#34 63

200404225011 Received FERC OSEC 04/22/2004 11:13:00 AM Docket# CP04-58-001

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Sound Energy Solutions) **Docket No. CP04-58-000**

REQUEST FOR CLARIFICATION OR IN THE ALTERNATIVE FOR REHEARING OF THE CITY OF LONG BEACH, CALIFORNIA

Pursuant to Section 19 of the Natural Gas Act, 15 U.S.C. § 717r, and the Federal Energy Regulatory Commission's ("FERC" or the "Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.713, the City of Long Beach, California ("Long Beach"), an intervenor herein, requests clarification or in the alternative rehearing of the Commission's March 24, 2004 "Declaratory Order Asserting Exclusive Jurisdiction" ("Declaratory Order"), 106 FERC ¶ 61,279. In support of its request, Long Beach shows as follows.

I. REQUEST FOR CLARIFICATION

Footnote one of the Declaratory Order provides as follows:

> We note that although the SES application itemizes certain facilities it proposes to construct and operate in order to move LNG from ships to storage and then to market, the 2.3 mile pipe required to link the LNG terminal to the existing SoCalGas line is not among these itemized facilities. SES states that this segment will be "constructed, owned, and operated by others." Regardless of which entity builds, owns, or operates this interconnect, this portion of pipe is an essential component of the LNG terminal. Its only purpose will be to deliver gas imported in foreign commerce to the state-regulated facilities of SoCalGas. Consequently, the 2.3 mile segment, along with the other facilities essential to the proposed importation, is subject to our exclusive jurisdiction. An amendment to the SES application or a separate application pursuant to NGA Section 3, specifically requesting authorization for this portion of the proposed project, must be filed with the Commission. [1]

[1] The Commission amplifies somewhat on this footnote in Paragraph 26 of the Declaratory Order.

Long Beach, a municipal corporation that is a "municipality" as that term is defined in Section 2(3) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717a(3), owns and operates a gas distribution system serving the City of Long Beach. It plans to build the approximately 2.3-mile segment identified in the footnote above. This takeaway facility will transport the regasified LNG through Long Beach to a point of interconnection with SoCalGas at the Long Beach city limits. Long Beach is not a "natural gas company" under the Natural Gas Act, 17 U.S.C. § 717a(1), (2), and (5), and hence is not subject to FERC jurisdiction. *E.g., Tennessee Gas Pipeline Co.*, 69 FERC ¶61,239 (1994), *reh'g denied*, 70 FERC ¶61,329 (1995); Order No. 319, FERC Stats. & Regs., Reg. Preambles 1982-1985 ¶30,477 (1983); *Somerset Serv. Gas Co.*, 59 FERC ¶61,012 (1992); *Panhandle Eastern Pipe Line Co. v. City of Rolla*, 26 FPC 736 (1961); and *Northwest Alabama Gas District*, 42 FERC ¶61,371 (1988).

In the context of LNG and other import/export proceedings, the Commission has made clear that its jurisdiction does not extend to takeaway (or sendout) facilities or to like facilities leading to the point of export where such facilities are state-regulated. [2] *E.g., Pacific Alaska LNG Co.*, Initial Decision, 8 FERC ¶63,032 (1979), *aff'd in relev. part*, 9 FERC ¶61,041 (1979), *order on reh'g*, 9 FERC ¶ 61,334 (1979); *Portal Mun. Gas Co.*, 63 FERC ¶ 61,302 (1993); *Vermont Gas Sys., Inc.*, 80 FERC ¶61,011 (1997); *Michigan Consol. Gas Co.*, 48 FERC ¶61,300 (1989), *order on reh'g*, 50 FERC ¶61,010 (1990) ; and *San Diego Gas & Elec. Co.*, 64 FERC ¶61,221 (1993). It follows that where

[2] Note also that NGA section 3 only addresses "persons" seeking to import and export natural gas, and Long Beach is not a "person" under the established FERC precedents on this subject recited in the prior paragraph above.

the takeaway facilities are municipally-owned, the Commission may not assert jurisdiction over the facilities. *Portal, supra* at p. 63,108.

While Long Beach is not certain what the Commission intended by its discussion in the referenced footnote, it is certain that Commission precedent on the question of FERC jurisdiction over takeaway facilities such as those in question here is quite clear (which precedent represent an *a fortiori* proposition here since the takeaway facility will be owned by an exempt municipality), and consistent therewith, Long Beach respectfully requests that the Commission clarify its Declaratory Order and rule that it would not assert jurisdiction over Long Beach or the 2.3-mile takeaway facilities that it intends to construct for purposes of interconnecting the LNG facility with SoCalGas.

II. REQUEST FOR REHEARING

If the Commission declines to clarify its order as requested above, then Long Beach submits that the Commission has committed error in footnote one of the Declaratory Order and the accompanying discussion in Paragraph 26 thereof and that it should grant rehearing for the purpose of rectifying that error for the reasons discussed below.

A. Commission Precedent Is Clear That Takeaway Facilities from Section 3 Projects Are Not FERC-Jurisdictional.

It is abundantly clear from a long line of Commission cases addressing this very issue that the 2.3-mile segment to be built by Long Beach as a takeway facility from the LNG regasification plant is not subject to FERC jurisdiction (unless, of course, the

transportation is in interstate commerce, which is not the case here[3]). The Initial Decision in *Pacific Alaska LNG Co., et al.*, 8 FERC ¶ 63,032, explored this issue in some detail. There the takeaway facility was a 111.7-mile, 34-inch line (Gosford pipeline) receiving regasified LNG "at the tailgate of the regasification plant." 8 FERC at p. 65,292. The takeaway facility was to be a joint venture between Pacific Gas & Electric ("PGE") and Southern California Gas ("SoCalGas"). *Id.* PGE and SoCalGas did not seek FERC authorization for such facility on the ground that "such facility would be exempt from the provisions of the Natural Gas Act by operation of Section 1(c) thereof, the 'Hinshaw Amendment.'" *Id.* at p. 65,298. After exhaustive analysis, the Presiding Judge determined that "no reason appears for refusing to follow its [FERC's] consistent, rational application of Section 1(c) in the instant proceeding. Accordingly the Presiding Judge finds and concludes that the Gosford pipeline facilities will be exempt from Federal jurisdiction pursuant to Section 1(c) of the [Federal Power] Act." *Id.* at p. 65,299.[4]

The Presiding Judge's order was affirmed in all respects relevant to the issue discussed above, with the Commission noting as follows:

---

[3] Even if the movement of the gas were in interstate commerce, if the pipeline is municipally-owned and does not cross a state line, the Commission would have no jurisdiction. *E.g., Tennessee Gas Pipeline Co.*, 69 FERC ¶61,239 (1994), *reh'g denied*, 70 FERC ¶61,329 (1995); Order No. 319, FERC Stats. & Regs., Reg. Preambles 1982-1985 ¶30,477 (1983). In *Intermountain Municipal Gas Agency*, 97 FERC ¶61,359 (2001), *reh'g denied*, 98 FERC ¶61,216 (2002), the FERC ruled that pipeline facilities owned by municipalities that operated in more than one state were subject to NGA jurisdiction. Similarly, a June 7, 2002 General Counsel's letter ("GC letter") found that a municipality, the City of Duluth, Minnesota, would be subject to NGA jurisdiction if it built a 4.7 mile pipeline that operated in Minnesota and Wisconsin. Thereafter, the FERC without discussing the issue of jurisdiction issued a limited term certificate to the City to construct and operate the pipeline. *City of Duluth*, 103 FERC ¶61,150 (2003).

[4] The Presiding Judge noted that his finding and conclusion "does not relieve the Commission of the duty in this proceeding to inquire into and pass upon the cost, environmental impact and other factors respecting the Gosford pipeline as part of its 'corollary authority and responsibility to look into "all factors bearing on the public interest"...' *Henry v F.P.C.*, 513 F.2d 395, 405 (D.C. Cir. 1975)." Long Beach does not dispute the Commission's "corollary" authority and perhaps that is all that the Commission intended to encompass in the disputed first footnote in the Declaratory Order.

> Once the LNG is revaporized and leaves Western's facilities, the gas will enter a pipeline for transportation to Gosford. The pipeline will be an intrastate facility owned by PG&E and SoCal and will be under the jurisdiction of the California Public Utilities Commission.[5]

The Commission has frequently made clear that just as its jurisdiction does not extend beyond LNG project facilities to takeaway pipeline facilities, likewise its jurisdiction does not extend from import facilities at the Canadian/U.S. border to takeaway pipeline facilities. In *Vermont Gas Systems*, 80 FERC ¶ 61,011 (1997), the Commission, in rejecting the requests of several intervenors that it condition the import on Vermont Gas providing unbundled service, made clear the limits of its jurisdiction:

> The border facilities are the only portion of this project under the Commission's jurisdiction. Vermont Gas is a Hinshaw pipeline which will use the authorization to import gas transported in foreign commerce solely for consumption within Vermont. As a Hinshaw pipeline, Vermont Gas' operations are regulated by the Vermont Public Service Commission. We believe that the Commission should not impose an open access condition for section 3 authorizations granted to Hinshaw pipelines where rates and service remain subject to regulation by state commissions. [6]

Just as the takeaway facilities *from* a Canadian/U.S. import project are not FERC-jurisdictional, so also are the facilities transporting gas *to* a project for expectation out of the United States not subject to the Commission's jurisdiction. In *San Diego Gas & Electric Co., et al.*, 64 FERC ¶ 61,221 (1993), San Diego Gas & Electric Company ("SDG&E") was seeking NGA section 3 authorization to export gas to Mexico. Regarding the facilities to be built to take gas to the border crossing, the Commission opined as follows:

> As stated, SoCal and SDG&E are currently designated Hinshaw pipelines regulated by the CPUC. They proposed to construct incremental facilities on their already existing Hinshaw systems to provide the export service to Mexico, as well as to service increased native-load needs. We find that the proposed facilities will not be subject to the Commission's NGA jurisdiction. First, the new facilities will be located wholly within California and the rates and services over those facilities will be regulated by the CPUC. Second, the services that SoCal and SDG&E intend to provide with these new facilities will not be subject to the Commission's jurisdiction. Specifically, the gas used to serve native-load needs will be consumed in California, and the gas used to provide the export service will be in foreign commerce and not subject to the Commission's Section 7 jurisdiction, as discussed above. Accordingly, we conclude that the construction and operation of the proposed incremental facilities on the parties' respective Hinshaw systems are not subject to the Commission's jurisdiction under the NGA. [7]

In the same vein in *Portal Municipal Gas Co.*, 63 FERC ¶ 61,302 (1993), Portal Municipal, a state-chartered municipality performing local distribution functions, was seeking NGA section 3 authorization to construct a meter station, emergency shutdown facilities, and import facilities at the Canadian/U.S. border consisting of 2400 feet of 3-inch pipeline. In approving the application, the Commission made clear that "[t]he Commission's authority under section 3 is limited to approval of the site of the import/export and the construction and operation of the border facilities." 63 FERC at p. 63,108.

In brief, the Commission case law is quite unambiguous to the effect that while the Commission has NGA section 3 jurisdiction over import/export facilities, be it an LNG facility or a border crossing, it does not have NGA section 3 jurisdiction over the facilities used to transfer the natural gas from or to the LNG or border facility. Jurisdiction over such facilities would have to exist independently of NGA section 3. And as discussed below it is insufficient to assert jurisdiction on the ground that such facilities are "essential facilities" since all facilities taking gas to or away from an import or export are essential in that the import/export could not occur without such facilities – a

[5] 9 FERC ¶ 61,041 at p. 61,110 n. 16.
[6] 80 FERC at p. 61,030.
[7] 64 FERC at p. 62,653 (footnote omitted).

200404225011 Received FERC OSEC 04/22/2004 11:13:00 AM Docket# CP04-58-001

fact that has never been relied upon by the Commission as a basis for asserting NGA section 3 jurisdiction over takeaway facilities.

B. The 2.3-Mile Pipeline Connecting the LNG Facility to SoCalGas Is Indisputably a Takeaway Facility.

The Sound Energy Solutions ("SES") Application in this proceeding accurately describes the takeaway facility as a natural gas pipeline, 36 inches in diameter, and approximately 2.3 miles long, designed to interconnect with SoCalGas Line 765, a 26-inch diameter pipeline. The route to be followed by the 2.3-mile segment is described in Resource Report 1 appended to the SES Application (pp. 18-19).

The 2.3-mile pipeline is clearly not a part of the LNG facility for which SES seeks authorization. SES recognized as much by omitting the facilities from its Application, except to explain that they would be built by a third party. The 2.3-mile segment to be built by Long Beach is a takeaway facility indistinguishable from those discussed in the cases in Section II.A, above. The fact that it is shorter than, for example, the Gosford pipeline described in the *Pacific Alaska LNG* case is irrelevant. Likewise, the fact that the 2.3-mile segment has a different owner from the line to which it is interconnecting due to the fact that Long Beach seeks to be responsible for transporting the gas through the City to interconnect with SoCalGas facilities at the city limits, is also inconsequential in assessing whether the Commission has NGA section 3 jurisdiction over the facilities.

C. No Regulatory Gap Exists Requiring the Commission To Assert NGA Jurisdiction Over the Takeaway Pipeline

Though footnote 1 is silent on the subject of a regulatory gap, Paragraph 26 of the Declaratory Order (¶ 26) states that "[f]ederal regulation is necessary to avoid the regulatory gap identified in *Distrigas*, because the facilities at issue will have no other

function than to receive and deliver imported gas from the terminal directly into local facilities." First, the essential function of all takeaway facilities is to receive and deliver the imported gas downstream, and the Commission has never tried to use that as the basis for asserting jurisdiction over such facilities – quite the contrary, takeaway facilities like those in *Pacific Alaska LNG* were explicitly addressed and found outside the FERC's section 3 jurisdiction. *See also Yukon Pacific Corp.*, 39 FERC ¶ 61,216 at p. 61,759 (1987). In brief, all LNG and cross-border projects have facilities that take the gas to or away from the facility, and hence are essential for that purpose. But that has never been considered sufficient to assert jurisdiction over such facilities; rather quite the opposite is true, as the cases identified above make clear.

Further, there will be no regulatory gap, since the 2.3-mile segment will be subject to the jurisdiction of Long Beach. The Commission has, in fact, rejected attempts to use the "regulatory gap" argument as a basis to circumvent the explicit Congressional exemption of municipalities from NGA jurisdiction. *E.g.*, *Tennessee Gas Pipeline Co.*, 69 FERC ¶61,239, at pp. 61,903-905 (1994), *reh'g denied*, 70 FERC ¶61,329 (1995).

In summary, there is no justifiable factual or legal basis for the Commission to assert jurisdiction over the 2.3-mile segment that Long Beach intends to construct to take LNG from the SES project through the City to SoCalGas.

III. CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Commission should grant clarification of the Declaratory Order and rule that it would not assert jurisdiction over the 2.3-mile segment connecting the LNG facility to the SoCalGas facilities at the city

limits if such facility were built and owned by an exempt municipal utility; in the alternative, if the Commission denies such clarification, it should grant rehearing of its Declaratory Order, and on rehearing it should determine that it has no jurisdiction over the 2.3-mile segment if it is owned and operated by a municipal utility like Long Beach.

Respectfully submitted,

City of Long Beach, California

By: */s/ William T. Miller*

William T. Miller
Miller, Balis & O'Neil, P.C.
1140 19th Street, N.W.
Washington, D.C. 20036
Phone: 202-296-2960
Email: wmiller@mbolaw.com

Carol A. Shaw, Deputy City Attorney
Robert E. Shannon, City Attorney
Long Beach City Attorney's Office
City of Long Beach, City Hall
333 W. Ocean Boulevard, 11th Floor
Long Beach, CA 90802-4664
(562) 570-2224
Email: carol_shaw@longbeach.gov

Its Counsel

Dated: April 22, 2004

200404225011 Received FERC OSEC 04/22/2004 11:13:00 AM Docket# CP04-58-001

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing "Request for Clarification or in the Alternative for Rehearing of the City of Long Beach, California" by depositing copies thereof in the United States mail, first-class postage prepaid, upon the persons designated for service on the service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 22nd day of April 2004.

/s/ William T. Miller
William T. Miller
Miller, Balis & O'Neil, P.C.
1140 19th Street, N.W.
Washington, D.C. 20036
Phone: 202-296-2960
Email: wmiller@mbolaw.com

)mission Contents