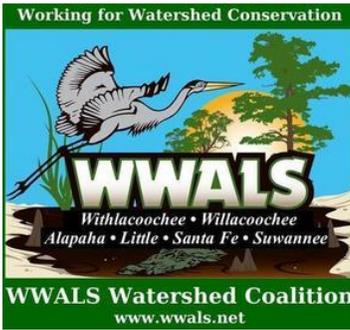


November 19, 2021



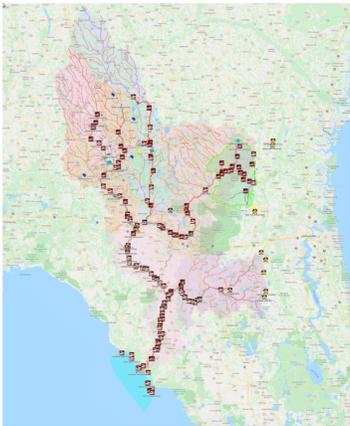
To: Ms. Tina Ham
tina.ham@ferc.gov
Ms. Anne Marie Hirschberger
Office of the General Counsel
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Cc: Chairman Richard Glick
richard.glick@ferc.gov
Ms. Kimberly D. Bose, Secretary
kimberly.bose@ferc.gov



Re: **Petition to Initiate a Rulemaking for Small-Scale Inland LNG Export Facilities**

We file this Petition under 18 CFR § 385.207 (a) (2) – Petitions (Rule 207): *A declaratory order or rule to terminate a controversy or remove uncertainty.*



Our Request

We respectfully request that the Federal Energy Regulatory Commission issue a formal *Rulemaking* mandating developers of proposed small-scale inland Liquid Natural Gas (LNG) export facilities file *Petitions for Declaratory Order* with the Commission in order for FERC to determine federal jurisdiction before a developer proceeds with a project, thereby affording FERC an opportunity to:

- Review the proposal;
- Fully understand what the project entails, including ultimate destination and end-users of the LNG;
- Ask pertinent questions; and
- **Establish a formal Docket** for a proposed project in order for the public to fully participate in the approval process.

PO Box 88, Hahira, GA 31632
850-290-2350
wwalswatershed@gmail.com
www.wwals.net

WWALS is an IRS 501(c)(3) nonprofit charity est. June 2012

WWALS Watershed Coalition advocates for conservation and stewardship of the Withlacoochee, Willacoochee, Alapaha, Little, Santa Fe, and Suwannee River watersheds in south Georgia and north Florida through education, awareness, environmental monitoring, and citizen activities.

Suwannee RIVERKEEPER® is a program and a paid staff position of WWALS.

The Problem

Since the Commission disclaimed jurisdiction over these facilities, developers and operators are “self-determining” federal jurisdiction. Residents of densely populated neighborhoods where inland LNG export plants are being sited, constructed, and operated are in harm’s way. FERC has relegated the responsibility to citizens to police potential threats to public health, safety and welfare posed by these high-risk LNG operations. There are no official Dockets that provide the public an opportunity to participate in any approval process.

FERC has a statutory obligation to minimize risks to the public and environment from FERC-jurisdictional energy infrastructure. Siting, construction, and operation of LNG facilities is governed by a comprehensive scheme of federal regulations. As the “lead” agency, FERC works with other federal, state and local agencies, as well as the general public, to ensure that all public interest considerations are carefully studied before an LNG facility is approved. FERC’s authority under Section 3 includes authority to apply terms and conditions as necessary and appropriate to ensure proposed siting and construction is in the public interest. FERC will not authorize an LNG facility if there are continued questions about safety, while citizens are forced to file FOIA requests in a futile attempt to obtain critical information



for non-FERC-jurisdictional LNG export plants.

FERC staff provides guidance on addressing siting requirements by the U.S. Department of Transportation (DOT). As a cooperating agency, DOT inspects and enforces compliance through a broad range of administration and judicial actions. Prior to filing of an LNG-related application, FERC staff meets, if asked, with the applicant to review conceptual facility design and provide guidance on resolving environmental, safety and design issues.

To fulfill National Environmental Policy Act of 1969 requirements, FERC staff prepares an Environmental Impact Statement (EIS), involving much interaction with intervenors, other interested parties, and the public.

While non-FERC jurisdictional inland LNG production, storage and transport facilities must comply with the same federal laws as FERC-jurisdictional, there is no “lead” federal agency. There are no *Memorandums of Understanding* or *Interagency Agreements* with any cooperating federal, state or local agencies to ensure compliance with the Federal Safety Standards for LNG Facilities, especially including CFR Title 49, Subpart B, Part 193, and the National Environmental Policy Act (NEPA). There is no transparency or public involvement in the siting, construction and operation of small-scale inland LNG export facilities.

FERC did not follow legislative intent

An **Act of Congress** is a statute enacted by the United States Congress. It can either be a Public Law, relating to the general public, or a Private Law, relating to specific institutions or individuals. Congress ensures agencies follow legislative intent, and agencies are not allowed to make arbitrary decisions. An agency must “articulate a satisfactory explanation for its action.” An agency’s interpretation is not owed deference if “there is reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.”

FERC failed to provide a reasoned explanation in disclaiming jurisdiction over small-scale inland LNG export facilities. FERC did this in Orders responding to three Petitions for Declaratory Order: *Shell*, *Emera*, and *Pivotal*. Each of the three petitioners requested that FERC disclaim jurisdiction over their operations involving importing or exporting natural gas. Commissioner Norman Bay filed Dissenting Opinions in each of these three cases. In the brief quotations below from these Orders we have added some **emphasis in red**.

Shell U.S. Gas & Power, LLC (“Shell”), [148 FERC ¶ 61,163 \(Sept. 4, 2014\)](#), Docket No. RP14-52-000

1. On October 16, 2013, Shell U.S. Gas & Power, LLC (Shell) filed a petition in Docket No. RP14-52-000. Shell requests the Commission declare that, by virtue of the exemption in section 1(d) of the Natural Gas Act (NGA) for the transportation and sale of natural gas that will be used as **vehicular fuel**, Shell will not be subject to any provisions of the NGA as a result of its importing liquefied natural gas (LNG) from Canada, liquefying domestic gas, and transporting Canadian and domestic LNG by truck, train, and waterborne vessel between states for the purpose of selling the LNG for use as fuel for vehicles, with any excess LNG being sold as fuel for non-vehicular uses.
2. We find herein, for reasons that do not rely on the exemption provided by NGA

section 1(d) for vehicular gas, that Shell will not need to apply to the Commission for authorization under NGA section 3 or section 7 for any of its planned facilities and activities.

¹ Shell's *Petition for a Declaratory Order (Petition)* was submitted pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207 (2014).

² 15 U.S.C. § 717, *et seq.* (2012).

Emera CNG, LLC (“Emera”), [148 FERC ¶ 61,219 \(Sep. 19, 2014\)](#), Docket No. CP14-114-000

1. On March 20, 2014, Emera CNG, LLC (Emera) filed a petition requesting that the Commission declare that Emera's construction and operation of facilities to produce **compressed natural gas (CNG)** that will be transported by trucks to ships for export to the Commonwealth of the Bahamas will not be subject to the Commission's jurisdiction under the Natural Gas Act (NGA).²

¹ Emera's *Petition for a Declaratory Order (Petition)* was submitted pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207 (2014).

² 15 U.S.C. § 717, *et seq.* (2012).

2. For the reasons discussed herein, we grant the petition for a declaratory finding that Emera's proposed facilities and operations will not be subject to the Commission's jurisdiction under the NGA.

In III. Response, A. NGA Section 3 Authority over Emera's Facility:

10. While the stated purpose of Emera's CNG facility will be to compress gas so that it can be **exported in ISO containers**, the facility will be subject to our section 3 jurisdiction only if we find it will be an “export facility.” Floridian argues that Emera's facility will constitute a jurisdictional natural gas export facility, and thus, its siting, construction, and operation are subject to the Commission's jurisdiction.

Pivotal LNG, Inc. (“Pivotal” or “Pivotal II”), [151 FERC ¶ 61,006 \(Apr. 2, 2015\)](#), Docket No. RP15-259-000

1. On December 10, 2014, Pivotal LNG, Inc. (Pivotal) filed a petition¹ requesting the Commission declare that liquefaction facilities operated by Pivotal and its affiliates that produce liquefied natural gas (LNG) that would ultimately be exported to foreign nations by a third party would not be subject to the Commission's jurisdiction pursuant to section 3 of the Natural Gas Act (NGA). For the reasons discussed herein, we find that the activities described in Pivotal's petition will not subject the liquefaction facilities to the Commission's NGA section 3 jurisdiction.

¹ Pivotal's *Petition for a Declaratory Order (Petition)* was submitted pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207 (2014).

4. Pivotal now seeks a declaratory order finding that the LNG facilities it identifies **would not be deemed “LNG Terminals”** subject to the Commission's NGA section 3 jurisdiction when engaging in transactions which ultimately result in any of the LNG they produce being exported. Specifically, Pivotal expects it or its affiliates to sell LNG that is (1) produced at the identified inland LNG facilities or supplied by a third party; (2) transported by Pivotal, an affiliate, or third party in interstate and intrastate commerce by means other than interstate pipeline; and (3) subsequently exported, or resold for ultimate export, by a third party.

5. Pivotal asserts that none of the named LNG facilities constitute an “LNG Terminal” as defined by NGA section 2(11), since they are all located inland, unlike the border-crossing pipelines and coastal LNG terminals that the Commission has traditionally regulated under NGA section 3. Pivotal further avers that there is no regulatory gap or public policy rationale that would justify exercise of the Commission’s NGA section 3 jurisdiction.

Analysis of how FERC failed to follow the law

Under the Natural Gas Act (NGA), the intent of Congress to regulate the importation and exportation of natural gas was not ambiguous. See 15 U.S. Code 717b(a): “[N]o person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so.” There is no exception for whether the natural gas is to be used as vehicular fuel (*Shell*), nor compressed or not (*Emera*), nor liquid or not (*Pivotal*), nor how far the facility is from the ocean. The Commission frustrated the intent of Congress in considering the manner in which Compressed Natural Gas (CNG) was transported to ocean-going carriers for export in *Emera*, and compounded that frustration in *Pivotal*.

Section 3 of the Natural Gas Act gave jurisdictional authority over siting, construction, operation and maintenance of onshore and near-shore LNG import or export facilities to FERC. Quoting former [Commissioner Norman Bay’s Dissenting Opinion](#) in *Emera*, the Commission’s jurisdiction under the NGA “should not turn on a 440-yard truck journey.”

In disclaiming jurisdiction over small-scale LNG export facilities, the majority failed to address the plain language of the NGA and, especially in *Pivotal*, has conflated Section 3(e) of the NGA, which relates to “LNG Terminals” and Section 7, which covers “transportation facilities.”

Nothing in Section 3 conditions Commission’s jurisdiction upon existence of a pipeline running to the port of export. FERC has substituted its policy judgment for that of Congress and has undermined national uniformity with respect to the import or export of natural gas.

Section 1(a) declares “[f]ederal regulation” of “transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.” Section 1(b) provides that the Act “**shall**” apply to “the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation.”

Whether pumped into a tanker ship or pumped into an ISO or other container that is transported by truck and/or rail to the dock, natural gas is still being exported. Narrowing the definition of “LNG Terminal” does not change that fact.

Some consequences of FERC’s failure to follow the law

By misreading and conflating Section 3(e) of the Natural Gas Act that relates to “LNG Terminals” with Section 7 that covers “transportation facilities,” FERC has created its own exemption, with these consequences among others:

- FERC has substituted its policy judgment for that of Congress.
- FERC has undermined national uniformity with respect to the import or export of gas.

- When Congress has spoken, it is not for FERC to call a congressional directive “over expansive.”
- FERC has created a significant and unnecessary gap in FERC’s jurisdiction that has left the public and the environment in harm’s way.
- Rail is becoming a *virtual rolling natural gas pipeline on wheels* for the distribution of LNG from non-FERC-jurisdictional inland LNG production facilities.

What FERC’s Strategic Plan and the NGA say FERC should do

From the [Federal Energy Regulatory Commission - Strategic Plan FY 2014–2018 March 2014](#):

- Conduct comprehensive and timely safety inspections of hydroelectric and LNG facilities. **Failure of an LNG facility or a non-federal hydropower project can result in loss of life and significant environmental and economic consequences.**
- To fulfill its responsibility for ensuring the safety of these facilities, FERC relies on physical inspections for detecting and preventing potential catastrophic structural failures, thereby protecting the public against the risk associated with such an event.
- FERC engineers are highly trained and work closely with local officials at all stages of project development and operation.
- Before projects are constructed, the designs, plans, and specifications of the proposed facility are reviewed and approved.
- Through regularly scheduled and comprehensive inspections during construction and operation, FERC engineers verify that dams and LNG facilities meet stipulated design criteria, identify necessary remedial modifications or required maintenance, and ensure compliance with requirements.
- The Commission ensures the safety of the public, as well as the continued operation of the facilities to meet the energy demands of the nation.
- In accordance with NEPA, highly-trained FERC staff thoroughly analyze environmental effects of proposed LNG facilities and coordinate with other agencies to consider environmental statutes, including Coastal Zone Management Act and Clean Water Act. LNG “Terminals” encompass more than just “Marine-Based” LNG export facilities.

15 U.S. Code § 717a (11): “LNG terminal” includes all natural gas facilities located onshore or in State waters that are used to:

1. Receive, unload, load, store, transport, gasify, liquefy; or
2. Process natural gas importer to United States from foreign country, or exported to foreign country from the United States, or transported in interstate commerce by waterborne vessel

Does not include:

1. Waterborne vessels used to deliver natural gas to or from any such facility; or
2. Any pipeline or storage facility subject to jurisdiction of the Commission under Section 717f

15 U.S. Code § 717f - *Construction, extension, or abandonment of facilities*

1. After notice and opportunity for hearing, if FERC finds such action necessary or

- desirable in the public interest, Commission may by order direct a natural-gas company to extend or improve its transportation facilities;
2. To establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public; and
 3. Extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural gas company.

Time to reconsider and revisit

As Chairman Glick wrote in his Concurring Opinion in [New Fortress Energy LLC, ORDER ON SHOW CAUSE, 174 FERC ¶ 61,207 \(March 19, 2021\). Docket No. CP20-466-000](#):

*1. We concur in today's order finding New Fortress Energy LLC's liquefied natural gas (LNG) facility subject to the Commission's jurisdiction under section 3 of the Natural Gas Act (NGA). We write separately to explain our view that **it is time to reconsider our precedent in Shell U.S. Gas & Power, LLC (Shell), which held that a facility must be connected to a pipeline to be a jurisdictional LNG terminal.**¹*

*3. Nowhere does the statute say that a facility must be connected to a pipeline to qualify as an LNG terminal and, thus, come within the Commission's jurisdiction under section 3.⁴ **We should revisit Shell to ensure that we are carrying out our statutory responsibilities under the letter of the law.**"*

1 Shell U.S. Gas & Power, LLC, 148 FERC ¶ 61,163, P 43 (2014).

4 See Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1725 (2020) ("[T]his Court may not narrow a provision's reach by inserting words Congress chose to omit."): Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1900 (2019) (plurality opinion) (The Court's "duty [is] to respect not only what Congress wrote but, as importantly, what it didn't write.").

Summary: safety, environmental, and economic consequences

Developers are taking advantage of the loophole FERC created in disclaiming jurisdiction over small-scale inland LNG export facilities. Such facilities are thus lacking FERC's environmental, construction, and safety oversight, causing risk of **"loss of life and significant environmental and economic consequences,"** according to FERC's own strategic plan.

Some of the economic consequences of FERC's tilting of the playing field were expressed by Floridian Natural Gas Storage (FGS) on June 12, 2015, as [Accession Number: 20150612-5136](#) in Docket No. CP13-541:

*"During its pendency, the Commission has determined that certain LNG projects are outside its jurisdiction, **permitting those projects to compete free from the FERC regulatory burdens** that FGS and other FERC-regulated projects bear in what has become an active, urgent and highly competitive small-scale LNG market."*

What FGS views as regulatory burdens we view as public goods of construction, environmental, and safety review, but the FGS point remains that competition has been warped by FERC's inland LNG export decisions.

Exacerbating the problem, the U. S. Department of Energy is authorizing LNG exports from

facilities where federal jurisdiction is unknown and where there are unanswered questions concerning compliance with the Federal Safety Standards for LNG Facilities and NEPA. A brief list is included in FERC [Accession Number 20210817-4000](#), “Comments of WWALS Watershed Coalition re NFE Miami LNG under CP20-466.” Should you require further details or more specific examples, we are happy to provide them.

Solutions

Ideally, the Commission should, as Chairman Glick suggested, “reconsider” and “revisit” *Shell*, as well as *Emera* and *Pivotal*, and revoke all three.

Meanwhile, we petition for the Commission to issue a formal *Rulemaking* mandating developers of proposed small-scale inland Liquid Natural Gas (LNG) export facilities file *Petitions for Declaratory Order* with the Commission in order for FERC to determine federal jurisdiction before a developer proceeds with a project.

Any consideration afforded this request is sincerely appreciated.

John S. Quarterman
Suwannee RIVERKEEPER®
/s
WWALS Watershed Coalition, Inc.