terminal."[12]

Second, the majority notes that LNG "would be transported, by means other than interstate pipeline, to the ultimate point of export."[13] But nothing in section 3 conditions the Commission's jurisdiction upon the existence of a pipeline running to the point of export. The majority's view that a pipeline is a condition to jurisdiction stems from an inappropriate attempt to graft concepts developed under section 7 of the Act, which addresses the Commission's jurisdiction over interstate "transportation facilities," to section 3, which governs the exportation of natural gas.[14] Congress has made clear that there is a distinction between domestic transportation or sales – which are only jurisdictional if they are interstate in character –and foreign imports or exports, all of which are covered.[15] And the DOE Delegation Order, which provides the Commission with authority over export facilities, is equally bereft of language that would support the majority's view that jurisdictional export facilities must share the defining characteristics of interstate transportation facilities.[16]

The majority attempts to buttress its analysis with the claim that an "over-expansive application of section 3" is unnecessary here because Pivotal's "facilities are regulated by various federal, state and local agencies."[17] Of course, the same is true with respect to the "traditional" LNG terminals and cross-border pipelines that the majority concedes are subject to the Commission's jurisdiction. More important, the Commission may not substitute its policies for those enacted by Congress. Section 3 is clear: "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."[18]

There are sound policy reasons in support of section 3's broad language, not the least of which is national uniformity. Under the majority's construct, gas export facilities will be subject to a patchwork of potentially conflicting state regulatory requirements. That result is contrary to the Commission's long-held view that "[t]he nation's energy needs are best served by a uniform national policy" with respect to gas in foreign commerce.[19] The majority has also foreclosed the opportunity for some developers to affirmatively seek the benefit of federal jurisdiction, including FERC's siting authority and established regulatory framework. Residents of a state in which the facility is located, or residents of surrounding states, may reasonably expect the facility to be subject to federal review of its operations and maintenance. While some states may have the staff and expertise to do this, others may not.

Unfortunately, the majority today ignores the plain language of the statute, substitutes its policy judgment for that of Congress, and undermines national uniformity with respect to the import or export of gas. While one might debate the relative policy arguments for or against a finding of non-jurisdiction, such a debate is not for us when Congress has spoken. It is not for us to call a congressional directive "over expansive." While it is difficult to know what the unintended consequences of today's order will be, one consequence is not: the Commission creates a significant and unnecessary gap in FERC's jurisdiction.

For all those reasons, I respectfully dissent.

Norman C. Bay
Commissioner

1 148 FERC ¶ 61,219 (2014).

2 15 U.S.C. § 717(a).

3 *Id*. § 717(b).

4 *Id*. § 717b(a) (emphasis added).

5 *See, e.g., NET Mex. Pipeline Partners*, *LLC*, 145 FERC ¶ 61,112, P 13 (2013).

6 *See* Order PP 1, 13.