

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Public Citizen, Inc.,

Petitioner,

v.

Federal Energy Regulatory
Commission,

Respondent.

No. 22-1251

PETITION FOR REVIEW

Pursuant to section 19 of the Natural Gas Act, 15 U.S.C. § 717r, Public Citizen, Inc. petitions for review of the following orders of the Federal Energy Regulatory Commission (FERC):

- Nopetro LNG, LLC, Order on Petition for Declaratory Order, Docket No. CP21-179-000, 178 FERC ¶ 61,168 (issued Mar. 25, 2022) (Nopetro Order) (granting petition filed by Nopetro LNG, LLC for declaratory order that Nopetro's liquid natural gas facility in Port St. Joe, Florida is not subject to the Commission's jurisdiction).
- Nopetro LNG, LLC, Order Addressing Arguments Raised on Rehearing, Docket No. CP21-179-001, 180 FERC ¶ 61,057 (issued July 29, 2022) (Nopetro Rehearing Order) (modifying and sustaining result of March 2022 declaratory order in response to Public Citizen's rehearing petition).

In accordance with section 19 of the Natural Gas Act, Petitioner sought rehearing of the Nopetro Order in the proceeding below, in response to which FERC issued the Nopetro Rehearing Order. Copies of the Nopetro Order and the Nopetro Rehearing Order are attached hereto as Exhibits A and B, respectively.

In accordance with Federal Rule of Appellate Procedure 15(c), a copy of this petition is being served on each of the parties admitted to participate in the FERC proceeding that gave rise to the orders on review. A list of such parties is provided in the attached service list.

September 27, 2022

Respectfully submitted,

/s/ Nandan M. Joshi

Nandan M. Joshi

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CERTIFICATE OF SERVICE**Pursuant to Federal Rule of Civil Procedure 15(c)**

I hereby certify that, on September 27, 2022, the forgoing document was served by first-class mail on the following parties:

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/s/ Nandan M. Joshi
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EXHIBIT A
NOPETRO ORDER

178 FERC ¶ 61,168
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

Nopetro LNG, LLC

Docket No. CP21-179-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued March 25, 2022)

1. On April 20, 2021, Nopetro LNG, LLC (Nopetro) filed a petition¹ requesting that the Commission declare that Nopetro's construction and operation of a natural gas liquefaction and truck loading facility and proposed transloading operations in Port St. Joe, Florida, would not be subject to the Commission's jurisdiction under section 3 or section 7 of the Natural Gas Act (NGA).² For the reasons discussed below, we grant the petition.

I. Petition for Declaratory Order

2. Nopetro, a limited liability company organized under the laws of Florida, is wholly owned subsidiary of Nopetro-CH4 Holdings, LLC. Nopetro plans to construct and operate a liquefaction facility, consisting of up to three liquefaction trains, in Port St. Joe, Florida, that will liquify up to 3.86 billion cubic feet (Bcf) per year of natural gas for export. The facility would receive natural gas from St. Joe Natural Gas Company Inc., a local distribution company (LDC) regulated by the Florida Public Service Commission.

3. Liquefied natural gas (LNG) would depart the facility in International Organization for Standardization (ISO) containers via third-party truck operators and travel roughly a quarter of a mile to a dock owned and operated by the St. Joseph's Port (Port). At the

¹ Nopetro submitted a petition for a declaratory order pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207 (2021).

² 15 U.S.C. §§ 717b, 717f.

dock, the ISO containers would be loaded onto ocean-going general cargo container vessels for export and delivery to markets in the Caribbean, Central America, and South America.³ The dock would remain available for general public use and subject to the Port's standard scheduling procedures, and could be used to export products other than ISO containers of LNG. Nopetro would construct and own a crane at the dock that would be operated by third-party stevedores and managed by the Port. The crane would be used to load the ISO containers onto ocean-going cargo vessels and, when not in use by Nopetro, would be available for use by others through the Port for a fee. Nopetro states that if this particular dock is unavailable because it is being used by another customer or is out of service, Nopetro could use any of four other general use docks located close to the liquefaction facility and owned and operated by the Port.⁴

II. Notice, Intervention, Protests, and Comments

4. Notice of Nopetro's petition was published in the *Federal Register* on April 28, 2021,⁵ with comments, interventions, and protests due May 24, 2021. The Center for Liquefied Natural Gas, Natural Gas Supply Association, Public Citizen, Inc. (Public Citizen), and Delaware Riverkeeper Network filed timely, unopposed motions to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.⁶

5. Comments and protests were filed stating that the Commission must assert jurisdiction over the facility⁷ and that the facility should be subject to environmental review under the National Environmental Policy Act (NEPA).⁸ Comments were also

³ The ocean-going vessels would not be dedicated solely to the export of LNG and may include containers filled with other goods.

⁴ Those docks are located in Panama City, Florida; Pensacola, Florida; Mobile, Alabama; and Jacksonville, Florida.

⁵ 86 Fed. Reg. 22,401 (2021).

⁶ 18 C.F.R. § 385.214(c) (2021).

⁷ Public Citizen May 24, 2021 Protest at 1; Delaware Riverkeeper Network May 24, 2021 Protest at 4.

⁸ Cecile Scofield May 7, 2021 Comment at 1.

filed in support of Nopetro's petition, stating the facility would stimulate the local economy in the wake of Hurricane Michael.⁹ Nopetro filed an answer to the protests on June 8, 2021.¹⁰ The Commission's Rules of Practice and Procedure do not permit answers to protests.¹¹ Accordingly, we reject Nopetro's answer. We address the protests and comments below.

III. Discussion

6. As discussed below, we find that Nopetro's construction and operation of the liquefaction and truck loading facility and proposed transloading operations, as described in its petition,¹² would not be subject to the Commission's jurisdiction under section 3 or section 7 of the NGA.

A. NGA Section 3 Authority

7. Section 3(a) of the NGA provides for federal jurisdiction over the siting, construction, and operation of facilities used to import or export gas.¹³ To date, the Commission has exercised its Department of Energy (DOE)-delegated section 3 authority to authorize: (1) LNG terminals located at the site of import or export; and (2) the site and facilities at the place of import/export where a pipeline crosses an international

⁹ Florida House Rep. Jason Shoaf June 8, 2021 Comment at 1; United States House Rep. Neal Dunn July 1, 2021 Comment at 1; St. Joe Natural Gas Co., Inc. June 8, 2021 Comment at 1.

¹⁰ Nopetro June 8, 2021 Answer.

¹¹ 18 C.F.R. § 385.213(a)(2) (2021).

¹² We note that in its request to export natural gas filed with the U.S. Department of Energy, Nopetro contemplates exporting LNG from existing Gulf Coast LNG terminals. *See Nopetro LNG, LLC*, FE Docket No. 20-167-LNG, DOE/FE Order No. 4671 (March 23, 2021). However, our analysis is limited to the scenario presented in Nopetro's petition, which did not include such exports.

¹³ The 1977 Department of Energy (DOE) Organization Act (42 U.S.C. § 7151(b)) placed all section 3 jurisdiction under DOE. The Secretary of Energy subsequently delegated authority to the Commission to "[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports." DOE Delegation Order No. 00-004.00A, section 1.21A (May 16, 2006).

border.¹⁴ Additionally, the Commission has declined to exert any place of entry/export authority over non-pipeline facilities that were not located at the actual point of export.¹⁵

8. Section 3(e)(1) of the NGA states that “[t]he Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”¹⁶ NGA section 2(11), which was added to the act in 2005, defines an LNG terminal as:

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 the United States . . . , exported to a foreign country . . . , or transported in interstate commerce by waterborne vessel, but does not include—
(A) waterborne vessels used to deliver natural gas to or from any such facility; or (B) any pipeline or storage facility subject to the jurisdiction of the Commission under [section 7].¹⁷

9. The Commission makes jurisdictional determinations concerning projects, including LNG projects, on a case-by-case basis.¹⁸ Further, the vast majority of proposals the Commission has had the opportunity to consider involved large, coastal facilities either receiving natural gas vapor from a transportation pipeline and delivering LNG into a large, ocean going bulk carrier, or receiving LNG from a large bulk carrier and delivering vapor into a pipeline for subsequent transportation. Based on this experience, we have considered three criteria when determining whether a facility is an LNG import

¹⁴ In addition to pipelines that cross the international border with Canada and Mexico, the Commission has also asserted authority over the portions of subsea pipelines planned to cross the ‘border’ of the Exclusive Economic Zone between the U.S. and the Bahamas. *See, e.g., Tractebel Calypso Pipeline, LLC*, 106 FERC ¶ 61,273 (2004).

¹⁵ *See Emera CNG, LLC*, 148 FERC ¶ 61,219 (2014) (*Emera*) (finding that a facility located a quarter mile from the point of export is not an export facility under NGA section 3); *Andalusian Energy, LLC*, 174 FERC ¶ 61,107 (2021) (*Andalusian*) (finding that a facility located 120 to 300 feet from the point of export is not an export facility under NGA section 3).

¹⁶ 15 U.S.C. § 717b(e)(1).

¹⁷ 15 U.S.C. § 717a(11).

¹⁸ *Gulf Oil Limited Partnership*, 148 FERC ¶ 61,029, at P 8 (2014) (citing *Marathon Oil Company*, 53 F.P.C. 2164 (1975)).

or export terminal subject to the Commission's jurisdiction: (1) whether an LNG terminal would include facilities dedicated to the import or export of LNG;¹⁹ (2) whether the facility would be located at or near the point of import or export;²⁰ and (3) whether the facility would receive or send out gas via a pipeline.²¹ For LNG terminals operating in interstate commerce the Commission has considered a fourth criterion – whether after leaving the facility the LNG is reintroduced into a pipeline such that the LNG terminal facilitates the interstate transportation of natural gas by pipelines.²²

10. Nopetro's liquefaction facility is not an LNG terminal subject to our jurisdiction under section 3 of the NGA because it is not located at the point of export such that LNG can be directly transferred to vessels for export.²³ The LNG-filled ISO containers would leave Nopetro's facility and be transported by truck approximately a quarter of a mile to

¹⁹ See *The Gas Company, LLC*, 142 FERC ¶ 61,036 (2013) (*The Gas Company*) (finding no jurisdiction where the same facilities would be used to import ISO containers full of LNG and other ISO containers filled with general goods).

²⁰ See *Pivotal LNG, Inc.*, 151 FERC ¶ 61,006 (2015) (*Pivotal II*) (finding that inland liquefaction facilities that transport ISO containers by truck to the point of export are not LNG terminals).

²¹ See *New Fortress Energy LLC*, 174 FERC ¶ 61,207, at P 10 (2021) (*New Fortress*), *reh'g denied*, 176 FERC ¶ 61,031. The natural gas here is received from an LDC pipeline, so this criterion is met.

²² *Id.* P 45 (“an LNG terminal receiving LNG transported in interstate commerce by waterborne vessel would be subject to section 7 jurisdiction if any of the gas received at the terminal would be revaporized and injected into a jurisdictional pipeline. Such facilities would be links in an interstate chain, liquefying and regasifying in order to enable gas to be ferried across a stretch of water interrupting what would otherwise be a continual flow of gas by pipeline from one state to another.”).

²³ In its petition, Nopetro incorrectly argues that the facility would not be an LNG terminal because the LNG produced at the facility would not be reintroduced into a pipeline. Nopetro April 20, 2021 Petition for Declaratory Order at 19. See, however, *New Fortress*, 174 FERC ¶ 61,207 at P 27 (explaining the distinction between LNG facilities operating in interstate commerce, where the Commission exerts jurisdiction only where the liquefaction of gas to LNG enables interstate transportation via pipeline, versus LNG facilities operating in foreign commerce, where the Commission exerts jurisdiction over facilities that receive or send out gas via pipeline).

the general use dock.²⁴ At the dock, a crane would load the ISO containers onto general use cargo ships, which would be the point of export. Further, the crane located at the dock would not be subject to NGA section 3 jurisdiction because, as the Commission has previously found, general-use pier facilities are outside the scope of the natural gas facilities to be regulated by the Commission.²⁵ Here, although the crane would be owned by Nopetro, it would be operated by third-party stevedores, be managed by the Port, and be available for general use. Thus, Nopetro's facility is not an LNG terminal as defined by the NGA.

11. Commenters argue that Nopetro's facility should be considered close enough to the point of export to meet the NGA's definition of an LNG terminal and therefore be subject to the Commission's jurisdiction.²⁶ Public Citizen asserts that Nopetro is trying to evade Commission oversight by locating its liquefaction facility a short distance from the export point.²⁷ Public Citizen argues that because Nopetro's facility is only a quarter of a mile away from the export point it is in effect directly transferring LNG to an ocean-going LNG tanker, notwithstanding the LNG being trucked in ISO containers from the facility to the export point.²⁸ Delaware Riverkeeper Network contends that the Commission should abandon its precedent that requires LNG to be directly transferred to LNG tankers from the LNG facility because nothing in the plain language of the NGA indicates that LNG loaded onto a waterborne vessel from a truck or train is not "direct" enough to be considered located at the point of export.²⁹

12. We disagree. Section 2(11) of the NGA defines an LNG terminal as including "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 . . . exported to a

²⁴ If the dock in Port St. Joe is not available, the LNG-filled ISO containers could be trucked to other general use docks located farther away in Panama City, Florida; Pensacola, Florida; Mobile, Alabama; and Jacksonville, Florida.

²⁵ *The Gas Company*, 142 FERC ¶ 61,036 at P 14; *Andalusian*, 174 FERC ¶ 61,107 at P 11.

²⁶ Public Citizen May 24, 2021 Protest at 1; Delaware Riverkeeper Network May 24, 2021 Protest at 4.

²⁷ Public Citizen May 24, 2021 Protest at 4.

²⁸ *Id.* at 4-5.

²⁹ Delaware Riverkeeper Network May 24, 2021 Protest at 5.

foreign country from the United States.”³⁰ The term “onshore,” when used in conjunction with “or in State waters,” and combined with the fact that section 3 applies to LNG that is “transported in interstate commerce by waterborne vessel,” connotes that section 2(11) applies to facilities that are located on or near the water or the coast.³¹ Although the Commission has not specified that LNG facilities must be within a certain distance from the point of export, we have clarified that LNG terminals must be capable of transferring LNG onto water-borne vessels.³² Trucking ISO containers filled with LNG from the facility to the point of export where the containers will be loaded onto general cargo ships using facilities that are available for general public use (i.e., the dock and crane), as is the case for the Nopetro facility, does not meet this standard.³³

13. Delaware Riverkeeper Network also argues that even if the Nopetro facility is not an LNG terminal, it is still subject to the Commission’s jurisdiction as an export facility under NGA section 3(a).³⁴ Delaware Riverkeeper Network claims that section 3(a) applies to export facilities generally, a broader category than just LNG terminals, and if the Commission does not exert jurisdiction under section 3(a) to determine whether the facility is in the public interest, the Commission will be abdicating its responsibility under the NGA.³⁵ Additionally, commenters argue that *Emera* and *Andalusian* are not relevant precedent for our analysis because those cases examined the jurisdiction of compressed natural gas (CNG) facilities rather than LNG facilities.³⁶

³⁰ 15 U.S.C. § 717a(11) (emphasis added).

³¹ *Pivotal LNG, Inc.*, 148 FERC ¶ 61,164 (2014) (*Pivotal I*) (Bay, Comm’r, concurring at 61,826); see also *Pivotal II*, 151 FERC ¶ 61,006 at P 11 (finding inland liquefaction facilities that truck LNG to the point of export are not LNG terminals subject to the Commission’s jurisdiction).

³² *New Fortress*, 174 FERC ¶ 61,207 at P 17 (citing *Pivotal II*, 151 FERC ¶ 61,006 at P 12).

³³ The Commission has not been presented with a project that would include a dedicated LNG facility at the point of import/export that only imported or exported LNG through ISO containers; thus, we have not considered whether such a facility would be jurisdictional.

³⁴ Delaware Riverkeeper Network May 24, 2021 Protest at 6.

³⁵ *Id.* at 6-7.

³⁶ Public Citizen May 24, 2021 Protest at 4; Delaware Riverkeeper Network

14. As we explain above, the Commission has to date only exerted its delegated authority under NGA section 3(a) over LNG terminals located at the site of import or export and over facilities at the place of import/export where a pipeline crosses an international border.³⁷ Although commenters correctly note that *Emera* and *Andalusian* examine the jurisdiction of CNG facilities rather than LNG facilities, these cases are relevant to our analysis. In both *Emera* and *Andalusian*, the Commission disclaimed jurisdiction over facilities that: (1) would be located approximately a quarter of a mile from the point of export; (2) trucked CNG-filled ISO containers to the point of export;³⁸ and (3) would not be capable of transferring CNG directly into an ocean-going vessel for export.³⁹ With the exception of exporting LNG rather than CNG, Nopetro's facilities are essentially identical. Thus, consistent with *Emera* and *Andalusian*, the Nopetro facility would not be subject to our section 3 jurisdiction over import and export facilities.

B. NGA Section 7 Authority

15. Section 7 of the NGA requires that a natural gas company or person that will be a natural gas company obtain a certificate of public convenience and necessity from the Commission before undertaking jurisdictional transportation and sales for resale of natural gas in interstate commerce or the construction or operation of facilities to engage in natural gas transportation that is subject to the Commission's jurisdiction.⁴⁰ In interpreting the scope of our NGA section 7 jurisdiction, the Commission has determined that our regulatory authority only applies to the transportation in interstate commerce of gas by pipeline and does not apply to gas transported by other means, including by truck or train.⁴¹

16. We find that Nopetro's liquefaction facility and associated transloading operations would not facilitate the interstate transportation of natural gas by pipeline and therefore

May 24, 2021 Protest at 5-6.

³⁷ *Andalusian*, 174 FERC ¶ 61,107 at P 9.

³⁸ *Emera*, 148 FERC ¶ 61,219 at P 7; *Andalusian*, 174 FERC ¶ 61,107 at P 4.

³⁹ *Emera*, 148 FERC ¶ 61,219 at P 13; *Andalusian*, 174 FERC ¶ 61,107 at P 11.

⁴⁰ 15 U.S.C. § 717f.

⁴¹ See *Pivotal I*, 148 FERC ¶ 61,164 at P 7 (citing *Exemption of Certain Transport and/or Sales of LNG from the Requirements of Section 7(c) of the NGA*, 35 Fed. Reg. 3,076 (Feb. 17, 1970); *Order Terminating Proposed Rulemaking Proceeding*, 49 FPC 1078 (1973)); see also *Gulf Oil Limited Partnership*, 148 FERC ¶ 61,029, at P 8 (2014).

would not be subject to the Commission's section 7 jurisdiction. The LNG would leave Nopetro's facility in ISO containers and be transported via truck to a dock, where it would be loaded onto ocean-going cargo vessels for export and delivery to the Caribbean, Central America, and South America. None of the LNG sent out from the facility would be regasified and introduced into a domestic downstream interstate pipeline; therefore, the facility is not subject to the Commission's section 7 jurisdiction.

C. Regulatory Gap

17. Commenters argue that finding the Nopetro facility and associated transloading operations non-jurisdictional would create a regulatory gap.⁴² Specifically, commenters point to the DOE's new rule creating a categorical exclusion under NEPA for "[a]pprovals or disapprovals of new authorizations or amendments of existing authorizations to export natural gas under section 3 of the [NGA] and any associated transportation of natural gas by marine vessel."⁴³ Commenters argue that, as a result of this categorical exclusion, Nopetro's facility will not be subject to NEPA review unless the Commission finds it jurisdictional, thus resulting in a regulatory gap.⁴⁴

18. As the court explained in *ExxonMobil Gas Marketing Company v. FERC*, the "need for regulation cannot alone create authority to regulate," and "jurisdiction may not be presumed based solely on the fact that there is not an express withholding of jurisdiction."⁴⁵ As discussed above, we find that Nopetro's facility is not a jurisdictional LNG terminal or otherwise subject to the Commission's jurisdiction.⁴⁶ However, we note that although the facility is not subject to our environmental review, the facility has been subject to NEPA review through DOE's issuance of a categorical exclusion,⁴⁷ and Nopetro

⁴² Delaware Riverkeeper Network May 24, 2021 Comment at 6; Cecile Scofield May 7, 2021 Comment at 1.

⁴³ Delaware Riverkeeper Network May 24, 2021 Comment at 6 (quoting NEPA Implementing Procedures, DOE, 85 Fed. Reg. 78,197, 78,205 (2020)).

⁴⁴ Delaware Riverkeeper Network May 24, 2021 Comment at 7; Cecile Scofield May 7, 2021 Comment at 1.

⁴⁵ 297 F.3d 1071, 1088 (D.C. Cir. 2002).

⁴⁶ To the extent that Commenters argue that this action requires review under NEPA, our action is categorically excluded. *See* 18 C.F.R. § 380.4(a)(1) (2021).

⁴⁷ *See* DOE Categorical Exclusion Determination, Nopetro LNG, LLC, FE Docket No. 20-167-LNG, March 22, 2021.

will be required to obtain various local, state, and federal permits.⁴⁸ Additionally, the trucking operations will be subject to the U.S. Department of Transportation's regulations, and Nopetro's export operations will be subject to the regulations and requirements of the U.S. Environmental Protection Agency under the Clean Water Act, Clean Air Act, and the Hazardous Materials Transportation Act.⁴⁹

IV. Conclusion

19. For the foregoing reasons, we find that Nopetro's liquefaction and truck loading facility and associated transloading operations in Port St. Joe would not be subject to the Commission's jurisdiction under section 3 or section 7 of the NGA.

The Commission orders:

Nopetro LNG, LLC's petition for declaratory order is granted.

By the Commission. Commissioner Danly is concurring with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

⁴⁸ Nopetro April 20, 2021 Petition for Declaratory Order at 23.

⁴⁹ *Id.*

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Nopetro LNG, LLC

Docket No. CP21-179-000

(Issued March 25, 2022)

DANLY, Commissioner, *concurring*:

I concur with the Commission's finding that Nopetro LNG, LLC's liquefaction and truck loading facility and associated transloading operations in Port St. Joe, Florida would not be subject to the Commission's jurisdiction¹ under section 3 or section 7 of the Natural Gas Act.² I write separately merely to express my continued disagreement with the Commission's expansive view of its jurisdiction in *New Fortress Energy, LLC*.³

For these reasons, I respectfully concur.

James P. Danly
Commissioner

¹ See *Nopetro LNG, LLC*, 178 FERC ¶ 61,168 (2022).

² 15 U.S.C. §§ 717b, 717f.

³ See *New Fortress Energy LLC*, 174 FERC ¶ 61,207 (Danly, Comm'r, dissenting), *reh'g denied*, 176 FERC ¶ 61,031 (2021) (Danly, Comm'r, dissenting).

Document Content (s)

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EXHIBIT B

NOPETRO REHEARING ORDER

180 FERC ¶ 61,057
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

Nopetro LNG, LLC

Docket No. CP21-179-001

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued July 29, 2022)

1. On March 25, 2022, the Commission issued an order granting Nopetro LNG, LLC's (Nopetro) petition for a declaratory order finding that Nopetro's construction and operation of a natural gas liquefaction and truck loading facility and proposed transloading operations in Port St. Joe, Florida, would not be subject to the Commission's jurisdiction under section 3¹ or section 7² of the Natural Gas Act (NGA).³ On April 22, 2022, Public Citizen, Inc. (Public Citizen) filed a timely request for rehearing of the Declaratory Order.
2. Pursuant to *Allegheny Defense Project v. FERC*,⁴ the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by NGA section 19(a),⁵ we are modifying the discussion in the Declaratory Order and continue to reach the same result in this proceeding, as discussed below.⁶

¹ 15 U.S.C. § 717b.

² 15 U.S.C. § 717f.

³ *Nopetro LNG, LLC*, 178 FERC ¶ 61,168 (2022) (Declaratory Order).

⁴ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁵ 15 U.S.C. § 717r(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁶ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Declaratory Order. See *Smith Lake Improvement & Stakeholders Ass'n v.*

I. Background

3. On April 20, 2021, Nopetro filed a petition requesting that the Commission declare that Nopetro's planned natural gas liquefaction and truck loading facility and proposed transloading operations would not be subject to the Commission's jurisdiction under NGA sections 3 and 7. Nopetro's facility would consist of up to three liquefaction trains that would liquify up to 3.86 billion cubic feet per year of natural gas for export. Liquefied natural gas (LNG) would depart the facility in International Organization for Standardization (ISO) containers via third-party truck operators and travel roughly a quarter of a mile to a dock owned and operated by the St. Joseph's Port (Port). At the dock, the ISO containers would be loaded onto ocean-going general cargo container vessels for export and delivery to markets in the Caribbean, Central America, and South America.⁷ The dock would remain available for general public use and be subject to the Port's standard scheduling procedures, and could be used to export products other than ISO containers containing LNG. Nopetro plans to construct and own a crane at the dock that would be operated by third-party stevedores and managed by the Port. The crane would be used to load the ISO containers onto ocean-going cargo vessels and, when not in use by Nopetro, would be available for use by others through the Port for a fee. Nopetro states that if this particular dock was unavailable because it is being used by another customer or is out of service, Nopetro could use any of four other general use docks located close to the liquefaction facility, which are owned and operated by the Port.⁸

4. On March 25, 2022, the Commission issued an order granting Nopetro's petition and found that Nopetro's liquefaction facility is not an LNG terminal subject to the Commission's NGA section 3 jurisdiction because the facility would not be located at the point of export such that LNG could be directly transferred to vessels for export.⁹ As relevant to Public Citizen's rehearing request, the Commission disclaimed jurisdiction under NGA section 3 noting that "[t]o date, the Commission has exercised its

FERC, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁷ The ocean-going vessels would not be dedicated solely to the export of LNG and may include containers filled with other goods.

⁸ Those docks are located in Panama City, Florida; Pensacola, Florida; Mobile, Alabama; and Jacksonville, Florida.

⁹ Declaratory Order, 178 FERC ¶ 61,168 at PP 10, 19. The Commission also found that Nopetro's facility would not facilitate interstate transportation of natural gas by pipeline and therefore would also not be subject to the Commission's NGA section 7 jurisdiction. *Id.* P 16. Public Citizen does not challenge that finding on rehearing here.

Department of Energy (DOE)-delegated section 3 authority¹⁰ to authorize: (1) LNG terminals located at the site of import or export; and (2) the site and facilities at the place of import/export where a pipeline crosses an international border,”¹¹ and that “the Commission has declined to exert . . . entry/export authority over non-pipeline facilities that were not located at the actual point of export.”¹²

5. The Commission recognized that NGA section 3(e)(1) vests the Commission with “exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal,”¹³ and that NGA section 2(11), which was added as part of the Energy Policy Act of 2005 (EPAcT 2005),¹⁴ defines “LNG terminal” as:

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 the United States . . . , exported to a foreign country . . . , or transported in interstate commerce by waterborne vessel, but does not include—(A) waterborne vessels used to deliver natural gas to or from any such facility; or (B) any pipeline or storage facility subject to the jurisdiction of the Commission under [section 7].¹⁵

6. The Commission explained that it makes jurisdictional determinations concerning LNG projects on a case-by-case basis and that the vast majority of proposals it has considered involved large, coastal facilities either receiving natural gas vapor from a

¹⁰ The 1977 Department of Energy (DOE) Organization Act (42 U.S.C. § 7151(b)) placed all section 3 jurisdiction under DOE. The Secretary of Energy subsequently delegated authority to the Commission to “[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports.” DOE Delegation Order No. 00-004.00A, section 1.21A (May 16, 2006).

¹¹ Declaratory Order, 178 FERC ¶ 61,168 at P 7.

¹² *Id.*

¹³ 15 U.S.C. § 717b(e)(1).

¹⁴ Pub. L. 109-58, § 311(b), 119 Stat. 594, 685 (2005).

¹⁵ 15 U.S.C. § 717a(11).

transportation pipeline and delivering LNG into a large, ocean going, bulk carrier, or receiving LNG from a large bulk carrier and delivering vapor into a pipeline for subsequent transportation.¹⁶ Based on that experience, the Commission has considered three criteria when determining whether an LNG facility is subject to the Commission's jurisdiction: (1) whether the LNG facility would include facilities dedicated to the import or export of LNG; (2) whether the facility would be located at or near the point of import or export; and (3) whether the facility would receive or send out gas via a pipeline.¹⁷ For LNG terminals operating in interstate commerce the Commission has considered a fourth criterion – whether after leaving the facility the LNG is reintroduced into a pipeline such that the LNG terminal facilitates the interstate transportation of natural gas by pipelines.¹⁸

7. The Commission further explained that in the definition of “LNG terminal” under NGA section 2(11), the term “onshore,” when used in conjunction with “or in state waters,” and combined with the fact that section 3 applies to LNG that is “transported in interstate commerce by waterborne vessel,” connotes that section 2(11) applies to facilities that are located on or near the water or the coast.¹⁹ Noting that the Commission had previously clarified that LNG terminals must be capable of transferring LNG onto waterborne vessels,²⁰ it found that Nopetro's proposed facility, which would truck ISO containers a quarter of a mile to a general use dock to be loaded onto general cargo ships, did not meet that standard.²¹

8. The Commission also found that the crane located at the dock would not be subject to NGA section 3 jurisdiction because general-use pier facilities are outside the scope of the “natural gas facilities” regulated by the Commission.²² The Commission noted that although Nopetro would own the crane used to load the ISO containers, the

¹⁶ Declaratory Order, 178 FERC ¶ 61,168 at P 9.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* P 12.

²⁰ *Id.* (citing *New Fortress*, 174 FERC ¶ 61,207, at P 17 (2021), *aff'd*, *New Fortress Energy, Inc. v. FERC*, 36 F. 4th1172. (D.C. Cir. Jun. 14, 2022) (consolidated with No. 21-1157)); *see also Pivotal LNG, Inc.*, 151 FERC ¶ 61,006, at P 12 (2015) (*Pivotal II*).

²¹ *Id.*

²² *Id.* P 10 (citing *Andalusian Energy, LLC*, 174 FERC ¶ 61,107, at P 11 (2021) (*Andalusian*); *The Gas Co., LLC*, 142 FERC ¶ 61,036, at P 14 (2013)).

crane would be located on a general use dock, operated by third-party stevedores, be managed by the Port, and be available for general use.²³

II. Discussion

A. Interpretation of “onshore”

9. On rehearing, Public Citizen argues that the Commission impermissibly interpreted the term “onshore” as used in the definition of LNG terminal in NGA section 2(11) as being limited to facilities that are physically located on the shoreline and the Commission thus erred by declining to assert its NGA section 3 jurisdiction over Nopetro’s proposed facility.²⁴ As discussed below and in the Declaratory Order, the definition of LNG terminal in NGA section 2(11) is ambiguous, and reasonably read in a manner consistent with the Commission’s well-established precedent and evidence of congressional intent, to include only those onshore facilities that are on the coast such that LNG can be directly transferred to vessels for export. As a result, we continue to find that Nopetro’s liquefaction and truck loading facility and associated transloading operations in Port St. Joe would not be subject to the Commission’s jurisdiction under section 3.

10. Public Citizen contends that Nopetro’s facility meets the three criteria we consider in determining whether a particular facility is an LNG terminal,²⁵ and thus the Commission erred in concluding that the facility is not subject to our jurisdiction.²⁶ Public Citizen only briefly addresses the first and third criteria—*i.e.*,: (1) whether there would be facilities dedicated to the import and export of LNG and (2) whether the facility would receive or send out gas via a pipeline²⁷—focusing instead on the second criterion: that an LNG terminal must be located at the point of import or export, such that there is a direct transfer of LNG between the facility and vessels. Public Citizen argues that the Commission’s second criterion relies on an erroneous interpretation of the word

²³ *Id.*

²⁴ Public Citizen Rehearing Request at 1.

²⁵ See list of the three criteria *supra* P 6. Public Citizen characterizes these criteria as a “three part test.” Public Citizen Rehearing Request at 4.

²⁶ Public Citizen Rehearing Request at 4.

²⁷ The Commission stipulated in the Declaratory Order that the natural gas was received by a pipeline so the applicability of that criterion is not at issue on rehearing. See Declaratory Order, 178 FERC ¶ 61,168 at P 9 n. 21 (“The natural gas here is received from an LDC pipeline, so this criterion is met.”).

“onshore” in the definition of “LNG terminal.” Specifically, Public Citizen claims that the word “onshore” does not require a facility to be located at or near the point of transfer and therefore the Commission must exercise jurisdiction over any land-based facility that engages in one of the eight specified functions of an “LNG terminal” under NGA section 3(e)(1).²⁸

11. As explained in the Declaratory Order, the Commission makes jurisdictional determinations regarding LNG projects on a case-by-case basis,²⁹ which has resulted in principles derived from a body of experience that can be applied to ensure a consistent and reasonable application of our jurisdiction. Thus, the three criteria are not an arbitrary test that the Commission has grafted onto section 3 of the NGA. As the result of the Commission’s consistent application of the criteria, and setting aside border-crossing pipelines, the only facilities for which the Commission has granted section 3 siting, construction, and operating authority have been coastal LNG facilities that are served by ocean-going, bulk-carrier LNG tankers.³⁰

12. This understanding of our section 3 jurisdiction was well-established prior to Congress enacting EPAct 2005,³¹ and, as we have previously stated, section 2(11) “does not seek to redefine the term ‘natural gas facilities’ as commonly understood for purposes of Commission jurisdiction.”³² As such, and consistent with the three criteria, the purpose of NGA section 3, and legislative history and Commission precedent, it is reasonable to interpret NGA section 2(11) as not expanding the universe of facilities over which such authority applies.

²⁸ Public Citizen Rehearing Request at 5-6.

²⁹ Declaratory Order, 178 FERC ¶ 61,168 at P 9 (citing *Gulf Oil Ltd. P’hip*, 148 FERC ¶ 61,029, at P 8 (2014)); *see also New Fortress Energy LLC*, 174 FERC ¶ 61,207 at P 10; *Marathon Oil Co.*, 53 F.P.C. 2164 (1975).

³⁰ *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163, at P 39 (2014). For additional historical discussion of the Commission’s section 3 jurisdiction, *see Sound Energy Sols.*, 107 FERC ¶ 61,263, at PP 19-26 (2004); *Dynegy LNG Prod. Terminal, L.P.*, 97 FERC ¶ 61,231, at 62,048-62,050 (2001).

³¹ *See, e.g., Hackberry LNG Terminal, L.L.C.*, 101 FERC ¶ 61,294, at P 25 (2002) (referring to coastal LNG facility as an “onshore facility”); *Tenneco Atl. Pipeline Co.*, 1 FERC ¶ 63,025, at 65,203 (1977) (stating that an LNG terminal “needs access to deep water”).

³² *Shell*, 148 FERC ¶ 61,163 at P 43.

13. None of Public Citizen’s arguments compel a departure from the Commission’s longstanding interpretation of section 2(11). First, Public Citizen argues that the plain language of NGA sections 2(11) and 3 do not support the Commission’s decision to disclaim jurisdiction over inland facilities, because those provisions do not expressly state that a facility must be capable of transferring LNG directly onto oceangoing vessels or be located at or near the point of transfer.³³ Public Citizen acknowledges that the Commission has previously disclaimed jurisdiction over inland LNG facilities in *Pivotal II*,³⁴ but attempts to bolster its position by referencing the dissent in *Pivotal II*, which argues that the Commission should have exercised jurisdiction over Pivotal’s facility because it was an export facility within the terms of the NGA.³⁵

14. As an initial matter, we note that the Declaratory Order appropriately followed *Pivotal II*; duly issued orders of a Commission majority, not a dissent, carry precedential weight, and the Commission acts arbitrarily and capriciously if it departs from such precedent without a reasoned explanation for doing so.³⁶ In particular, the Declaratory Order explained that the “term ‘onshore,’ when used in conjunction with ‘or in State waters,’ and combined with the fact that section 3 applies to LNG that is ‘transported in interstate commerce by waterborne vessel,’ connotes that section 2(11) applies to facilities that are located on or near the water or the coast.”³⁷ As we have explained, that

³³ Public Citizen Rehearing Request at 5.

³⁴ *Pivotal LNG, Inc.*, 151 FERC ¶ 61,006 (2015).

³⁵ *Id.* (citing *Pivotal II*, 151 FERC ¶ 61,006 (Bay, Comm’r, dissenting)).

³⁶ See *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) (“It is textbook administrative law that an agency must provide a reasoned explanation for departing from precedent or treating similar situations differently...”) (citing *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995); *Colo. Interstate Gas Co. v. FERC*, 146 F.3d 889, 893 (D.C. Cir. 1998) (“Because [the Commission] has not adequately explained its decision to treat [entities] differently in a context where they appear similarly situated, we remand the case to the Commission for a fuller explanation.”)).

³⁷ Declaratory Order, 178 FERC ¶ 61,168 at P 12 (citing *Pivotal I*, 148 FERC ¶ 61,164 (Bay, Comm’r, concurring at 61,826); *Pivotal II*, 151 FERC ¶ 61,006 at P 11 (finding inland liquefaction facilities that truck LNG to the point of export are not LNG terminals subject to the Commission’s jurisdiction)).

interpretation reasonably construes section 2(11) in the light of the text, statutory structure, and history underlying that provision.³⁸

15. Regardless, Public Citizen misapprehends the *Pivotal II* dissent, which does not support Public Citizen's argument regarding the breadth of the term "onshore" in the definition of "LNG terminal." The *Pivotal II* dissent recognized that the inland nature of the facilities precluded them from constituting an "LNG terminal" under the NGA.³⁹ The *Pivotal II* dissent argued that the facilities were jurisdictional not because they were "LNG terminals," but because they were part of a broader category of "export facilities" over which the Commission has NGA section 3(a) jurisdiction.⁴⁰ In the Declaratory Order, the Commission explained that "the Nopetro facility would not be subject to our section 3 jurisdiction over import and export facilities."⁴¹ Public Citizen's rehearing request only asserts that Nopetro's proposed facility satisfies the "onshore" requirement for an "LNG terminal," but does not argue that Nopetro's facilities are part of an "export facility" under NGA section 3(a). We reiterate that *Emera* and *Andalusian*, both of which involved facilities located approximately a quarter of a mile from the point of export, contain "essentially identical" facts to the instant case (other than involving the shipment of CNG rather than LNG).⁴² In the absence of any rehearing argument to the

³⁸ See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) ("Court[s] will normally accord particular deference to an agency interpretation of 'longstanding' duration.").

³⁹ *Pivotal II*, 151 FERC ¶ 61,006 at 61,059 (Bay, Comm'r, dissenting) ("First, the majority observes that Pivotal's facilities are located inland and incapable of transferring LNG directly to tankers. *These facts establish that the facilities do not constitute an 'LNG terminal' as defined by section 2(11) of the Act.*") (emphasis added).

⁴⁰ *Id.* at 61,058 (Bay, Comm'r, dissenting) (also referencing sections 1(a) and (b) of the NGA in support of the argument for a broad Congressional mandate to regulate the import and export of gas). NGA section 3(a) provides for federal jurisdiction over the siting, construction, and operation of facilities used to import or export gas. The Department of Energy Organization Act, Pub. L. 95-91, § 301(b), 91 Stat. 565, 578 (1977) (codified at 42 U.S.C. § 7151(b)), placed all section 3 jurisdiction under the Department of Energy. The Secretary of Energy subsequently delegated authority to the Commission to "[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports." Department of Energy Delegation Order No. 00-004.00A, section 1.21A (May 16, 2006).

⁴¹ Declaratory Order, 178 FERC ¶ 61,168 at P 14.

⁴² *Id.*

contrary, we continue to find that *Emera* and *Andalusian* support our finding that Nopetro's facility would not be subject to our section 3(a) jurisdiction over import and export facilities.

B. Onshore versus Offshore Jurisdiction

16. Next, Public Citizen argues that Congress used the term “onshore” in the definition of “LNG terminal” simply to differentiate the Commission’s jurisdiction from that of the U.S. Coast Guard over offshore deepwater ports used for the import or export of natural gas pursuant to the Deepwater Ports Act of 1974 (Deepwater Ports Act).⁴³ Public Citizen argues that Congress’ enactment of the Maritime Transportation Security Act of 2002, which included natural gas within the Coast Guard’s authority under the Deepwater Ports Act, evinces congressional intent that “onshore” in “LNG terminal” was intended to complete a plenary scheme of federal jurisdiction over both onshore and offshore facilities.⁴⁴ Public Citizen contends that this interpretation is bolstered by one sentence of testimony from Commission staff in a 2005 hearing before the Senate Subcommittee on Energy on LNG issues in which staff distinguished between facilities that are “onshore and in state waters” versus “offshore facilities” that are under the Coast Guard’s jurisdiction.⁴⁵

17. Public Citizen’s reference to the Deepwater Ports Act is unavailing. There is no dispute that the Commission, as opposed to the Coast Guard, has jurisdiction over “onshore” facilities, nor is it disputed that an “onshore” location is one explicit requirement in the definition of “LNG terminal.” The question is whether “onshore,” especially when paired with “or in State waters,” should be read so broadly as to encompass non-coastal facilities. Public Citizen offers no support for the conclusory assertion that the Coast Guard’s jurisdiction over offshore facilities means that the

⁴³ Public Citizen Rehearing Request at 6-7.

⁴⁴ *Id.* at 7. Public Citizen also argues that the exclusion of “waterborne vessels used to deliver natural gas” from the definition of “LNG terminal” provides additional support for the Coast Guard having responsibility for offshore facilities. *Id.* at 8.

⁴⁵ *Id.* at 6-7 (citing *The Prospects for LNG in the United States and to Discuss the Safety and Security Issues Related to LNG Development: Hearing Before the Subcomm. on Energy of the Senate Comm. on Energy and Natural Resources, 109th Cong. 40 (2005)* (statement of J. Mark Robinson, Director, Office of Energy Projects, Federal Energy Regulatory Commission) (Robinson Testimony) (“The Commission has interpreted section 3 of the Natural Gas Act as conferring exclusive jurisdiction on the Commission with respect to the siting, construction, operation, and safety of LNG facilities onshore and in state water (as distinguished from those offshore facilities that are within the Coast Guard’s jurisdiction). . . .”).

Commission necessarily has section 3 jurisdiction over *any* onshore facility which might liquefy natural gas which might ultimately be exported from the country, particularly when part of section 2(11) explicitly contemplates “transport[ation] in interstate commerce by waterborne vessel.”

18. The fact that Commission staff in the referenced testimony distinguished the Commission’s jurisdiction over “onshore” facilities from the Coast Guard’s jurisdiction over “offshore” facilities also does nothing to further Public Citizen’s argument. Earlier in the same testimony, when discussing “[t]he basic criteria for any proposed LNG terminal,” the first requirement referenced was “deepwater access to accommodate LNG ship traffic,”⁴⁶ which would only be possible for facilities sited on a coast or shore. The same testimony notes that LNG projects are subject to oversight by state agencies that have been delegated authority to act under federal laws including the Coastal Zone Management Act, which also suggests a nexus between the facility’s location and the coast.⁴⁷ Moreover, staff testimony does not prevail over the Commission’s interpretation of the statutory language in light of its purpose and context that the definition of “LNG terminal” should not be construed so broadly as to include these inland facilities, many of which are otherwise non-jurisdictional.⁴⁸

19. We also note that this Senate hearing was conducted during the pendency of a jurisdictional dispute between the Commission and the California Public Utilities Commission over the siting of an LNG terminal in Long Beach, California, in which both agencies asserted jurisdiction over the terminal.⁴⁹ As Congress enacted the definition of

⁴⁶ Robinson Testimony at 35.

⁴⁷ *Id.* at 37.

⁴⁸ *See Shell*, 148 FERC ¶ 61,163 at P 43 n. 78 (declining to adopt a “literal reading of section 2(11)’s definition of ‘LNG Terminal’ [that] would cause otherwise NGA-exempt gathering, intrastate pipeline, processing, and local distribution facilities to be jurisdictional under section 3 as LNG terminal facilities if they transport gas that was imported or gas that will be exported”).

⁴⁹ *See The Prospects for LNG in the United States and to Discuss the Safety and Security Issues Related to LNG Development: Hearing Before the Subcomm. on Energy of the Senate Comm. on Energy and Natural Resources, 109th Cong. 40 at 3* (“Sound Energy Solutions (a subsidiary of the Mitsubishi Corporation) has proposed a LNG terminal in Long Beach, California. As a result of that proposal, a jurisdictional battle over siting authority between the [Commission] and the California Public Utilities Commission (PUC) is now pending before the 9th Circuit Court of Appeals.”); *see also Sound Energy Sols.*, 106 FERC ¶ 61,279 (asserting exclusive jurisdiction over SES’ LNG import project), *reh’g denied*, 107 FERC ¶ 61,263 (upholding the Commission’s assertion of exclusive jurisdiction over SES’ import project), *clarified*, 108 FERC ¶

“LNG terminal” against the backdrop of this dispute, and the LNG facility in question was an import terminal on the Long Beach coast (*i.e.*, a facility that would fall within the Commission’s traditional interpretation of its section 3 jurisdiction), it is reasonable to assume that Congress did not contemplate a sweeping expansion of the Commission’s jurisdiction to encompass all inland LNG facilities without purporting to do so in clear terms, at least without some contrary indication, which Public Citizen does not identify in its rehearing request.⁵⁰ To the contrary, the legislative history of EAct 2005 evinces that Congress specifically contemplated the word “onshore” as referring to coastal, rather than inland, facilities.⁵¹

61,155 (2004) (affirming exclusive jurisdiction and clarifying that federal, state, and local agencies share regulatory responsibilities to assess and authorize the proposed project), *appeal docketed sub. nom., Cal. for Renewable Energy, Inc. v. FERC*, No. 04-73650 (9th Cir. filed Jul. 23, 2004) (appealing the Commission’s assertion of exclusive jurisdiction over SES’ project pursuant to NGA section 3; appeal was voluntarily dismissed following enactment of EAct 2005).

⁵⁰ Congress was aware of the jurisdictional dispute between the Commission and the California Public Utilities Commission that was pending while the bill was being considered. *See, e.g.*, 151 Cong. Rec. H2180-01, H2187 (daily ed. Apr. 20, 2005) (containing a letter from several Representatives to the Governor of California discussing, among other things, siting authority for LNG terminals and stating: “For these reasons, the provision is unanimously opposed by the California Public Utilities Commission, which, as you know, is fighting FERC in the courts for jurisdiction over an LNG terminal in the heart of the Port of Long Beach.”); *see also Shell*, 148 FERC ¶ 61,163 at P 49 (“The potential need for this jurisdictional clarification was highlighted at the time Congress was considering the legislation that became EAct 2005 by pending proceedings in which the State of California challenged the Commission’s exclusive jurisdiction over a proposed LNG terminal that would receive gas which would be consumed entirely within California.”).

⁵¹ *See* 151 Cong. Rec. S6980-04 (daily ed. Jun. 22, 2005) (statement of Sen. Feinstein) (“[T]his bill gives the State less input for facilities that are located *on shore*, in our busy ports, and near closely packed communities.”) (emphasis added); *Id.* (stating that some Senators will argue that states already have a veto under the Coastal Zone Management Act (which would not apply to inland facilities)); *Id.* (“[I]f the State were to find that the onshore LNG terminal would negatively impact the State’s coastline....”); *Id.* (statement of Sen. Boxer) (supporting “Senator Feinstein’s amendment to provide Governors with veto authority on the siting of *onshore liquified natural gas, LNG, facilities*” and critiquing the bill, absent the amendment, as “*den[y]ing States a role in deciding whether and where LNG terminals may be located on our coastlines.*”) (emphasis added); *see also* 151 Cong. Rec. S7451-04 (daily ed. Jun. 28, 2005) (statement

C. Use of “onshore” in other statutory schemes

20. Public Citizen next argues that Congress has used “onshore” in a number of other statutes to refer to facilities or activities on any land that is not submerged, regardless of proximity to the coastline. It first points to the Oil Pollution Act of 1990, which defines “onshore facility” as any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land.⁵² Public Citizen also highlights the distinction in regulatory regimes for “onshore” versus “offshore” lands for oil and gas extraction on public lands, the former being subject to the Mineral Leasing Act of 1920, the latter to the Outer Continental Shelf Lands Act.⁵³ Public Citizen states that “onshore” is used in various other places of EPA Act 2005 and argues that all such uses refer to facilities on land within the United States that are not submerged underwater.⁵⁴ Finally, it argues that this interpretation is supported by federal caselaw and a Commission order.⁵⁵

21. Statutory language must always be read in its proper context, which involves looking not only at the language at issue, but also the design of the statute and its object and policy.⁵⁶ Here, the object of NGA section 3, and specifically the relevant portion of section 2(11)’s definition of LNG terminal, is to provide for Commission jurisdiction where an LNG terminal is “located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is ... exported to a foreign country.”⁵⁷ The Commission has not specified that LNG facilities must be located within a certain distance from the point of export, but the Commission has interpreted “onshore” as applying to facilities located on or near the water or the coast such that “that LNG terminals must be capable of transferring LNG onto waterborne

of Sen. Feinstein) (“[F]or facilities *that are located onshore, in our busy ports* and near our closely packed communities, States have less input.”) (emphasis added).

⁵² Public Citizen Rehearing Request at 7 (citing 33 U.S.C. § 2701(24)).

⁵³ *Id.* at 8.

⁵⁴ *Id.*

⁵⁵ *Id.* at 9 (citing *Transcon. Gas Pipe Line Corp.*, 96 FERC ¶ 61,118 (2001)).

⁵⁶ See *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (“[S]tatutory language must always be read in its proper context.”); *Crandon v. U.S.*, 494 U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.”).

⁵⁷ 15 U.S.C. § 717a(11).

vessels.”⁵⁸ As we explain above, in enacting the definition of “LNG terminal” in EPAct 2005, Congress was reacting to a particular jurisdictional dispute involving a proposed facility on the California coastline. It also was legislating against the backdrop of the Commission’s preexisting practice of exercising of its section 3 jurisdiction only as to facilities at the site of import or export.⁵⁹ This context is far more relevant to ascertaining the meaning of “onshore” as used in NGA section 3 than its use in other statutory schemes. Public Citizen offers no support for why the Commission should ignore this context and we decline to do so.

22. Moreover, the statutory references cited by Public Citizen are inapposite for the purpose of determining the meaning of “onshore” under NGA section 2(11). As acknowledged by Public Citizen, Congress provided a specific definition of “onshore facility” under the Oil Pollution Act, which includes, among other things, “motor vehicles” and “rolling stock.” A definition that includes objects so far outside the purview of that which is regulated under NGA section 3 lacks any probative value for what might be included under section 2(11),⁶⁰ and Congress has provided no such definition of “onshore” here. Similarly, the fact that Congress used the term “onshore” in

⁵⁸ Declaratory Order, 178 FERC ¶ 61,168 at P 12 (citing *New Fortress*, 174 FERC ¶ 61,207 at P 17 (citing *Pivotal II*, 151 FERC ¶ 61,006 at P 12).

⁵⁹ See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 846 (1986) (“It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, ‘the congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.’”) (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974)). “[T]he Commission has to date only exerted its delegated authority under NGA section 3(a) over LNG terminals located at the site of import or export and over facilities at the place of import/export where a pipeline crosses an international border.” Declaratory Order, 178 FERC ¶ 61,168 at P 14 (citing *Andalusian*, 174 FERC ¶ 61,107 at P 9); see also *Shell*, 148 FERC ¶ 61,163 at P 45 (stating that the only waterside facilities with which the Commission has dealt are “coastal facilities, *i.e.*, terminals” because they were authorized pursuant to NGA section 3 under the Commission’s import/export jurisdiction).

⁶⁰ See *D.C. v. Carter*, 409 U.S. 418, 421 (1973) (“At first glance, it might seem logical simply to assume...that identical words used in two related statutes were intended to have the same effect. Nevertheless, where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law.”) (internal quotation marks omitted).

the context of the Mineral Leasing Act, under which the Secretary of the Interior authorizes and governs the leasing of federal lands throughout the country for the production of certain natural resources, provides no guidance for interpreting NGA section 2(11).⁶¹ These are different statutory schemes, enacted for different purposes, and the breadth of one does not necessarily dictate that of the other. Public Citizen also offers no support for why other uses of “onshore” in EPAct 2005 bear upon its use in section 2(11) and no support for the conclusory assertion that all of the other uses of “onshore” refer to facilities “on land within the United States that are not submerged under water.”⁶² Public Citizen even acknowledges that the other uses of “onshore” arise under “different statutory authorities,”⁶³ which, as explained above with respect to the Oil Pollution Act and the Mineral Leasing Act, have their own purpose and context to guide how terms should be interpreted.

23. Public Citizen’s references to other instances of the word “onshore” in court and Commission precedent are equally unpersuasive because they disregard the use of the term “onshore” in NGA section 2(11) and the purpose of NGA section 3. Two of the cases—*Pacific Operators Offshore, LLP v. Valladolid*⁶⁴ and *United States v. Ward*⁶⁵—do not arise under the NGA and are thus inapplicable for the reasons described above. Although the third case—*ExxonMobil Gas Marketing Co. v. FERC*⁶⁶—does arise under the NGA, the question in that case centered on the distinction between jurisdictional natural gas transportation and non-jurisdictional gathering under NGA section 1(b).⁶⁷

⁶¹ 30 U.S.C. § 181 *et seq.*

⁶² Public Citizen Rehearing Request at 8.

⁶³ *Id.*

⁶⁴ 565 U.S. 207 (2012) (referring to an “onshore” oil and gas processing facility as distinguished from offshore drilling platforms on the Outer Continental Shelf).

⁶⁵ 448 U.S. 242 (1980) (referring to a reporting requirement under the Federal Water Pollution Control Act for discharges of “oil or a hazardous substance” by “any person in charge of a vessel or of an onshore facility or an offshore facility”).

⁶⁶ 297 F.3d 1071 (D.C. Cir. 2002).

⁶⁷ We acknowledge, as pointed out by Public Citizen and discussed below, that in other contexts, most often when discussing gathering under NGA section 1(b), the Commission uses the term “onshore” to reference facilities not located off the coasts in state or deep waters. However, it is also the case that with respect to inland facilities, the fact that a facility is located on submerged land (*e.g.*, under a river) has never kept it from being considered an “onshore” facility. For purposes of its NGA jurisdiction, the Commission has not adhered to what Public Citizen posits as the generic “any land within

The D.C. Circuit's use of "onshore" served to distinguish the difference between gathering pipelines constructed on the Outer Continental Shelf versus those constructed on land, where there was no dispute regarding the meaning of "onshore" and the court had no occasion to address the meaning.⁶⁸ Public Citizen does not explain why this use of "onshore," which notably was not used as part of a defined term as it is in the definition of "LNG terminal," and the fact that it is used under the framework of a completely separate section of the NGA, would bear more upon the definition of "onshore" under section 2(11) than the ample context provided above for how that term fits within the regulatory scheme of section 3. Finally, Public Citizen points to *Transcontinental Gas Pipeline Corp.*⁶⁹ as an example of the Commission using "onshore" to distinguish between parts of a pipeline system located underwater versus on land, rather than to indicate proximity to the shoreline. As in *ExxonMobil*, this use of "onshore" arises in a completely different context—the Commission issued this order pursuant to NGA section 7(b) in response to an abandonment application; its jurisdiction under section 3 was not at issue. The fact that the Commission used the term "onshore" expansively in a different context does not mean render that meaning appropriate in the specific context of the statutory definition of "LNG terminal."

24. We acknowledge, as the Commission has in the past, that the text of section 2(11) sets forth a broad, ambiguous definition of "LNG terminal," the plain language of which, if interpreted unmoored from the context in which the statute was enacted,⁷⁰ could be read to include in its ambit a far larger universe of facilities than Congress intended.⁷¹ In light of that ambiguity, the Commission has reasonably interpreted section 2(11), consistent with its longstanding application of its NGA section 3 jurisdiction and evidence of congressional intent, to include only those onshore facilities that are on the coast such that LNG can be directly transferred to vessels for export.

the United States other than submerged land" definition. Public Citizen Rehearing Request at 8.

⁶⁸ See *id.* at 1077.

⁶⁹ 96 FERC ¶ 61,118 (2001).

⁷⁰ See *Shell*, 148 FERC ¶ 61,163 at P 43; see also *New Fortress Energy LLC*, 174 FERC ¶ 61,207 (Daly, Comm'r, dissenting) ("This text [referencing section 2(11)] is ambiguous and broad.").

⁷¹ See *supra* note 45 and accompanying text.

25. For the reasons stated herein, we continue to find that Nopetro's proposed facility is not an LNG terminal subject to the Commission's jurisdiction under section 3 of the NGA.

The Commission orders:

In response to Public Citizen's request for rehearing, the Declaratory Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission. Commissioner Danly is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Nopetro LNG, LLC

Docket No. CP21-179-001

(Issued July 29, 2022)

DANLY, Commissioner, *concurring*:

1. I join the Commission's decision and agree that on rehearing the Commission should sustain its determination that Nopetro LNG, LLC's (Nopetro) proposed facility is not an LNG terminal subject to the Commission's jurisdiction under Natural Gas Act (NGA) section 3.¹

2. While I agree that the Commission lacks jurisdiction for the described facilities, I write separately to reiterate that, for the reasons stated in my *New Fortress* dissents, I generally do not think that the Commission should take an expansive view regarding its NGA section 3 jurisdiction.² I recognize that the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently affirmed the Commission's broad interpretation of its jurisdiction in *New Fortress*.³ Nonetheless, as I stated in my *New Fortress* dissent, NGA section 3 is poorly drafted,⁴ and NGA section 2(11), which defines "LNG terminal" is ambiguous and broad.⁵ I remain convinced that had the Commission taken a narrow

¹ 15 U.S.C. § 717b.

² See *New Fortress Energy LLC*, 174 FERC ¶ 61,207 (Danly, Comm'r, dissenting), *order on reh'g*, 176 FERC ¶ 61,031 (2021) (Danly, Comm'r, dissenting) (*New Fortress*).

³ See *New Fortress Energy Inc. v. FERC*, 36 F.4th 1172 (D.C. Cir. 2022) (denying the petitions for review of the Commission's determination that the New Fortress facility is jurisdictional under NGA section 3).

⁴ *New Fortress Energy LLC*, 174 FERC ¶ 61,207 (Danly, Comm'r, dissenting at P 3) (recognizing that the definition for "LNG terminal" in NGA section 2(11) is broad but doubting that the text was intended to be broadly interpreted or "that any majority of commissioners charged with implementing the statute from the time of its enactment would have found that jurisdiction should have been exercised over [a] rail yard in Topeka" "that takes shipments of LNG in ISO containers shipped by rail from Canada and holds them for a period of time before sending them elsewhere by rail").

⁵ *Id.* (Danly, Comm'r, dissenting at PP 2-3); see also *Nopetro LNG, LLC*, 180 FERC ¶ 61,057, at P 24 (2022) ("We acknowledge, as the Commission has in the past,

view of its jurisdiction, consistent with my dissent in *New Fortress*,⁶ that interpretation of our jurisdiction would also have been affirmed by the D.C. Circuit as reasonable⁷ and that interpretation—by the agency that oversees the siting of “LNG terminal[s]”⁸—would have therefore been afforded deference.⁹

that the text of section 2(11) sets forth a broad, ambiguous definition of ‘LNG terminal,’ the plain language of which, if interpreted unmoored from the context in which the statute was enacted, could be read to include in its ambit a far larger universe of facilities than Congress intended.”) (citing *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163, at P 43 (2014); *New Fortress Energy LLC*, 174 FERC ¶ 61,207 (Danly, Comm’r, dissenting) (“This text [referencing section 2(11)] is ambiguous and broad.”)).

⁶ See *New Fortress Energy LLC*, 174 FERC ¶ 61,207 (Danly, Comm’r, dissenting).

⁷ See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S.967, 980 (2005) (“If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 & n.11 (1984) (*Chevron*)); *Chevron*, 467 U.S. at 843 (1984) (“if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute”); see also *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) (finding “the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority”).

⁸ 15 U.S.C. § 717a(11).

⁹ The 1977 Department of Energy (DOE) Organization Act (42 U.S.C. § 7151(b)) placed all section 3 jurisdiction under DOE. The Secretary of Energy subsequently delegated authority to the Commission to “[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports.” DOE Delegation Order No. 00-004.00A, section 1.21A (May 16, 2006).

For these reasons, I respectfully concur.

James P. Danly
Commissioner

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