ORAL ARGUMENT NOT YET SCHEDULED

No. 22-1251

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN, INC.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

REPLY BRIEF FOR PETITIONER PUBLIC CITIZEN, INC.

Nandan M. Joshi
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
njoshi@citizen.org

Attorneys for Petitioner

Initial Reply Brief: April 17, 2023
Final Reply Brief: May 8, 2023

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GLOSSARY

DOE	Department of Energy
LNG	Liquefied natural gas
NGA	Natural Gas Act

SUMMARY OF ARGUMENT

Nopetro, LLC proposes to construct a natural gas liquefaction and truck-loading facility within a quarter mile of the shoreline in the heart of Port St. Joe, Florida. Nopetro's facility constitutes an "LNG terminal" under the Natural Gas Act (NGA) because it will be used to prepare liquefied natural gas (LNG) for export and will be "located onshore." Therefore, before Nopetro can proceed, the NGA requires that the Federal Energy Regulatory Commission conduct a review of the environmental impacts of the facility on the local community and give Nopetro authorization. To reach the contrary conclusion, the Commission interpreted "onshore" to mean "on or near the water or the coast," rather than "on land," and then disregarded its own interpretation in favor of a "direct transfer" test that it asserts will produce better policy outcomes. The arguments offered by the Commission to support its decision do not withstand scrutiny. This Court should grant the petition for review and vacate the Commission's orders.

I. The Commission argues that, when Congress enacted the definition of "LNG terminal" in 2005, it incorporated agency precedent that had confined its section 3 authority to large, coastal facilities that

import and export gas via ocean-going, bulk-carrier LNG tankers. The Commission, however, fails to identify any agency precedent that, as of 2005, excluded inland export facilities from the Commission's NGA authority. The Commission did not issue orders declining to exercise jurisdiction over inland facilities until almost a decade later. Those post-2005 decisions, therefore, cannot support the Commission's conclusion that Congress intended "onshore" to refer exclusively to coastal facilities.

The Commission also cannot identify any other statute applicable to the oil and gas field that uses the term "onshore" to mean "on or near the shore" rather than "on land." And the Commission's reliance on scattershot references to "coastal" facilities in the legislative history of the 2005 law is misplaced. Coastal facilities are mentioned because they are the predominant means used to import or export LNG by ship. But the Commission fails to identify any legislative history suggesting that Congress's concerns about the environmental and safety impacts of import and export facilities evaporated when those facilities were located in inland communities, let alone a few hundred yards from the shoreline in coastal communities, or that Congress anticipated that the Commission would have no regulatory authority over such inland

facilities. But the Commission's interpretation of "onshore" would produce that result.

The Commission's attempt to derive that interpretation from the references to "State waters" and "waterborne vessel" in the definition of "LNG terminal" is unconvincing. And the Commission's policy concerns do not justify its refusal to interpret "onshore" to mean "on land." Recognizing the Commission's jurisdiction to regulate inland export facilities would not compel the agency to regulate either general-use facilities that incidentally handle natural gas destined for export or facilities that Congress has expressly excluded from the scope of the NGA.

II. Despite defending its decision to interpret "onshore" to mean "on or near the water or the coast," the Commission acknowledges that application of a proximity-based standard to particular facilities would produce arbitrary outcomes. The Commission argues that it may, therefore, replace that standard with one that gives dispositive weight to whether a facility is capable of directly transferring natural gas to a ship for export.

The Commission's "direct transfer" test is incompatible with the statutory text—as well as the Commission's own construction of the term "onshore" as meaning "near" the shore. Under the Commission's direct-transfer test, the only jurisdictionally relevant facility is the pipe that directly transfers LNG onto tankers, and that pipe will always be located at the shoreline. The direct-transfer test is also inconsistent with Congress's decision to spell out multiple types of facilities—not just pipes—that make up an LNG terminal. And the test draws jurisdictional distinctions between methods of delivering LNG that cannot be reconciled with the definition of "LNG terminal."

The Commission's attempt to justify its direct-transfer test as an exercise in administrative line-drawing fails. The Commission did not rely on that rationale in its orders and, therefore, may not defend it on that basis. Moreover, the direct-transfer test does not "draw a line" to measure proximity, but jettisons proximity as a standard and substitutes a standard that has no foundation in any construction of the statutory language. Labeling the test administrative line-drawing does not salvage it, because the test necessarily produces arbitrary outcomes that do not align with the purposes of the statute.

ARGUMENT

The NGA grants the Commission exclusive authority over "LNG terminal[s]"—a term defined expressly to include "all natural gas facilities" used in connection with the import or export of natural gas where such facilities are "located onshore or in State waters." 15 U.S.C. §§ 717a(11), 717b(e). Standing alone, the term "onshore" could carry only one of two potentially plausible meanings: "on land" or "on or near the shore." The Commission now acknowledges that the latter interpretation is unworkable in the context of the statute because it would require the agency to make "arbitrary" and "subjective" judgments about which facilities are sufficiently near the shore to fall within the Commission's jurisdiction. FERC Br. 31. That acknowledgment should end the argument: If a word used in a statute has two possible meanings, but context rules out one meaning because it would render the statute unworkable, the necessary consequence is that the other meaning must govern—not that an agency gets to substitute a third meaning with no grounding in the text at all.

Nonetheless, rather than interpreting "onshore" to mean "on land," the Commission insists that it may substitute an agency-fashioned

"direct transfer" test for the location-based standard that Congress imposed. The Commission is wrong. History, purpose, and context confirm that Congress intended the Commission to exercise exclusive jurisdiction over export facilities such as Nopetro's, and to consider the environmental and safety impacts that such facilities will have on the local community. Because the Commission disavowed its jurisdiction here, this Court should vacate the orders on review.

I. "Onshore" means "on land."

A. Petitioner's opening brief explains why Congress inserted the phrase "onshore or in State waters" in the definition of "LNG terminal" when it enacted the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594. As the brief explains, Congress three years earlier had removed offshore facilities in federal waters from the scope of the NGA, which had historically been interpreted to grant the Commission implicit jurisdiction over all import or export *facilities* associated with import or export *activities* explicitly covered by section 3(a) of the NGA, 15 U.S.C. § 717b(a). *See* Pet'r Br. 37–39. By defining "LNG terminal" to include only those facilities "located onshore or in State waters," the Energy Policy Act built upon the geographic division of regulatory authority established

three years earlier. *Id.* at 39–41. In doing so, Congress did not deny the Commission the authority to regulate facilities engaged in the same functions as coastal facilities but located further inland. To the contrary, the Energy Policy Act amended section 1 of the NGA to confirm the statute's continued application to "the importation or exportation of natural gas in foreign commerce and … persons engaged in such importation or exportation." 15 U.S.C. § 717(b).

The Commission offers several responses to this history, but none is persuasive.

1. The Commission argues that it interprets "onshore" to require proximity to the coast because proximity "historically" has been one of the three criteria it used for determining whether "a facility used to import or export liquefied natural gas is an 'LNG terminal' for purposes of section 3 of the [NGA]." FERC Br. 8. Specifically, the Commission asserts that it considers "(1) whether the 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." *Id.* at 21 (emphasis added).

The Commission's "test," however, cannot inform the meaning of the Energy Policy Act because the agency decisions that articulate the test were issued after 2005. *See id.* at 8–9 (citing post-2005 orders). Accordingly, the test's second criterion—whether the facility would be located at or near the point of import or export—was not part of the regulatory backdrop that existed when Congress enacted the definition of "LNG terminal."

The Commission cobbles together a handful of pre-2005 decisions that purportedly describe LNG terminals in ways that suggest that such facilities are located on the coast. *Id.* at 27 (citing orders); *see also id.* at 39–40 (asserting that the Energy Policy Act "did not revise the longstanding agency interpretation as to LNG facilities subject to the Commission's jurisdiction"). None of those pre-2005 decisions, however, articulates a three-pronged test, or otherwise requires proximity to the coast, as a condition for the Commission's exercise of authority under section 3. In particular, none of those decisions considers whether an inland import or export facility qualifies as an LNG terminal.

By contrast, elsewhere in its brief, the Commission acknowledges that "under its section 3 jurisdiction," it "approved projects that include

both inland and coastal facilities" before 2005. FERC Br. 50 (citing *Freeport LNG Development, L.P.*, 107 FERC ¶ 61,278 (2004)). As the Commission explained in *Freeport*, section 3 applied "[s]ince the proposed LNG terminal facilities will be used to import natural gas from a foreign country." 107 FERC ¶¶ 61,278, at 62,296 para. 19.

The Commission's exercise of section 3 authority in *Freeport* is consistent with the text of the Commission's regulations, which, since at least 1997, have required "[a]ny person proposing to site, construct, or operate facilities which are to be used for the export of natural gas" to obtain the Commission's approval under section 3. *See* Pet'r Br. 54 (quoting 18 C.F.R. § 153.5(a)). The Commission offers no explanation for the absence of a geographic limitation in its regulations if, as it contends, it has historically excluded inland facilities from the scope of its section 3 authority.

The Commission counters that, aside from cross-border pipelines, it historically has exercised its section 3 authority to authorize large, coastal facilities that import or export LNG via LNG tankers. FERC Br. 7, 21, 34–35. That is hardly surprising. Before 2014, there was only one LNG export facility in the country. *See* Pet'r Br. 6. LNG exports by ship

did not become common until 2016, and, even today, the lion's share of exports by volume occur via LNG tankers served by large, coastal facilities. *See* Pet'r Br. 6–7. Imports of LNG by ship appear to occur exclusively through tankers. DOE, LNG Monthly 2, 45–55 (Feb. 2023) (tracking exports via container but not imports).[1] But the predominance of large, coastal facilities that import or export LNG via tankers does not imply that the Commission's section 3 authority is jurisdictionally confined to such facilities. As discussed above, the Commission's jurisdiction to regulate import or export facilities has historically been tied to the underlying import or export activity, not to the geographic location of the facility. Absent clear agency precedent prior to 2005 disclaiming such jurisdiction, there is no reason to believe that Congress intended to confine the Commission's authority over import and export facilities to those that resembled the historical pattern. "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *PGA Tour,*

[1] https://www.energy.gov/sites/default/files/2023-03/LNG%20Monthly%20December%202022_3.pdf.

Inc. v. Martin, 532 U.S. 661, 689 (2001) (internal quotation marks omitted).

The Commission asserts that it historically has distinguished between "terminals" that are "located on the coast" and "peakers" which are located "inland." FERC Br. 26–27 & n.7; *see id.* at 9–10 & n.1. The orders on review do not classify Nopetro's facility as a "peaker," so the Commission cannot defend its orders on that basis. *See Coal. of MISO Transmission Customers v. FERC*, 45 F.4th 1004, 1019 (D.C. Cir. 2022) (giving "no weight" to a rationale that the Commission had not adopted in its order). The Commission's assertion is also wrong on the merits. Historically, peakers and similarly termed facilities refer to facilities that generate or store natural gas during periods of low demand and release the gas during periods of high, *i.e.*, "peak" demand.[2] That function has nothing to do with a facility's physical location or with whether the release is for import or export activities. See FERC, LNG, https://www.ferc.gov/natural-gas/lng ("*Some facilities export natural gas from the U.S.*, some provide natural gas supply to the interstate pipeline

[2] *See* FERC Br. 10 n.1 (citing FERC, Energy Primer: A Handbook of Energy Market Basics 20 (Apr. 2020) (describing "LNG peaking facilities" as those where "stored gas [is] held for peak demand periods").

system or local distribution companies, *while others are used to store natural gas for periods of peak demand*." (emphasis added)). The only Commission order that purports to draw a geographic distinction between peakers and terminals was issued in 2014—nearly a decade after Congress enacted the Energy Policy Act. FERC Br. 27 & n.7 (citing *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163, at para. 45 (2014)). The Commission, therefore, cannot rely on this "history" in suggesting that Congress intended to limit the Commission's jurisdiction to import or export facilities located on or near the coast.

For similar reasons, the Commission's argument that the orders on review are consistent with the outcomes in *Shell* and three other post-2005 agency orders is a red herring. *See* FERC Br. 28–31, 33–35 (citing *Andalusian Energy, LLC*, 174 FERC ¶ 61,107 (2021); *Pivotal LNG, Inc.*, 151 FERC ¶ 61,006 (2015); *Emera CNG, LLC*, 148 FERC ¶ 61,219 (2014); and *Shell*, 148 FERC ¶ 61,163). Post-2005 decisions cannot logically bear on what Congress had in mind when it enacted the Energy Policy Act. And an agency cannot rewrite a statute by consistently misinterpreting it. *Cf. Citizens for Resp. & Ethics in Wash. v. FEC*, 904 F.3d 1014, 1018

(D.C. Cir. 2018) ("[U]nlike fine wines, regulations that so materially rewrite and recast plain statutory text do not improve with age.").

2. Petitioner's opening brief explains that "onshore" is a term of art frequently used in statutes that regulate the oil and gas industry—including the Energy Policy Act and the NGA—and that "onshore" in those statutes uniformly refers to facilities or activities occurring on land. Pet'r Br. 41–45. The Commission has offered no counterexamples where "onshore" means "on or near the shore." *See* FERC Br. 41–44, 51–52. Instead, it argues that other statutes "deal with different subjects at different times." *Id*. at 42. But "[e]very field of serious endeavor develops its own nomenclature—sometimes referred to as *terms of art*." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012). And "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Id*. (cleaned up; citation omitted); *see also* Pet'r Br. 44. The consistent use of "onshore" to mean "on land" in the most analogous statutes is strong evidence that Congress did not intend a narrower meaning when it enacted the Energy Policy Act. *See HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2178 (2021) (stating that

"unless … the ordinary meaning of 'extension' changed in just 10 years, it's hard to understand why these enactments don't shed at least some light on today's question").

Correctly observing that "onshore" is a defined term in some other statutes, FERC Br. 41–42, the Commission does not dispute that those definitions consistently equate "onshore" with "on land." Moreover, in statutes where "onshore" is not defined, including the Energy Policy Act, *see* Pet'r Br. 42–43 (citing statutes), the Commission does not suggest that "onshore" has a narrower meaning than "on land."

3. When Congress was considering the Energy Policy Act, it heard from high-level Commission representatives, including its then-Chairman, about the division of regulatory authority over LNG facilities between the Commission and the Department of Transportation under the Deepwater Port Act, as amended by the Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064. *See* Pet'r Br. 9–13, 39. Those representatives explained that terms like "onshore or in State waters" distinguish facilities that fall under the NGA from those that fall under the Deepwater Port Act. *Id*.

The Commission dismisses the relevance of this testimony because the witnesses did not directly address whether "onshore" described purely coastal facilities or, more broadly, those located on land. *See* FERC Br. 45–46. The testimony, however, reveals Congress's purpose in defining the Commission's jurisdiction in terms of facilities that are "onshore or in State waters": to preserve the distinction Congress drew three years earlier in the Maritime Transportation Security Act between those facilities offshore in federal waters and all other import and export facilities. And as explained above, *supra* p. 6, the Commission's authority to regulate such other import and export facilities, prior to 2005, was implicitly tied to the underlying import or export activity regulated by section 3(a) of the NGA.

While dismissing the testimony of its own witnesses, the Commission finds "revelatory" various floor statements made by senators that "focus on the coastal impacts of LNG facilities." FERC Br. 37–39. The senators' expressions of concern are unsurprising given that most LNG import and export facilities, and the largest ones by volume of LNG shipped, are located on or near the coast. *See* Pet'r Br. 52. What the Commission has not found, however, is any legislative history indicating

that the environmental and safety concerns associated with liquefaction plants and other import or export operations cease to apply when those facilities are located a quarter-mile from the coast or further inland. What's more, even though Congress vigorously debated the authority that the states should have with respect to LNG terminals located within their borders, the Commission has not identified any legislative history suggesting that the states should have sole jurisdiction to regulate import and export facilities located away from the coastline. Yet these are the outcomes that its interpretation of "onshore" would produce.

The Commission's brief allusion to its "jurisdictional dispute" with California over a coastal LNG terminal in Long Beach does not advance its cause. *See* FERC Br. 39. As the opening brief explains, Pet'r Br. 52–53, Congress resolved that dispute by preempting state regulation of all import and export facilities "located onshore or in State waters" (except as authorized by other federal statutes, *see* 15 U.S.C. § 717b(d)). The Commission offers no reason why Congress would have expected inland import and export facilities to be exempt from the preemptive scope of the Energy Policy Act.

B. The Commission argues that interpreting "onshore" to require "some nexus to the shoreline or coast" is justified because the definition of "LNG terminal" refers to "State waters" and to gas "transported in interstate commerce by waterborne vessel." FERC Br. 25–26. As the opening brief explains, Pet'r Br. 48, the orders on review do not explain the Commission's reasoning. The Commission now seeks to fill that gap by invoking the *noscitur a sociis* canon, which provides that "a word may be known by the company it keeps." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 287 (2010) (internal quotation marks omitted). *See* FERC Br. 25. That canon, however, has no application here, where the words are not "conjoined in such a way as to indicate that they have some quality in common." Scalia & Garner 196; *see also Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 934 F.3d 649, 665 (D.C. Cir. 2019). And in general, "[a] list of three items, each quite distinct from the other no matter how construed, is too short to be particularly illuminating." *Graham Cnty.*, 559 U.S. at 288. Here, the terms "onshore" and "in State waters" describe discrete, non-overlapping geographic areas, and the only element they have in common is that they describe areas that fall outside of the coverage of the

Deepwater Port Act. *See* Pet'r Br. 48. Moreover, given that nothing in the term "in State waters" suggests that only state waters located a certain distance from the shore are included, the Commission fails to explain how it derived such a limitation when applying the canon to the term "onshore."

Congress's expansion of section 3 to include facilities associated with natural gas "transported in interstate commerce by waterborne vessel" provides even less interpretative guidance. That phrase is used, along with "imported" and "exported," to describe the type of gas shipments that would give rise to the Commission's jurisdiction over LNG terminals. The phrase does not describe the location of the natural gas facilities used to "receive, unload, load, store, transport, gasify, liquefy, or process" in connection with such shipments. 15 U.S.C. § 717a(11). Moreover, the term "waterborne vessel"—which would appear to encompass both "ocean-going, bulk-carrier LNG tankers," Rehearing Order ¶ 11 (JA 66), and cargo ships carrying containerized LNG—suggests that Congress did not intend for the Commission's jurisdiction over import and export facilities to turn on the category of ship that would transport LNG. That expectation is at odds with the

Commission's interpretation of "onshore," which encompasses only LNG terminals that directly transfer LNG onto tankers. *See infra* pp. 24–25.

C. As Petitioner's opening brief explains, the Commission's interpretation of "onshore" would undermine the balance struck by the Energy Policy Act, which granted the Commission exclusive authority to regulate LNG terminals while imposing specific duties on the agency to consider environmental and safety concerns. *See* Pet'r Br. 45. Under the Commission's reading, two exporters would "be subject to different regulatory regimes—one federal, the other state—and different environmental-review and safety requirements based solely on the distance between their facilities and the shoreline." *Id.* at 46.

The Commission does not dispute that its interpretation of "onshore" would result in disparate regulatory treatment of facilities engaged in similar export activities, and it makes no serious attempt to defend that outcome. Instead, it argues that it must "fashion[] guardrails around its interpretation of" the statutory definition because, "[r]ead literally, the statute's definition of 'LNG terminal' would sweep in all manner of facilities." FERC Br. 20–21.

The Commission, however, cannot "avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy." *Eagle Pharms., Inc. v. Azar*, 952 F.3d 323, 337 (D.C. Cir. 2020) (quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)). Moreover, its policy concern lacks any foundation. The Commission states that a "literal[]" interpretation of the definition would encompass "NGA-exempt gathering, intrastate pipeline, processing, and local distribution facilities" if they "transport gas that was imported or gas that will be exported." FERC Br. 20 (quoting *Shell*, 148 FERC ¶ 61,163, at para. 43 n.78). But facilities wholly exempt from the NGA, such as gathering or intrastate facilities, may fall outside of the definition of "LNG terminal" by virtue of Congress's express statement that the NGA "shall not apply" to such facilities. 15 U.S.C. §§ 717(b) & (c). In addition, the Commission has established "guardrails"—unchallenged here—that prevent the definition of LNG terminals from including "[r]ailyards" or a "private owned parking lot." *See* New Fortress Amicus Br. 16. Facilities that constitute an LNG terminal must be "natural gas facilities," which are those that are "dedicated to the import or export of LNG," and they must "receive or send out gas via a pipeline."

Rehearing Order ¶ 6 (JA 64). Nopetro's Port St. Joe facility satisfies those conditions, *see* Pet'r Br. 35, but they would exclude general-use facilities such as parking lots from being considered LNG terminals in themselves.

The Commission's policy concern also bears no rational relationship to its decision to read the statute as applying only to those import or export facilities located on or near the shoreline. For instance, even if Nopetro's facility were redesigned to satisfy the Commission's interpretation of the definition of "LNG terminal," the Commission would still need to determine which facilities make up the LNG terminal and which facilities—for example, the pipeline that delivers gas to Nopetro's liquefaction plant—do not. Whatever discretion the Commission has to make those sorts of judgments is not at issue here, however, because this case concerns facilities that fall within the heartland of section 3—those dedicated to import or export activities regulated by the Department of Energy (DOE). For such facilities, there is no basis for treating proximity to the coast as jurisdictionally dispositive.

The Commission also cannot rely on the DOE's role to avoid its own statutory responsibilities. As Petitioner's opening brief demonstrates, the Commission incorrectly believed that the DOE undertook an

environmental analysis of Nopetro's Port St. Joe facility when it authorized Nopetro to export natural gas. Pet'r Br. 46–47. The Commission responds by recharacterizing that discussion as a "new argument" that the existence of a "regulatory gap" in federal environmental review requires the Commission to regulate the Port St. Joe facility. FERC Br. 52. That is incorrect. The opening brief does not make an independent argument that the Commission's reading of "onshore" is impermissible because it has the effect of creating a regulatory gap. Rather, the brief argues that the Commission's reading of "onshore" is incorrect because, among other things, it is inconsistent with the framework Congress established in the Energy Policy Act. In that context, the brief observes that the Commission's reliance on the DOE's environmental review was misplaced. Pet'r Br. 46. Because the question whether the Commission has correctly interpreted "onshore" was raised below, that question is properly before this Court, as are arguments relevant to this Court's consideration of that question. *Belco Petroleum Corp. v. FERC*, 589 F.2d 680, 683 (D.C. Cir. 1978) (holding that exhaustion requirement in 15 U.S.C. § 717r(b) does not "preclude

appellate consideration of an argument in support of a properly preserved ground of error").

D. Despite the foregoing, the Commission argues that its interpretation of "onshore" to mean "on or near the water or the coast" is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), because the dictionary definitions of "onshore" permit that reading. FERC Br. 23–24. That argument is flawed for three reasons. First, ambiguity under *Chevron* "is a creature not of definitional possibilities, but of statutory context." *Hearth, Patio & Barbecue Ass'n v. DOE*, 706 F.3d 499, 504 (D.C. Cir. 2013) (internal quotation marks omitted). Thus, under *Chevron*, the Court must first "consider text, structure, purpose, and history of an agency's authorizing statute to determine whether a statutory provision admits of congressional intent on the precise question at issue." *Id.* at 503 (internal quotation marks omitted). For the reasons given above, the Commission's interpretation of "onshore" fails the *Chevron* step-one analysis.

Second, when a statute is ambiguous, *Chevron*'s second step permits deference to the agency's reasonable interpretation "only if the agency has offered a reasoned explanation for why it chose that

interpretation." *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011). That has not happened here.

Finally, even if "on or near the water or the coast" were a permissible interpretation of "onshore," the Commission does not, in fact, interpret "onshore" that way. As explained below, the test that the Commission has fashioned ignores the geographic location of most of the facilities that make up an LNG terminal and, instead, considers only whether the facilities at issue are "capable of transferring LNG directly onto waterborne vessels." FERC Br. 3. The Commission identifies no dictionary definition of "onshore" that countenances such a reading.

II. Nopetro's Port St. Joe facility is "located onshore" even if "onshore" means "on or near the water or the coast."

A. Nopetro's liquefaction facility and truck-loading operations will be located a quarter mile from the coast. As the opening brief explains, the Commission failed to explain why that distance is "insufficiently 'near' the shoreline to qualify as 'onshore,'" Pet'r Br. 57–58, even assuming the Commission is correct that "onshore" refers to a location "on or near the water or the coast" or the "point of export," Rehearing Order ¶ 21 (JA 72). The Commission now acknowledges that it cannot provide a reasoned explanation for its treatment of Nopetro's facility

because a proximity-based standard would entail "inherently subjective" judgments and result in "arbitrary distance threshold[s]." FERC Br. 31.

The unworkability of a proximity-based standard should have led the Commission to choose the only other construction of "onshore" that the English language permits: on land. Instead, the Commission argues that, because a distance-from-the-shoreline standard produces arbitrary outcomes (which it does, *see* Pet'r Br. 59), it has discretion to jettison location-based standards altogether in favor of a "direct transfer" test that gives dispositive weight to how LNG is delivered from a facility to the ship. FERC Br. 32–33. The agency cannot, however, abandon a textual reading of the statute just because one possible reading is unsatisfactory. *Cf. NASDAQ Stock Mkt., LLC v. SEC*, 961 F.3d 421, 429–430 (D.C. Cir. 2020) (rejecting agency's interpretation that imposed "unworkable" obligations on the industry).

The direct-transfer test cannot be reconciled with the statutory language. First, the direct-transfer test eliminates "half of [the Commission's] own definition of "onshore," which covers facilities both "on or near" the shoreline, making "near" meaningless. Pet'r Br. 59. Under the direct-transfer test, the only jurisdictionally relevant facility

becomes the pipe that loads the tanker—a facility that will necessarily be "on" the shoreline—at least on the end that connects to the ship. All other facilities that make up an LNG terminal can apparently be located anywhere else on land, so long as they "link[] up" with that pipe. FERC Br. 50. A facility's proximity to the coast, thus, becomes irrelevant to the analysis.

Second, the direct-transfer test is inconsistent with Congress's command that the "facilities located onshore" that make up an LNG terminal include not only pipes that directly load ships, but "all natural gas facilities" that are "used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas" for export. 15 U.S.C. § 717a(11). By elevating the role of the pipe in the jurisdictional analysis, the Commission writes the other types of listed facilities out of the statute.

Third, the practical effect of the direct-transfer test is to distinguish between LNG shipped by specialized tankers and LNG shipped in containers by cargo ship. *See* Pet'r Br. 3–5, 58–60. The definition of "LNG terminal," however, draws no such distinction: Its only mention of ships refers to them as "waterborne vessels," which would encompass cargo ships as well as LNG tankers. 15 U.S.C. § 717a(11). Likewise, to the

extent the definition discusses methods of transporting natural gas, it does so to exclude certain transportation facilities from the definition of "LNG terminal." Although truck-based transport of containerized LNG to cargo ships does not fall within those statutory exclusions, it would be excluded under the Commission's direct-transfer standard. *See* Pet'r Br. 60,

B. The Commission has no persuasive response to the problems with the direct-transfer test. The Commission's principal argument is that the direct-transfer test is not an interpretation of "onshore" at all, but an exercise in administrative line drawing. FERC Br. 31–32. The Commission, however, did not rely on this rationale in the orders on review and, therefore, cannot defend the orders on that basis. *Coal. of MISO Transmission Customers*, 45 F.4th at 1019. The direct-transfer test, in any event, does not purport to draw a line to determine whether a particular facility is "on or near" the shore. Instead, the direct-transfer test jettisons proximity-based standards altogether in favor of one that gives dispositive weight to the method of shipment.

Even if the direct-transfer test could be considered a line-drawing exercise, it would be invalid because it is "patently unreasonable, having

no relationship to the underlying regulatory problem." *LSP Transmission Holdings II, LLC v. FERC*, 45 F.4th 979, 992 (D.C. Cir. 2022) (internal quotation marks omitted). The test arbitrarily allows facilities hundreds of miles from the shore to be included as part of an LNG terminal, while excluding near-shore facilities like Nopetro's from the Commission's regulatory oversight. *See* FERC Br. 50 (citing *Alaska Gasline Dev. Corp.*, 171 FERC ¶ 61,134 (2020), and *Freeport*, 107 FERC ¶ 61,278); *see also* Pet'r Br. 63. The Commission, moreover, has never explained how that test advances the purposes of the Energy Policy Act: to preempt state regulation of import and export facilities and require the Commission to address the environmental and safety concerns that such facilities present. "The Commission's discretion" to draw lines is "bounded by the requirements of reasoned decisionmaking." *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 20 (D.C. Cir. 2010); *see also Env't Def. Fund v. FERC*, 2 F.4th 953, 975 (D.C. Cir. 2021) ("The Commission must provide a cogent explanation for how it reached its conclusions" when it draws administrative lines), *cert. denied sub nom. Spire Mo. Inc. v. Envtl. Def. Fund*, 142 S. Ct. 1668 (2022). The Commission exceeded those bounds in treating the direct-transfer test as a substitute for proximity.

The Commission's final argument in defense of the direct-transfer standard rests on 15 U.S.C. § 717r(b). Section 717r(b) provides that "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do." The Commission contends that section 717r(b) applies here because Public Citizen's rehearing petition, in contesting the Commission's adoption of the direct-transfer test, did not rely on (1) the exclusion of certain transportation methods from the definition of "LNG terminal," FERC Br. 32; and (2) the Commission's decisions in *Alaska Gasline* and *Freeport*, *id*. at 49. Even if the Commission were correct, that would not foreclose the other arguments raised against the direct-transfer standard. But the Commission's exhaustion argument is incorrect. The rehearing petition preserved the argument that Nopetro's Port St. Joe facility was sufficiently near the coast to be considered "onshore" and that the direct-transfer test was not a permissible basis for reaching a different conclusion. *See* Request for Rehearing of Public Citizen, Docket No. CP-179, at ¶¶ 12–13 (Apr. 22, 2022) (JA 55). The discussion of the exclusions in the statutory definition and the

Commission's decisions in *Alaska Gasline* and *Freeport* are not a new "objection to the order," 15 U.S.C. § 717r(b), but arguments that aid this Court in resolving the statutory questions properly before it. *See Belco Petroleum Corp.*, 589 F.2d at 683.

CONCLUSION

For the foregoing reasons and those in the opening brief, the Court should vacate the orders on review.

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Respectfully submitted,

/s/ Nandan M. Joshi

Nandan M. Joshi
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
njoshi@citizen.org

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

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I hereby certify that, on May 8, 2023, the forgoing document was served through the Court's ECF system on counsel for all parties.

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