

ATTACHMENTS

Shell: Norman Bay Dissent, 148 FERC ¶ 61,163 (Sept. 4, 2014), Docket No. RP14-52-000

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Emera CNG, Inc.

Docket No. CP14-114-000

(Issued September 4, 2014)

BAY, Commissioner, concurring in part and dissenting in part:

I concur with the majority's determination that Shell U.S. Gas & Power LLC's proposed activities do not fall within the jurisdictional exemption created by section 1(d) of the Natural Gas Act. I disagree with the majority's conclusion regarding the scope of the Commission's jurisdiction under section 3 of the Act.

The Energy Policy Act of 2005 "explicitly provides the Commission with exclusive authority over LNG terminals subject to our section 3 jurisdiction." *The Gas Company*, 142 FERC ¶ 61,036, P 17 (2013). The majority acknowledges that, in doing so, Congress employed "a very broad definition of 'LNG Terminal'" (Order P 43); namely, "all 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, or exported from, the United States, or "transported in interstate commerce by waterborne vessel." 15 U.S.C. § 717a(11) (emphasis added).

It is beyond dispute that Shell's proposed Canadian project will involve facilities that will "receive," "unload" and "store" "natural gas that is imported [from Canada] to the United States." Similarly, the proposed Geismar project would "receive" and "liquefy" natural gas and then load it on to "waterborne vessels" for "transport in interstate commerce." See Order PP 4-5. Nonetheless, the majority finds that neither involves an "LNG terminal" within the meaning of section 2(11) of the Natural Gas Act, 15 U.S.C. § 717a(11). That conclusion cannot be squared with the plain language of the Act.

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. See Order P 43. But section 7 speaks of the Commission's jurisdiction over "transportation facilities." See 15 U.S.C. § 717f(a). Section 2(11) defines "LNG terminals" to include "all natural gas facilities," not merely natural gas "transportation facilities." See 15 U.S.C. § 717a(11) ("'LNG terminal' includes all natural gas facilities ... that are used to receive, unload, load, store, [or] transport ... natural gas"). 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. The majority also argues that, although the projects – in particular, the Geismar project – will involve natural gas "transported in interstate commerce by waterborne vessel," the only waterborne transportation that counts for purposes of section 2(11) is interstate delivery to a facility that is connected to a pipeline (whether intrastate or interstate). See Order PP 43, 48. In support, the majority points to a jurisdictional dispute between California and FERC involving this fact pattern that preceded the enactment of the Energy Policy Act of 2005. *Id.* If anything, that history suggests that Congress intended to pre-empt state action and used broad language to accomplish that result, providing "exclusive authority" to FERC with respect to LNG terminals, 15 U.S.C. § 717b(e)(1), including "all natural gas facilities" in which natural gas was "transported in interstate commerce by waterborne vessel," *id.* § 717a(11).

While one might debate the relative policy arguments for or against a finding of FERC jurisdiction, we are constrained, as we should be, by the language of the statute. Here, I believe the plain meaning of the statute compels a different result. Accordingly, I must respectfully dissent.

Norman C. Bay
Commissioner