

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pivotal LNG, Inc.

Docket No. RP15-259-000

(Issued April 2, 2015)

BAY, Commissioner, *dissenting*:

One might well wonder how a natural gas facility that is used to export gas and that must obtain an export license from the Department of Energy is not, from FERC's perspective, an "export" facility within the meaning of the Natural Gas Act and thus not subject to FERC's jurisdiction. If this inconsistency seems puzzling, that's because it is. Logic, not to mention the plain language of the Act, compels a different result. Nevertheless, in *Emera CNG, LLC*,¹ over my dissent, the Commission held that a natural gas facility used to export gas to the Bahamas was not an "export" facility because the gas from the facility had to be trucked 440 yards to the docks. Relying on the reasoning of *Emera*, Pivotal, which operates five LNG facilities in three different states, seeks a similar declaratory order. For the reasons I stated in *Emera*, I would deny Pivotal's request as well.

The central flaw in the majority's reasoning is that it fails to address the plain language of the Natural Gas Act. The Act makes clear Congress's intent to regulate the import and export of gas. Section 1(a) declares that "[f]ederal regulation" of the "transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."² Section 1(b) similarly 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."³ To that end, section 3 states that "no 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*."⁴ To effectuate these congressional directives, the Department of Energy authorizes the export of the commodity natural gas, while the Commission exercises authority over the siting, construction, operation, and maintenance of export facilities in order to ensure that any authorized exports will serve the public interest.⁵

Here, the majority acknowledges that "liquefaction facilities operated by Pivotal and its affiliate ... [will] produce liquefied natural gas that [will] ultimately be exported to foreign nations by a third party" and that such foreign sales must be made pursuant to an export license from DOE.⁶ There can be little doubt, therefore, that the facilities will be involved in the "exportation of natural gas in foreign commerce."⁷

Instead of addressing the plain language of the statute, the majority simply ignores it – not once is section 1(a) or (b) or section 3(a) even acknowledged – and proceeds to create its own exemption by misreading and conflating section 3(e) and section 7 of the Act. Section 3(e) relates to "LNG terminals;" section 7 covers "transportation facilities." First, the majority observes that Pivotal's facilities are located inland and incapable of transferring LNG directly to tankers.⁸ These facts establish that the facilities do not constitute an "LNG terminal" as defined by section 2(11) of the Act.⁹ But the Commission's jurisdiction under section 3 extends to export facilities, not merely "LNG terminals." The two are not the same. Under section 2(11), "LNG terminal" is defined to include facilities used for import, export, or interstate commerce. An LNG terminal is simply one type of export facility. Indeed, the first commercial LNG facility was not built until 1941, three years after enactment of the Natural Gas Act.¹⁰ The first U.S. export terminal was completed in 1969.¹¹ There is no evidence to suggest that Congress sought to limit export facilities to "coastal LNG terminals that are accessible to ocean-going, bulk-carrier LNG tankers and that are connected to pipelines that deliver gas to or take gas away from the