent in *Shell U.S. Gas & Power*, expressed the point well:

The majority's determination is based, in part, on the fact that the Commission has generally limited its jurisdiction under Section 7 of the Natural Gas Act to facilities that send or receive natural gas by pipeline. But Section 7 speaks of the Commission's jurisdiction over "transportation facilities." Section 2(11) defines "LNG terminals" to include "all natural gas facilities," not merely natural gas "transportation facilities." The former is clearly broader than the latter, and had Congress intended a more limited approach it could have used the language of Section 7 in Section 3.²³

As Section II.D will explain, *Shell U.S. Gas & Power*, and other FERC decisions holding similarly, also have important distinctions in the situations those orders applied to that make them distinguishable from the situation before FERC now. Further, FERC is not bound by precedent. It makes decisions on a case-by-case basis.²⁴ Therefore, to the extent that FERC mistakenly interpreted the reach of Section 3 of the NGA in a previous case, it is not bound by that mistaken interpretation in this case.

There is at least one federal case that supports the point that the Wyalusing LNG facility is subject to FERC's jurisdiction under Section 3 of the NGA. In *Distrigas Corp. v. Federal Power Commission*, the plaintiffs made a very similar argument as the petitioners are making here. The petitioners in that case were

²³ 148 FERC ¶ 61,163, at *17 (Sept. 4, 2014) (Bay, C., dissenting) (internal citations omitted). To the degree that FERC believes that applying the law as it was clearly written would lead to overly broad jurisdiction for the agency, Commissioner Bay offered a retort in a dissent in a different case: [T]he Commission may not substitute its policies for those enacted by Congress. . . It is not for us to call a congressional directive 'over expansive.'" *Pivotal LNG, Inc.*, 151 FERC ¶ 61,006, 61059 (Apr. 2, 2015) (Bay, C., dissenting).

²⁴ *Marathon Oil Co.*, 10 P.U.R.4th 198, at ¶ 2172 (1975) ("[J]urisdictional determination concerning LNG projects are made on a case-by-case basis.").

importing LNG, and they argued that their regasification facilities were separate from the facilities actually importing the LNG from foreign ports, and so could not be regulated under Section 3 of the NGA. But the U.S. Court of Appeals for the D.C. Circuit ruled that those regasification facilities were connected enough to the import of LNG that they could be regulated under Section 3.²⁵ That case was interpreting a different part of Section 3 giving FERC jurisdiction over any “person” importing or exporting LNG, rather than the language giving FERC jurisdiction over “LNG terminals.” However, this case does make clear that the D.C. Circuit views regasification (and presumably, liquefaction) facilities that are physically separate from import terminals to be part of the import process, as is required for such facilities to qualify as “LNG terminals.”

C. The commission must exercise Section 7 jurisdiction if it finds Section 3 jurisdiction inapplicable

If the Commission decides it does not have jurisdiction over the Wyalusing LNG facility under Section 3 of the NGA, it should exercise jurisdiction under Section 7. That section prohibits any facility from “engag[ing] in the transportation or sale of natural gas” without first getting a certificate of public convenience and necessity from FERC, if the facility is “subject to the jurisdiction of the Commission.”²⁶ The NGA defines the jurisdiction of the Commission to include “the transportation of natural gas in interstate commerce . . . and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation . . .”²⁷ “Interstate commerce” is further defined as “commerce between any point in a State and any point outside thereof, or between

²⁵ *Distrigas Corp. v. Fed. Power Comm’n*, 495 F.2d 1057, 1064 (D.C. Cir. 1974).

²⁶ 15 U.S.C. § 717f(c) (2018).

²⁷ 15 U.S.C. § 717 (2018). There are several exceptions to this jurisdiction that are not relevant here.

points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.”²⁸ The Wyalusing LNG facility is subject to FERC’s jurisdiction under these statutes because it is transporting and then selling gas from its facility in Pennsylvania to the DRP Gibbstown facility in New Jersey. This is a straightforward act of interstate commerce.

Bradford claims that Section 7 only applies to facilities that transport gas interstate via pipeline, and does not apply to facilities that transport gas interstate via truck or rail. They cite as support previous FERC decisions holding that LNG facilities that liquefy gas to turn it into an “end product” are not engaging in interstate commerce. While it is true that previous FERC decisions are focused on whether LNG is inserted back into the interstate pipeline system, Section II.D explain how important factual differences make their holding inapplicable here. Further, the Commission has always explained that it engages in case-by-case analysis, and can change its views as new facts are presented. Because previous decisions finding LNG facilities are not subject to FERC’s jurisdiction under Section 7 of the NGA contradict the plain terms of the law, FERC should not follow those decisions here. The NGA is clear that any natural gas company engaged in interstate commerce is subject to Section 7 jurisdiction. There is nothing in the statutory language indicating that the interstate commerce must be via pipeline, or that if LNG is delivered to an out of state end-user, rather than being regasified, that this somehow doesn’t “count” as interstate commerce. FERC cannot invent requirements for jurisdiction that do not exist in the law. Further, Bradford admits that “there is potential that LNG produced at the Facility could ultimately be regasified and delivered into an LDC

²⁸ 15 U.S.C. § 717a (2018).

system to meet the LDC's peaking needs.”²⁹ Therefore, FERC should hold that the facility is both engaged in interstate commerce and is part of an interstate pipeline network and thus is subject to Section 7 jurisdiction.

In addition to being engaged in interstate commerce, the Wyalusing LNG facility is also a link in an international export operation, making it fall within FERC's Section 7 jurisdiction over foreign commerce. FERC's jurisdiction under Section 7 applies to “the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation.”³⁰ Most of the LNG the facility produces will be sent to the DRP Gibbstown facility, where it will be exported and put into the international market. The Wyalusing LNG facility is thus engaged in the exportation of natural gas in foreign commerce. This is yet another reason FERC should hold it has jurisdiction over the facility.

The U.S. Supreme Court has made clear that FERC must interpret its jurisdiction broadly under Section 7 of the NGA. In *Interstate Natural Gas Company v. Federal Power Commission*, the Court, interpreting a previous version of Section 7, ruled against plaintiffs' claims that any gas sales they conducted were incidental to local production and gathering and so shouldn't be regulated under Section 7 as interstate commerce. The Supreme Court, while recognizing the local exception existed, held, “Exceptions to the primary grant of jurisdiction in the section are to be strictly construed. It is not sufficient to defeat the Commission's jurisdiction over sales for resale in interstate commerce to assert that in the exercise of the power of rate regulation in such cases, local interests may in some degree be affected.”³¹

²⁹ Pet. for Declaratory Order 9.

³⁰ 15 U.S.C. § 717 (2018).

³¹ *Interstate Nat. Gas Co. v. Fed. Power Comm'n*, 331 U.S. 682, 690–91 (1947).

In a later case, the Supreme Court again broadly interpreted Section 7 jurisdiction, writing: “[W]e believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, *whether by a pipeline company or not* and whether occurring before, during, or after transmission by an interstate pipeline company.”³² While the language in this holding assumes that interstate commerce involves the eventual use of a pipeline to transport gas, that was in response to the facts of the case; the petitioners argued that because they themselves did not operate any interstate pipelines and only engaged in intrastate sales to interstate pipelines, they were not subject to regulation under Section 7.³³ The Supreme Court held that it did not matter when the sale happened in the interstate pipeline transportation process; FERC has jurisdiction over all interstate sales of natural gas, broadly construed, and any exceptions are narrowly drawn. Because the plain meaning of the Natural Gas Act makes clear that the Wyalusing LNG facility is engaging in interstate commerce that subjects it to FERC jurisdiction under Section 7 of the NGA, and because Supreme Court precedent argues for an expansive interpretation of Section 7 jurisdiction, FERC should find that the Wyalusing LNG facility is subject to such jurisdiction.

D. Petitioner’s reliance on certain FERC precedent is either inappropriate or factually distinguishable

As an initial matter, because the plain and unambiguous language of the Natural Gas Act applies to confer Commission jurisdiction over the Wyalusing LNG facility, and because the Commission makes jurisdictional determinations for LNG

³² *Phillips Petroleum Co. v. State of Wis.*, 347 U.S. 672, 682 (1954) (emphasis added).

³³ *Id.* at 680-81.

projects on a case-by-case basis,³⁴ reliance on any prior determinations by the Commission would be inappropriate in this case.

If FERC looks at prior decisions, it should recognize that Bradford and its affiliates are proposing an unprecedented new interconnected LNG production, transportation, and exportation scheme that is factually distinguishable from all the examples cited in Bradford's Petition. To our knowledge, the Commission has never considered a scheme such as this in determining Section 3 or Section 7 jurisdiction.

For example, unlike the scheme proposed by Bradford, the company in *Gulf Oil Limited Partnership*, 148 FERC ¶ 61,029, was producing LNG for local distribution via truck transport to end users and local distribution companies in markets limited to Pennsylvania and the northeast United States. Likewise, the LNG leaving the facility in the *Shell U.S. Gas & Power* case, 148 FERC ¶ 61,163, was ultimately intended for domestic end users in the United States. Here, however, the LNG produced at Bradford's Wyalusing LNG facility will be transported to the related DRP Gibbstown facility for export, explicitly including international export.³⁵ Similarly, the facility in *Pivotal LNG, Inc.*, 151 FERC ¶ 61,006, was not part of an interconnected-by-design LNG production, transportation, and export scheme that was logistically and financially dependent like the Wyalusing LNG facility. Given the emphasis FERC has put on whether or not LNG facilities send their product to "end-users" or for further commerce, the fact that this facility is sending its LNG for international export is a critical distinction. Therefore, reliance on these cases are unhelpful at best.

³⁴ See *Marathon Oil Co.*, 10 P.U.R.4th 198, at ¶ 2172 (1975).

³⁵ DRP Petition, at 4 (discussing export for delivery to "foreign ports").

Finally, any reliance on the decision in *Emera CNG, LLC*, 148 FERC ¶ 61,219, is unwarranted because “CNG facilities would not meet the [NGA] section 2(11) definition of ‘LNG Terminal’ because the facilities would be compressing and not liquefying gas” and therefore that case is irrelevant to the Wyalusing LNG facility.³⁶

Thus, given the unprecedented nature of the proposed LNG operations and based on the plain language of Sections 3 and 7 of the NGA, Bradford’s operations – whether alone or correctly considered together with DRP’s affiliated Gibbstown facility – are distinguishable from the precedent cited in the Bradford Petition and the Commission should deny the request for declaratory order that the facility is not subject to FERC jurisdiction.

Finally, Bradford alleges that the Commission applies a three-part test to determine Section 3 jurisdiction, and that the facility must satisfy all three requirements, but there is no such standard in FERC precedent. Indeed, Bradford does not (and cannot) cite to any case or FERC statement to support this allegation. Instead, Bradford’s argument centers on a comparison between their facility and those in the *Pivotal LNG, Inc.* and *Enera CNG, LLC* cases, which as explained above, are factually distinguishable from the present case.

E. Not exercising jurisdiction would result in a regulatory loophole

Allowing an otherwise jurisdictional LNG project to evade Commission oversight by segmenting the links in the logistically- and financially-connected LNG production, transportation, and export chain would be patently inconsistent with the

³⁶ *Pivotal LNG Inc.*, 151 FERC ¶ 61,006, at *11 (Apr. 2, 2015).

Natural Gas Act and would result in massive loopholes in the Act's regulatory scheme.

Here, it seems that the scheme proposed by Bradford is designed in a way “motivated by a desire to circumvent” the Commission’s Section 3 or Section 7 jurisdiction.³⁷ These affiliates should not be able to evade federal oversight of the LNG project simply by undertaking corporate maneuverings and segmentation of the overall LNG project to affiliate companies, especially when it has been designed to so clearly be an interconnected LNG project.

Indeed, the Commission seems to encourage such blatant circumvention of federal jurisdiction under the NGA, inappropriately “undermin[ing] the statute’s basic federal regulatory objectives.”³⁸ This leads to the absurd results where the Commission has found that by locating an export facility one-quarter mile (440 yards) from the loading dock, a facility could evade Section 3 jurisdiction.³⁹ As Commissioner Bay pointed out in his dissent in *Pivotal LNG, Inc.*, “[l]ogic, not to mention the plain language of the Act, compels a different result.”⁴⁰ 151 FERC ¶ 61,006 (Bay, C., dissenting).

As discussed above, this new scheme (apparently intended to evade federal oversight) is something that has never been proposed before. It is speculative and untested and the ramifications of the operations of the project could be devastating to Pennsylvania’s environment and the health and safety of our communities, including environmental justice communities. The safety of this proposed LNG project is unknown; the environmental impacts of this LNG project are unknown;

³⁷ *Gulf Oil L.P.*, 148 FERC ¶ 61,029, at *8 (July 17, 2014).

³⁸ *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020).

³⁹ *See Emera CNG, LLC*, 148 FERC ¶ 61,219 (Sept. 19, 2014).

⁴⁰ 151 FERC ¶ 61,006 (Bay, C., dissenting).

whether this LNG project is required by the public convenience and necessity⁴¹ is unknown. This LNG project is contrary to the public interest.⁴² Commission oversight would ensure a comprehensive understanding, analysis, and regulation of this LNG project that would otherwise be missing from this proposed LNG project. Any oversight provided by other agencies is piecemeal: For example, the Pennsylvania Department of Environmental Protection only regulates the facility's air emissions, and does not regulate the transport of LNG once it leaves the facility, nor does it determine whether the project is actually needed by the public in the first place. Allowing the Wyalusing LNG facility to evade comprehensive FERC review risks the health of Pennsylvania's communities and environment.

III. Conclusion

For the foregoing reasons, movants/petitioners ask the Commission to admit movants as parties to the case, to consolidate the petitions in dockets CP20-524 and CP20-522, and to hold that it does have jurisdiction to regulate the Wyalusing LNG facility under section 3 and 7 of the NGA.

Respectfully submitted October 23, 2020.

/s/ Ankit Jain

Ankit Jain
Sierra Club
50 F Street NW
Washington, DC 20001
(202) 495-3023
ankit.jain@sierraclub.org
Attorney for Sierra Club

/s/ Abigail M. Jones

Abigail M. Jones
PennFuture
425 Carlton Road, Suite 1
Mt. Pocono, PA 18344
(570) 216-3313
jones@pennfuture.org
Attorney for PennFuture

⁴¹ See 15 U.S.C. §§ 717f(c)(1)(A), (2)

⁴² See 15 U.S.C. § 717b(a).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 23rd day of October, 2020.

A handwritten signature in black ink, appearing to read 'Ankit Jain', written over a horizontal line.

Ankit Jain

Counsel for Movants/Petitioners