IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-73650 & 04-75240

CALIFORNIANS FOR RENEWABLE ENERGY, INC.

&

CALIFORNIA PUBLIC UTILITIES COMMISSION

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION

Respondent.

On Petition for Review of an Order of the Federal Energy Regulatory Commission
FERC Docket Nos. CP04-58-000 and CP04-58-001

OPENING BRIEF OF PETITIONER CALIFORNIA PUBLIC UTILITIES COMMISSION

January 3, 2005

Randolph L. Wu, SBN 78651
Arocles Aguilar, SBN 94753
Harvey Y. Morris, SBN 87902

Attorneys for Petitioner
California Public Utilities Commission
505 Van Ness Avenue, Room 5138
San Francisco, California 94102
(415) 703-1086

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF JURISDICTION 3

ISSUES PRESENTED 4

STATEMENT OF THE CASE 5

STATEMENT OF FACTS 8

SUMMARY OF ARGUMENT 12

STANDARD OF REVIEW 14

ARGUMENT 16

I. The FERC's Assertion Of Jurisdiction Over The Proposed LNG Facilities Is Contrary To The Plain Meaning Of Section 3 of The Natural Gas Act 16

A. Section 3 of the Natural Gas Act Does Not Grant the FERC Jurisdiction Over LNG Facilities 16

1. Section 3, on its face, pertains only to imports and exports of gas, not to gas facilities 16

2. The "terms and conditions" clause in section 3(a) does not give the FERC authority over facilities 18

B. The Legislative History of the EPAct Does Not Support the FERC's Interpretation of Section 3, as Amended 22

C. The FERC's Finding of Congressional Acquiescence to FERC's Purported Practice Is Contrary to the Law 25

II. Even If The FERC Has Authority To Condition Authorization Of SES's Imports With Requirements As To Its Facilities, That Would Not Confer Jurisdiction to FERC Over the Proposed Facilities 31

A. Congress Did Not Delegate to the FERC Jurisdiction to Preempt State Authority over Intrastate Facilities, Which Are Not Used for Sales or Transportation in Interstate Commerce 31

B. The FERC's Assertion of Jurisdiction in the Present Case Is Contrary to the Purpose and Coverage of the Natural Gas Act, Because There Is No Interstate Commerce Involved 35

C. The FERC May Not Use Its Conditioning Authority to Circumvent Limits on Its Delegated Authority under Section 1(b) 38

D. The FERC's Assertion of Jurisdiction over Foreign Commerce Is Arbitrary, Capricious and Not the Product of Reasoned Decisionmaking 41

1. The FERC's unexplained and unsupported departure from its previous precedent on foreign commerce is arbitrary and capricious 41

2. The FERC's expansive interpretation of foreign commerce is contrary to Congress's limited occupation of its Commerce Clause powers with the enactment of the Natural Gas Act 43

E. FERC's Purported Findings of a Need for Preempting State Safety Jurisdiction Are Not Based Upon Record Evidence And Are Inconsistent With Provisions in the NGPSA 47

III. The FERC Has No Statutory Basis To Claim That The CPUC Is Preempted From Regulating SES As A California Public Utility 51

CONCLUSION 56

CERTIFICATION OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1 57

STATEMENT OF RELATED CASES

STATUTORY ADDENDUM

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Federal Cases

Algonquin Gas Transmission Co. v. FPC, 534 F.2d 952 (D.C. Cir. 1976)............41

Altamont Gas Transmission Co. v. FERC, 92 F.3d 1239 (D.C. Cir. 1996)...........41

American Ass'n of Med Colleges v. United States, 217 F.3d 770 (9th Cir. 2000)..48

American Rivers v. FERC, 201 F.3d 1186 (9th Cir. 2000)....................................15

ANR Pipeline Co. v. FERC, 771 F.2d 507 (D.C. Cir. 1985) 14

Arkansas Electric Cooperative v. Arkansas Public Service Commission, 461 U.S. 375 (1983)...54

Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987)..................41

Atlantic City Elec. Co. v. FERC, 295 F.3d 1 (D.C. Cir. 2002) 31

BankAmerica Corp. v. U. S., 462 U.S. 122 (1983) 21

Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994) 45

Border Pipe Line Co. v. FPC, 171 F.2d 149 (D.C. Cir. 1948) 27, 28, 38

California v. FERC, 877 F.2d 743 (9th Cir. 1989)...14

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)...15

City of Centralia, Wash. v. FERC, 799 F.2d 475 (9th Cir. 1986)..........................14

City of Fort Morgan v. FERC, 181 F.3d 1155 (10th Cir. 1999).............................43

Clinton v. Acequia, Inc., 94 F.3d 568 (9th Cir.1996)...48

Colorado Interstate Gas Co. v. FPC, 324 U.S. 581 (1945)....................................37

Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1974)............23

Consumer Product Safety Comm. v. GTE Sylvania, 447 U.S. 102 (1980)............25

Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983)..............45

Cramer v. Commissioner, 64 F.3d 1406 (9th Cir. 1995).................................17, 18

Distrigas Corporation v. FPC, 495 F.2d 1057 (D.C. Cir. 1974)..................... passim

Duckworth v. Arkansas , 314 U.S. 390 (1941)...45

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)......................15

Federal Election Comm'n v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981)...11

Federal Maritime Commission v. Seatrain Lines, Inc., 411 U. S. 726 (1973)........31

Ford otor Co. v. EPA, 606 F.2d 1293 (9th Cir. 1979)...26

FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944)...32

FPC v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1948).............................40

FPC v. Southern California Edison Co., 376 U.S. 205 (1964)...............................37

General Motors Corp. v. Tracy, 519 U.S. 278 (1997)..32

Henry v. FPC, 513 F.2d 395 (D.C. Cir. 1975)...40

Hollister Ranch Owners Ass'n v. FERC, 759 F.2d 898 (D.C. Cir. 1985)................9

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960)....................45

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).........................44

Lewis v. Younger, 653 F.2d 1258 (9th Cir. 1980)...51

Lorillard v. Pons, 434 U.S. 575 (1978)..27

Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986)....................16, 38, 53

Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).......................14

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)..14

National Fuel Gas Supply v. Public Service Commission., 894 F.2d 571 (2d Cir. 1990) 39

Natural Gas Pipeline Co. v. FERC, 765 F.2d 1155 (D.C. Cir. 1985)......................29

New York v. FERC, 535 U.S. 1 (2002) 37

Pacific Gas & Elec. Co. v. FERC, 746 F.2d 1383 (9th Cir. 1984)..........................14

Panhandle E. Pipeline Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329 (1951) 44

Panhandle E. Pipeline v. Pub. Serv. Comm'n of Indiana, 332 U. S. 507 (1947) 32, 33, 43

PG&E Co. v. California, 350 F.3d 932 (9th Cir. 2003)..32

Reno v. Bossier Parish School Bd., 528 U.S. 320 (2000) 20

Schism v. United States, 316 F.3d 1259 (Fed. Cir. 2002).......................................27

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988).....................................39

Skokomish Indian Tribe v. FERC, 121 F.3d 1303 (9th Cir. 1997) 15

So. Natural Gas Co. v. FERC, 780 F.2d 1552 (11th Cir. 1986).............................29

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 26, 27

Sporhase v. Neb., 458 U.S. 941 (1982) 48

State of California v. FERC, 383 F.3d 1006 (9th Cir. 2004)..................................15

Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv., 340 F.3d 969 (9th Cir. 2003) 21

U.S. v. United Mine Workers of America, 330 U.S. 258 (1947) 25

United Gas Pipe Line Co. v. FPC, 385 U.S. 83 (1966) 34, 40

United States v. Ron Pair Enterprises, 489 U.S. 235 (1989)............................22, 30

W. Virginia Pub. Serv. Comm'n v. DOE, 681 F.2d 847 (D.C. Cir. 1982).............29

Wardair Canada Inc. v. Florida Dep't. of Revenue, 477 U.S. 1 (1986)..................45

State Cases

Postal Telegraph-Cable Co. v. R.R. Comm'n, 197 Cal. 426, 241 P. 81 (1925) 8

San Diego Gas & Elec. Co. v. Sup. Ct., 13 Cal. 4th 893, 920 P.2d 669 (1996)........8

Federal Statutes

Energy Policy Act of 1992, Pub.L. 102-486, tit. II, § 201, 106 Stat. 2866 (codified as amended 15 U.S.C. § 717b(a)-(c))..17, 18

Federal Power Act § 201(a), 16 U.S.C. § 824(a)...37

Federal Power Act § 201(b), 16 U.S.C. § 824(b) 37

Natural Gas Act § 1(a), 15 U.S.C. § 717(a)... 36, 37

Natural Gas Act § 1(b), 15 U.S.C. § 717(b) .... passim

Natural Gas Act § 2(6), 15 U.S.C. 717a 14, 53

Natural Gas Act § 3, 15 U.S.C. 717b.. passim

Natural Gas Act § 3(a), 15 U.S.C. 717b(a).. passim

Natural Gas Act § 3(b), 15 U.S.C. 717b(b) 36

Natural Gas Act § 3(c), 15 U.S.C. 717b(c)... passim

Natural Gas Act § 4, 15 U.S.C. 717c...39

Natural Gas Act § 5, 15 U.S.C. 717d...39

Natural Gas Act § 7, 15 U.S.C. 717f .... passim

Natural Gas Act § 7(a), 15 U.S.C. 717f(a) 34

Natural Gas Act § 7(b), 15 U.S.C. 717f(b)..34

Natural Gas Act § 19(b), 15 U.S.C. 717r(b) 4

Natural Gas Pipeline Safety Act, 49 U.S.C. § 60101(a)(3) 34

Natural Gas Pipeline Safety Act, 49 U.S.C. § 60101(a)(9) 7,35

Natural Gas Pipeline Safety Act, 49 U.S.C. § 60101(a)(14)(A) 34

Natural Gas Pipeline Safety Act, 49 U.S.C. § 60103(a).............................. 3, 49, 50

Natural Gas Pipeline Safety Act, 49 U.S.C. § 60104 .... passim

Natural Gas Pipeline Safety Act, 49 U.S.C. § 60105 .... passim

Natural Gas Pipeline Safety Act, 49 U.S.C. § 60117(h)(3)....................................50

State Statutes

Cal. Pub. Util. Code §§ 216, 221, 222, 226, 227..11, 51, 55

Cal. Pub. Util. Code § 701 55

Cal. Pub. Util. Code § 761 55

Cal. Pub. Util. Code § 854 .... 53, 55

Federal Legislative Materials

H.R. REP. NO. 102-474(1) (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954...........23

H.R. REP. NO. 102-474(IX) (1992), *reprinted in* 1992 U.S.C.C.A.N. 2422 23

H.R. CONF. REP. NO. 102-1018 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2472 23

H.R. REP. NO. 109-792 accompanying the Consolidated Appropriations Act of 2005 *reprinted in* 150 CONG. REC. H10560 (Nov. 19, 2004) 25

138 CONG. REC. H11404 (October 5, 1992) (Statement of Rep. Sharp)....... 24, 25

Federal Regulations

49 C.F.R. Part 193 (2004)..9, 49

53 Fed. Reg. 47084 (November 21, 1988) 8

Other Authorities

Application of Mather Field Utilities, Inc., 1997 Cal. PUC LEXIS 348; 72 Cal. PUC 2d 333 (1997) 11

Columbia LNG Corp., 48 FPC 723 (1972)....................42

Distrigas Corp., 58 FPC 2589 (1977) 28, 42

Dynegy LNG Production Terminal L.P., 97 FERC ¶ 61,231 (2001)....................22

Pacific Indonesia LNG Co., 1 ERA ¶ 70,101 (1977) 29

Sound Energy Solutions, 106 FERC ¶ 61,279 (2004).................... passim

Sound Energy Solutions, 107 FERC ¶ 61,263 (2004).................... passim

Sound Energy Solutions, 108 FERC ¶ 61,155 (2004)....................8, 52

INTRODUCTION

The present case involves the Federal Energy Regulatory Commission's ("FERC") attempt to preempt the States' health and safety jurisdiction over hazardous, intrastate liquefied natural gas ("LNG") facilities.[1]

For more than 80 years, the California Public Utilities Commission ("CPUC") has protected the people of the State of California from the health and safety risks posed by intrastate facilities of California public utilities, including natural gas facilities. In the present case, Sound Energy Solutions ("SES"), a California corporation, has proposed to construct LNG facilities at the Port of Long Beach, California. Although these are hazardous facilities, the proposed site would be blocks away from one of the busiest streets and numerous commercial establishments in the City of Long Beach and two miles or less from residential neighborhoods in the City of Long Beach (including downtown Long Beach) and the City of Los Angeles. It would also be constructed on landfill in an area with 27 active earthquake faults within approximately 100 miles.

In its orders challenged herein, FERC asserts exclusive jurisdiction and purports to preempt the CPUC's jurisdiction. To do so, FERC relies upon section 3 of the Natural Gas Act, 15 U.S.C § 717b, even though the plain meaning of its

[1] For the sake of convenience, references to the "FERC" herein are to the Federal Energy Regulatory Commission or its predecessor, the Federal Power Commission.

language does not confer authority upon FERC over the proposed intrastate LNG facilities. Moreover, FERC and SES agree that SES's sales would only be to California customers and there would be no interstate commerce involved in the sales or transportation of the natural gas from SES's proposed LNG facilities. These are significant jurisdictional facts, because in section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), Congress only delegated authority to the FERC over sales or transportation in interstate commerce and no other sales or transportation. Thus, in more than 66 years since the enactment of the Natural Gas Act, no court has ever held that state regulation of intrastate natural gas facilities was preempted when there was no interstate commerce involved.

The CPUC is not challenging the need for LNG imports, but has asserted its safety jurisdiction under state law to decide the siting in California where proposed LNG facilities may be safely located. In the FERC's unprecedented and unlawful expansion of its purported authority, the FERC relies upon findings that it needs to protect investors from illegitimate State safety requirements. However, there is no evidence, let alone substantial evidence in the record, to support the FERC's findings. Indeed, the CPUC is certificated by the United States Department of Transportation ("DOT") to enforce natural gas pipeline safety standards, including federal LNG safety standards, because the CPUC has adopted the federal standards. *See* Natural Gas Pipeline Safety Act ("NGPSA"), 49 U.S.C. §§

60104(c), 60105. Moreover, the CPUC has raised safety concerns, in light of the densely populated area and seismic problems around this proposed site and the need to at least consider alternative sites in more remote areas, which are totally consistent with the congressional mandate for LNG siting safety standards. *See* 49 U.S.C. § 60103(a)(2),(4),(6).

SES's proposed LNG project, which would put at risk neighborhoods in two of California's most populated cities (i.e., Los Angeles and Long Beach), raises issues that go to the core of the State's police powers - the sovereign authority of the State to protect the health and safety of its citizens. It is contrary to the purpose of the Natural Gas Act for FERC to attempt to expand its authority in order to preempt the CPUC's safety jurisdiction over a California public utility's intrastate LNG facilities. In the present case, FERC has exceeded the limited authority delegated to it under sections 1(b) and 3 of the Natural Gas Act, and, therefore, it can not preempt the police powers of the State of California.

STATEMENT OF JURISDICTION

Agency jurisdiction: FERC has very limited jurisdiction over SES's proposed imports of LNG pursuant to section 3 of the Natural Gas Act, 15 U.S.C. § 717b, but FERC has no jurisdiction over SES's proposed intrastate LNG facilities.

Appellate jurisdiction: This Court has jurisdiction over the CPUC's Petition for Review pursuant to section 19(b) of the Natural Gas Act, 15 U.S.C § 717r(b).

Timeliness: FERC issued its final order denying rehearing on June 9, 2004. ER 219. The CPUC timely filed its Petition for Review on August 5, 2004 within 60 days of FERC's order.

ISSUES PRESENTED

1. Whether the conditioning authority for import and export applications in subsection 3(a) of the Natural Gas Act, 15 U.S.C. § 717b(a), provides FERC with authority to regulate SES's proposed intrastate LNG facilities, notwithstanding: (1) the lack of any reference in section 3 of the Natural Gas Act, 15 U.S.C. § 717b, to FERC authority over "facilities," and (2) the language in subsection 3(c) of the Natural Gas Act, 15 U.S.C. § 717b(c), which expressly precludes FERC from even imposing conditions upon applications to import LNG. This issue was presented to FERC at ER 057-061, 112-113, 119-130, 134-137.

2. Assuming *arguendo* FERC could utilize the conditioning authority in subsection 3(a) of the Natural Gas Act, may FERC use the conditioning authority to circumvent express limits on the FERC's delegated authority under section 1(b), the coverage section of the Natural Gas Act, 15 U.S.C. § 717(b), by regulating

non-jurisdictional, intrastate LNG facilities? This issue was presented to FERC at ER 056-057, 114-115, 130-134, 139-146.

3. Whether FERC's deviation from its previous decisions, which addressed where foreign commerce ends and interstate or intrastate commerce begins on intrastate gas pipeline facilities, is arbitrary and capricious, because it relies upon mere conclusory statements and an overly broad view of regulation of foreign commerce. This issue was presented to FERC at ER 113-114, 146-155.

4. Whether the lack of any statutory basis for FERC to regulate SES, as a company, precludes FERC from purporting to preempt state regulation of SES, as a California public utility. This issue was presented to FERC at ER 052-056, 118-119, 184-189.

STATEMENT OF THE CASE

The CPUC's petition for review challenges FERC orders asserting exclusive jurisdiction over the siting, construction and operation of SES's proposed intrastate LNG facilities at the Port of Long Beach, California. The FERC orders purport to preempt the CPUC's jurisdiction over SES's proposed LNG facilities.

On January 26, 2004, SES filed with FERC an application ("SES App.") for authority to site, construct and operate SES's proposed LNG facilities at the Port of Long Beach, California. SES App. at 1-2, ER 004-005. On February 23, 2004, the CPUC timely filed its notice of intervention and protest ("CPUC Protest"),

which questioned FERC's jurisdiction, raised significant safety concerns necessitating a hearing, and explained the need to consider alternative, remote sites (such as the two pending LNG proposals at sites more than 10 miles offshore in Southern California). CPUC Protest at 1-19, ER 051-069.[2] On March 24, 2004, FERC issued its "Declaratory Order Asserting Exclusive Jurisdiction," *Sound Energy Solutions*, 106 FERC ¶ 61,279 (2004) ("March 24 Order"), ER 080-096, which purported to preempt the CPUC's jurisdiction and which rejected the request for a hearing but set this application for a technical conference. *See* March 24 Order at PP 3, 37, 39,[3] ER 080, 094-095. The FERC issued its declaratory order in advance of its decision on the merits in order to resolve the State and Federal jurisdictional conflict by providing a vehicle for court review of this determination. *See* March 24 Order at P 3, ER 080.

On April 23, 2004, the CPUC filed its timely request for rehearing ("CPUC Rehearing Request"), ER 098-190, challenging, among other things, FERC's statutory basis for asserting jurisdiction over SES's LNG facilities and FERC's

---

[2] Accompanying the CPUC Protest, as Attachment B, was the Affidavit of Wendy Maria Phelps ("Phelps Affidavit"), ER 073-078, which established how close the proposed LNG site would be to residential and commercial neighborhoods in the City of Long Beach and the City of Los Angeles.

[3] The CPUC's cites to "P" in the FERC orders are to the numbered paragraphs within the orders. This is consistent with the FERC's practice and recommendation for citations announced on December 19, 2001 in the FERC's "Notice Regarding Paragraph Numbering in Commission Orders." This form of citation facilitates finding the cited excerpt in the Excerpts of Record.

findings attempting to justify preempting the CPUC's jurisdiction.[4] On June 9, 2004, the FERC issued its "Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order," *Sound Energy Solutions,* 107 FERC ¶ 61,263 (2004) ("Rehearing Order"), ER 219-267, which denied the rehearing requests of the CPUC and others on the issues concerning safety, but the FERC clarified that it was not preempting other state agencies on certain environmental issues for which they have been delegated authority under federal laws.[5]

On August 5, 2004, the CPUC timely filed its petition for review in the D.C. Circuit. Based upon the FERC's unopposed motion, the D.C. Circuit transferred the petition to the Ninth Circuit, where it was assigned No. 04-75240 and subsequently consolidated with *Californians for Renewable Energy, Inc. v. FERC*, No. 04-73650.

On August 5, 2004, the FERC issued an order clarifying its prior order in response to the California Coastal Commission's request for rehearing. *See Sound*

---

[4] Accompanying the CPUC Rehearing Request, as a separate document, was the Supplemental Affidavit of Wendy Maria Phelps ("Supp. Phelps Affidavit"), ER 191-197, which, among other things, authenticated documents (attached thereto as Exhibits C and D) providing details of certain accidents at LNG facilities. ER 198-214.

[5] In its Rehearing Order at P 74, ER 252, the FERC asserts that SES's proposed LNG facilities would be subject to the FERC's jurisdiction, and, therefore, these facilities would not be subject to the CPUC's safety oversight under the NGPSA, 49 U.S.C. §§ 60101(a)(9) and 60104(c), even though the CPUC is a DOT-certificated state agency pursuant to 49 U.S.C. § 60105. The CPUC challenges the FERC's assertion of jurisdiction over these intrastate gas pipeline facilities.

Energy Solutions, 108 FERC ¶ 61,155 (2004). As of this date, the FERC has not issued a decision on the non-jurisdictional issues.

STATEMENT OF FACTS

The CPUC is the state agency with comprehensive jurisdiction over the safety and the siting of all public utilities (except the siting of thermal power plants) in the State of California. *See San Diego Gas & Elec. Co. v. Sup. Ct.,* 13 Cal. 4th 893, 923-25, 920 P.2d 669, 686-88 (1996). The CPUC has been protecting the health and safety of the people of the State of California from hazards of intrastate natural gas or electric facilities in California for more than 80 years.[6]

LNG is highly concentrated natural gas. LNG and hydrocarbons extracted from LNG are potentially very dangerous. According to the DOT, compared to an accidental release of natural gas, a release of LNG from a facility poses a much greater risk "for people living near LNG storage facilities where the sudden release of a large volume of LNG can engulf surrounding areas with a flammable vapor cloud and create the potential for conflagration." 53 Fed. Reg. 47084, 47087 (November 21, 1988). For example, in 1944, there was an accident in Cleveland where LNG spilled from storage tanks, formed into vapor clouds that directly affected one quarter square mile, generated waves of heat which blistered buildings

[6] *See, e.g., Postal Telegraph-Cable Co. v. R.R. Comm'n,* 197 Cal. 426, 241 P. 81 (1925)(CPUC, previously known as the California Railroad Commission, upheld on requiring relocation of hazardous transmission lines.)

one half mile away, and resulted in fires and explosions that killed 130 people. *See* Supp. Phelps Affidavit at 3-4 and its Exhibit C at 25, ER 193-194, 201. More recently, on January 19, 2004, there was an accident caused by a vapor cloud at an LNG export facility in Algeria, where 27 people were killed. *See* Supp. Phelps Affidavit at 6 and its Exhibit D at 13, 17-18, ER 196, 213-214.

The CPUC has certification from the DOT pursuant to the NGPSA, 49 U.S.C. § 60105, and receives matching funds from the federal government for the CPUC's natural gas pipeline safety inspectors. In the CPUC's General Order No 112-E, the CPUC has adopted the DOT's federal pipeline safety regulations, including the LNG safety regulations in 49 C.F.R. Part 193. *See* CPUC Protest at 5, ER 055; CPUC Rehearing Request at 58-59, ER 159-160.

The last time LNG facilities were proposed in California was in the 1970s, when both the CPUC and the FERC held hearings and issued certificates approving LNG facilities in a remote area at Point Conception, California. However, these facilities were never constructed, because market forces changed and the LNG was no longer needed at that time. *See Hollister Ranch Owners Ass'n v. FERC,* 759 F.2d 898, 899-903 (D.C. Cir. 1985) (description of background of case and ruling on mootness).

In the present case, SES has proposed to site hazardous LNG facilities at the Port of Long Beach, California in a densely populated area near the border of the

City of Long Beach and the City of Los Angeles. In addition to the workers at the Port of Long Beach, a major street (with more than 50,000 vehicles per day) and commercial establishments are as close as four blocks away, and residential and commercial neighborhoods in Long Beach and Los Angeles, including downtown Long Beach, are two miles or less from the proposed site. *See* CPUC Protest, Attachment B, Phelps Affidavit at 2- 6, ER 074-078. The Port of Long Beach is built on landfill that could be affected by substantial ground motion caused by up to 27 different active earthquake faults. SES's Resource Report No. 6 at 4-11, ER 036-043.

SES's proposed intrastate LNG facilities at the Port of Long Beach, include a berth (where LNG would be unloaded from ships), storage tanks,[7] vaporizers (to regasify the LNG into natural gas) and an intrastate pipeline used to deliver natural gas into Southern California Gas Company's ("SoCalGas") intrastate natural gas pipelines, which are regulated by the CPUC and exempt from the FERC's jurisdiction. SES App. at 4-5, 9-10, ER 007-008, 012-013. SES, which is a California corporation, would use the LNG facilities to sell natural gas and LNG only in the State of California. SES App. at 3-8, ER 006-011. The FERC, the

[7] The capacity of SES's two proposed LNG storage tanks is for approximately 50 times the volume of LNG that spilled from the two LNG storage tanks in Cleveland in 1944. *See* Supp. Phelps Affidavit at 5-6, ER 195-196.

CPUC, and SES are "in accord that the SES proposal will not involve interstate commerce." *See* March 24 Order at P 12, ER 083.

Because SES's proposed LNG facilities would make it a public utility subject to the CPUC's jurisdiction under state law (*i.e.*, Cal. Pub. Util. Code §§ 216, 221, 222, 226, 227), on October 30, 2003, the CPUC sent to SES a letter informing SES that it must apply for and receive a certificate from the CPUC before SES may construct its proposed LNG facilities. CPUC Protest at 3, and its Attachment A, ER 053, 071. [8] On January 26, 2004, SES instead filed only with FERC an application for authority to site, construct and operate SES's proposed intrastate LNG facilities at the Port of Long Beach. SES App. at 1, ER 004.

As of the date, SES has not applied for a certificate from the CPUC nor answered questions raised in the CPUC's protest, such as by demonstrating that the mitigation measures SES has proposed will withstand a major earthquake. Although the CPUC raised serious safety concerns in its protest at the FERC, the FERC did not set this matter for hearing. Instead, the FERC set it for a technical conference, which does not provide for discovery, cross-examination of witnesses, or a hearing transcript. *See* Rehearing Order at PP 60, 67, ER 247, 249.

---

[8] The CPUC reviews potential safety and environmental issues in certificate proceedings. *See, e.g., Application of Mather Field Utilities, Inc.,* 1997 Cal. PUC LEXIS 348; 72 Cal. PUC 2d 333 (1997) (ordering paragraph no. 4 required compliance with CPUC General Order 112-E and the federal pipeline safety regulations, 49 CFR Parts 190, *et seq.)*

SUMMARY OF ARGUMENT

The FERC has no authority to attempt to preempt the CPUC's jurisdiction over the siting and safety of a California public utility's intrastate facilities when the FERC is acting beyond the scope of its statutory authority. FERC's attempt to regulate SES's proposed LNG intrastate facilities is not authorized under section 3 of the Natural Gas Act, 15 U.S.C. § 717b, which governs imports or exports but omits any reference to authority over facilities, in contrast to section 7, the facilities section of the Natural Gas Act, 15 U.S.C. § 717f. FERC has no basis whatsoever to attempt to regulate SES's proposed LNG facilities by relying upon conditioning authority under subsection 3(a) of the Natural Gas Act, when subsection 3(c) explicitly states that FERC does not have subsection 3(a) conditioning authority for applications to import LNG.

FERC and SES concede that there will be no interstate transportation, interstate sales or interstate commerce involved in SES's proposed LNG project. SES's intrastate facilities will interconnect only with intrastate pipelines and all of SES's sales of LNG or natural gas from LNG will be to customers in the State of California. These concessions make it clear that SES's intrastate facilities are not subject to the jurisdiction of FERC, which was only delegated jurisdiction under section 1(b), the coverage section of the Natural Gas Act, 15 U.S.C. § 717(b), if the sales or transportation over the facilities were in interstate commerce. Thus,

FERC's characterization of the transportation over SES’s proposed LNG intrastate facilities as being in “foreign commerce” does not cause the transportation or the intrastate facilities to be subject to FERC's jurisdiction. In section 1(b) of the Natural Gas Act, Congress delegated authority to FERC over transportation in interstate commerce and “not … to any other transportation …” *See* 15 U.S.C. § 717(b).

Because SES's proposed intrastate LNG facilities would not be jurisdictional facilities under the Natural Gas Act, the FERC cannot preempt state law. FERC may not use its conditioning authority to expand its authority beyond substantive limits placed upon FERC's authority. In addition, in the NGPSA, Congress expressly delegated to DOT-certificated state agencies safety jurisdiction over intrastate gas pipeline facilities, which are not FERC-jurisdictional facilities. *See* 49 U.S.C. §§ 60104(c), 60105.

The FERC's recasting of transportation on an intrastate LNG facility as being in foreign commerce is also arbitrary and capricious, because it is contrary to previous FERC decisions based upon mere conclusory statements. In addition, FERC's reliance on foreign commerce clause cases to support its ability to preempt the CPUC is unreasonable, particularly when foreign commerce clause cases support state regulation of local effects from the foreign commerce.

Because SES is not a natural-gas company, as that term is defined in section 2(6) of the Natural Gas Act, 15 U.S.C. §717a(6), FERC does not have jurisdiction over SES, as a company. *See* 15 U.S.C. § 717(b). Thus, FERC cannot preempt the CPUC's jurisdiction over SES, the company, whose proposed LNG project would make it a California public utility.

STANDARD OF REVIEW

This Court's review of FERC orders is "respectful but searching." *California v. FERC*, 877 F.2d 743, 745 (9th Cir. 1989). FERC orders found to be "arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with the law" must be reversed. *Id.*; *City of Centralia, Wash. v. FERC*, 799 F.2d 475, 481 (9th Cir. 1986).

The arbitrary and capricious standard is appropriate for resolutions of factual issues implicating substantial agency expertise. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376 (1989). FERC's factual findings must be supported by substantial evidence. *See ANR Pipeline Co. v. FERC*, 771 F.2d 507, 516 (D.C. Cir. 1985). The agency must articulate a rational connection between the facts found and the conclusions made, and must demonstrate that its decision was based on a consideration of the relevant factors. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Pacific Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1386 (9th Cir. 1984).

Purely legal questions, however, are reviewed de novo and the courts are the final authorities on issues of statutory construction. *See Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1306 (9th Cir. 1997); *Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000) ("[w]here . . . the petitioners call into question the Commission's understanding of its statutory mandate, our review is de novo").

Under settled principles articulated by the United States Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984), in deciding whether to defer to an agency's construction of the statute it administers, the reviewing court must first ask if Congress has direct the spoken to the question at issue. If so, the court must give effect to the unambiguously expressed intent of Congress. If Congress has not specifically addressed the question, the court must respect the agency's construction of the statute so long as it is reasonable. "*Chevron* does not require blind deference." *State of California v. FERC*, 383 F.3d 1006, 1016 (9th Cir. 2004). The Court "must analyze the provision in the context of the entire governing statute, … presuming congressional intent to create a 'symmetrical and coherent regulatory scheme.'" *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000)).

ARGUMENT

I. The FERC's Assertion Of Jurisdiction Over The Proposed LNG Facilities Is Contrary To The Plain Meaning Of Section 3 Of The Natural Gas Act

A. Section 3 of the Natural Gas Act Does Not Grant the FERC Jurisdiction Over LNG Facilities

"[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Here, the FERC's assertion of exclusive jurisdiction over the siting, construction and operation of SES's proposed LNG facilities at the Port of Long Beach is based solely upon the FERC's view of its authority to approve applications for imports pursuant to section 3 of the Natural Gas Act, 15 U.S.C. § 717b. March 24 Order at P12, ER 083. However, nothing in section 3 of the Natural Gas Act, 15 U.S.C. § 717b, confers on the FERC authority over intrastate LNG facilities. Because the FERC does not have such delegated authority, the FERC may not preempt California law pertaining to such facilities, including California law governing safety and environmental issues

1. Section 3, on its face, pertains only to imports and exports of gas, not to gas facilities

Nothing in the express language of section 3 confers on the FERC jurisdiction over the facilities used to receive and transport imported LNG. There are no references to the "facilities" used by entities receiving imported natural gas

or LNG, and section 3 does not even use the word "facilities." Instead, section 3 only governs federal regulatory authority over "importation" or "exportation."

Congress' failure to refer to "facilities" in section 3 takes on added significance in light of Congress' inclusion of the term elsewhere.

> It is a fundamental rule of statutory construction that "when Congress includes a specific term in one section of a statute but omits it in another section of the same Act, it should not be implied where it is excluded." *Arizona Elec. Power Co-op. v. United States,* 816 F.2d 1366, 1375 (9th Cir. 1987) (citing *Russello v. United States,* 464 U.S. 16, 23 (1983).

Cramer v. Commissioner, 64 F.3d 1406, 1412 (9th Cir. 1995). Such is the case here. For example, in contrast to section 3 of the Natural Gas Act, section 7 of the Natural Gas Act , 15 U.S.C. § 717f, entitled "Construction, extension or abandonment of facilities," uses the word "facilities" fourteen times with regard to the FERC's regulatory authority over facilities used in the transportation of natural gas in interstate commerce.

Similarly, in 1992, the Energy Policy Act ("EPAct") amended section 3 of the Natural Gas Act, 15 U.S.C. § 717b.[9] Again, the word "facilities" was not included in the EPAct's amendments to section 3, in contrast to the original inclusion in and continued retention of numerous references to "facilities" in section 7, which remained unchanged. *Compare* 15 U.S.C. § 717b(a)-(c), *with* 15

[9] *See* Energy Policy Act of 1992, Pub.L. 102-486, tit. II, § 201, 106 Stat. 2866 (codified as amended 15 U.S.C. § 717b(a)-(c) by designating existing provisions as subsec. (a) and added subsecs. (b) and (c)).

U.S.C. § 717f(a)-(h). Because Congress has twice enacted legislation involving section 3, but omitted the term "facilities" both times, it is clear that Congress did not intend *this* section to provide the FERC with regulatory authority over facilities. *See Cramer,* 64 F.3d at 1412-13.

2. The "terms and conditions" clause in section 3(a) does not give the FERC authority over facilities

Despite the lack of any express reference to "facilities" in section 3, FERC contends that the "terms and conditions" clause (the "conditioning clause") of section 3(a) gives it the authority over facilities that the express text of the statute does not. *See* March 24 Order at P 19, ER 086-087. That clause provides, "The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate," and the FERC reads it as giving the FERC jurisdiction over not just gas imports and exports, but also over gas facilities.

The FERC's interpretation of this clause has no merit with regard to LNG imports, in light of subsections (b) and (c) of section 3, which were added in the amendments to section 3 when Congress enacted the EPAct in 1992. *See* Energy Policy Act of 1992, Pub.L. 102-486, tit. II, § 201, 106 Stat. 2866 (codified as amended 15 U.S.C. § 717b(a)-(c)). Subsection 3(c), specifically, amended the statute by providing:

> *For purposes of subsection (a) of this section*, the importation of the natural gas referred to in subsection (b) of this section [e.g., liquefied natural gas] . . . shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay.

15 U.S.C. § 717b(c) (emphasis added). This new section thus dramatically limited whatever conditioning authority the FERC might have had pursuant to section 3(a), for the FERC now must grant applications to import LNG without modification or delay. Thus, whatever authority over facilities that the conditioning clause might arguably have conferred on FERC prior to EPAct, now certainly has been withdrawn, because section 3(c) prohibits FERC from making any such "conditioning" modifications.[10] For the same reason, FERC's repeated reliance in the orders at issue here on *Distrigas Corporation v. FPC,* 495 F.2d 1057, 1064 (D.C. Cir. 1974), which in *dictum* stated a theory for using section 3 conditions on the import application to indirectly regulate facilities, now is misplaced. *Distrigas* predates the 1992 EPAct amendments.

In its Rehearing Order at PP 52, 53, ER 244-245, the FERC realized its previous interpretation would not wash, and the FERC gave it another shot. The FERC declared that the language in subsection 3(c) only applies to the Department

[10] Congress kept section 3(a) of the Natural Gas Act to retain some of the FERC's authority to modify import applications, but *only* in situations where the imports or exports of natural gas (other than liquefied natural gas, LNG) involve countries with which the United States does not have a Free Trade Agreement or, in the case of LNG, if the LNG is exported.

of Energy's ("DOE") part of the import/export process (i.e., the "economic impact" assessment), but it did not alter the FERC's purported role in subsection 3(a), which it alleges to be its safety and environmental regulation of facilities. However, the FERC ignored the actual language in both subsections 3(a) and 3(c).

First, FERC is incorrect about distinguishing between the DOE and FERC based upon the language in subsection 3(a). The import authorization for either the DOE or the FERC is based upon Congress' delegation of such authority to the "Commission" in the original section 3 of the Natural Gas Act, 15 U.S.C.§ 717b. The FERC's interpretation is unreasonable, because it inconsistently interprets the same word in the same sentences in subsection 3(a) (i.e., "Commission") as having conditioning authority for LNG imports when it refers to the FERC but no longer having such authority when it refers to the DOE. That is not just unreasonable, it is "an untenable construction of the text… to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying." *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 329 (2000).

The second problem with FERC's interpretation is that nothing in the language in subsection 3(c) supports such a distinction. It simply states: "For purposes of subsection 3(a)…" 15 U.S.C. § 717b(c). This language makes no distinction which federal agency is involved, because Congress has already

deemed the importation of LNG to be "consistent with the public interest" for purposes of subsection 3(a), and, therefore, the LNG import application "shall be approved without modification or delay." 15 U.S.C. § 717b(c). It would be unreasonable to apply the "public interest" finding and the requirement to approve the application "without modification or delay" in subsection 3(c) differently to both the DOE and the FERC, when these provisions explicitly modify subsection 3(a). *See BankAmerica Corp. v. U. S.,* 462 U.S. 122, 129 (1983) (it is unreasonable to interpret phrase differently where phrase modifies both words in a clause).

FERC's interpretation ignores and negates subsection 3(c)'s amendment to section 3 of the Natural Gas Act, because FERC has delegated back to itself discretion to decide the public interest of imports of LNG, when subsection 3(c) has already deemed such imports to be in the public interest and required the FERC to approve without modification or delay the applications to import LNG. It is a fundamental canon of statutory construction that every clause and word of the statute be given effect rather than emasculate an entire section. *See Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 975 (9th Cir. 2003). A federal agency's interpretation of the statute is not entitled to *Chevron* deference when it is contrary to the unambiguous language of the statute and effectively omits a key provision of the statute. *Id.*

B. The Legislative History of the EPAct Does Not Support the FERC's Interpretation of Section 3, as Amended

Where, as here, the language of the statute is plain, the statute must be enforced according to its terms, and there is no need to refer to legislative history or prior practices. *See United States v. Ron Pair Enterprises,* 489 U.S. 235, 241 (1989). In any event, a review of the legislative history of the EPAct's amendments to section 3 of the Natural Gas Act further supports the CPUC's position that Section 3 does not grant the FERC authority to regulate the facilities used in the importation of LNG.

In its March 24 Order at PP 18 and 19, ER 086-087, the FERC makes conclusory statements that the legislative history of the EPAct as "discussed" in *Dynegy LNG Production Terminal L.P.,* 97 FERC ¶ 61,231 (2001) is "silent" about FERC jurisdiction over facilities. The FERC is wrong. The legislative history of the EPAct is not silent about FERC jurisdiction over facilities. It reveals that Congress viewed such authority as being pursuant to section 7 of the Natural Gas Act rather than section 3.

In 1992, Congress was well aware that section 7 of the Natural Gas Act addressed authorization for facilities. Earlier proposed provisions of bills, for what was eventually passed as the EPAct, had contemplated major changes to section 7 for the authorization of construction of new facilities. However, proposed amendments to section 3 required the FERC's "automatic" approval of certain

imports and gave no indication that Congress envisioned section 3 authorizing FERC's regulation of facilities. *See* H.R. REP. NO. 102-474(I), at 177-82 (1992), *reprinted in* 1992 U.S.C.C.A.N., 1954, 2000-05. Indeed, consistent with the view that section 3 did not address facilities, the House amended one of the bills with the explicit purpose of clarifying that the National Environmental Policy Act of 1969 ("NEPA") applies to *all* FERC pipeline projects, but it only referred to section 7 of the Natural Gas Act and section 311 of the Natural Gas Policy Act. The bill never mentioned applying NEPA to FERC's section 3 activities. *See* H.R. REP. NO. 102-474(IX), at 33-34 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2422, 2436-37. Ultimately, as a result of the House-Senate Conference Committee's resolution of differences in the various bills concerning the proposed EPAct, most of the other proposed changes to the Natural Gas Act, including the ones addressing the authorization for new facilities, were never adopted. The changes made to the Natural Gas Act were the EPAct's amendments to section 3 that required the FERC's automatic approval of the LNG or Free Trade Agreement imports. *See* H.R. CONF. REP. NO. 102-1018, at 386-87(1992), *reprinted in* 1992 U.S.C.C.A.N. 2472, 2477-78.

The most specific legislative history explaining the Congressional intent in the EPAct's amendments to the Natural Gas Act was the joint bipartisan statement by Representative Sharp on behalf of four House conferees (i.e., Representatives

Sharp, Markey, Moorehead and Lent) on October 5, 1992 based upon the compromise worked out in the House-Senate Conference Committee Representative Sharp referred to section 201 of the EPAct as applying "to imports of Canadian natural gas into the United States; exports of natural gas to Canada from United States; and imports of liquefied natural gas into the United States." He further stated that:

> While applications for import or export approval still need to be made, imports or exports under new section 3(b)(3) are automatically approved, and by this act are deemed to be consistent with the public interest. The application process will still serve the function of affording the Federal Government a record of the foreign commerce taking place.

138 CONG. REC. H11404 (October 5, 1992) (Statement of Rep. Sharp).

Congress therefore provided no discretion for the FERC under section 3 with regard to applications to import LNG. These applications had to be "automatically approved," because Congress decided in the EPAct that they were already in the public interest. The reason that these particular applications still had to be made to the "Federal Government" was solely to keep records of the foreign commerce. In the words of subsection 3(c), the FERC must grant the application to import LNG

"without modification or delay."[11]

Given this legislative history, there is no ambiguity in the statute. The FERC can not regulate LNG import facilities under the conditioning authority of section 3, which no longer applied to imports of LNG after the EPAct's amendments.[12]

C. The FERC's Finding of Congressional Acquiescence to FERC's Purported Practice Is Contrary to the Law

The FERC asserts that because the legislative history of the EPAct did not refer to the FERC's purported administrative practice of authorizing facilities under section 3, this somehow supports the FERC's claimed jurisdiction over

---

[11] On the other hand, Representative Sharp clarified that this "new fast track process would not be available for LNG exports to, for example, Pacific rim nations other than Canada. Current law on LNG exports would remain unchanged." *See* 138 CONG. REC. H11404 (October 5, 1992) (Statement of Rep. Sharp).

[12] There are recent, conclusory statements in the H.R. REP. NO. 108-792 accompanying the Consolidated Appropriations Act of 2005, where certain House Conferees reference the FERC's March 24 Order and assert that the FERC has authority "under section 3 of the Natural Gas Act of 1938" over the siting of LNG facilities. *See* 150 CONG. REC. H10560 (Nov. 19, 2004). These statements in 2004 suggesting what Congress had intended in 1938 do not even mention the 1992 amendments to section 3 of the Natural Gas Act. These statements are not entitled to any weight, because they are 66 years after the enactment of the Natural Gas Act and in sharp contrast to the plain meaning of the Natural Gas Act and actual legislative history to the EPAct in 1992 at a time when members had to vote on the amendments. Subsequent legislative history provides an "extremely hazardous basis for inferring the meaning of a congressional enactment … [and] will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." *Consumer Product Safety Comm. v. GTE Sylvania,* 447 U.S. 102, 118 (1980); *see also U.S. v. United Mine Workers of America,* 330 U.S. 258, 282 (1947).

facilities in section 3. March 24 Order at PP 18- 19, ER 086-087. FERC's position is erroneous as a matter of law.

In the March 24 Order at P 19 n.16, ER 087, the FERC cites cases finding Congressional acquiescence to support a judicial or agency past interpretation of a statute where Congress *did not explicitly change the federal agency's authority* in the section of the statute under which the administrative practice or judicial interpretation had occurred. Here, Congress explicitly changed the FERC's authority pursuant to section 3 of the Natural Gas Act by adding two new subsections (i.e., 3(b) and 3(c)) that eliminated the FERC's discretionary authority over imports of LNG. This change cannot be considered acquiescence. *See Ford Motor Co. v. EPA,* 606 F.2d 1293, 1299-1300 (9th Cir. 1979) (regardless of lack of reference to agency's prior practice, the congressional amendments "significantly altered the . . . provision . . . . Neither the Administrator nor this Court is free to reverse the congressional determination").

Similarly, the omission of any reference in the legislative history of the EPAct to *Distrigas* (or to the FERC's practice under *Distrigas*) does not support the FERC's claim of Congress' acquiescence to the FERC's administrative practice. As explained in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159, 166 (2001), the Supreme Court has recognized Congressional acquiescence to administrative interpretations of a

statute only with "extreme care," such as when Congress had held hearings on the precise issue which made it hardly conceivable that any Member of Congress was not abundantly aware of the practice. The Supreme Court warned that "[a]bsent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute." *Id.* at 170 n.5.[13]

In the present case, there is no evidence in the legislative history of the EPAct, let alone overwhelming evidence, of Congressional awareness of and acquiescence to the FERC's practice under *Distrigas* or siting of facilities under section 3. Congressional silence alone does not support an inference of ratification or acquiescence. *See Schism v. United States,* 316 F.3d 1259, 1294-97 (Fed. Cir. 2002).

Indeed, the FERC's practice before and after *Distrigas* did not clearly establish by 1992 that FERC regulated LNG facilities under section 3, as opposed to section 7, of the Natural Gas Act. The FERC's original practice under section 3 followed *Border Pipe Line Co. v. FPC,* 171 F.2d 149, 150-52 (D.C. Cir. 1948), which involved foreign commerce and intrastate facilities located wholly within one state and which did not involve interstate commerce. The court held the FERC could not regulate the intrastate facilities or matters other than the fact of

[13] This same point is clear in the two cases cited by the FERC. In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 846-47 (1974), Congress had explicitly affirmed the agency's interpretation. In *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978), every court to consider the issue had ruled the same way, and Congress had exhibited a detailed knowledge of the provisions.

importation or exportation. *Id.* Thus, the court in *Distrigas,* 495 F.2d at 1063 refused to overrule *Border Pipe Line,* precisely because: (1) for the previous 25 years *Border Pipe Line* had governed FERC's regulatory efforts with respect to imports and exports under section 3; (2) FERC had asked Congress on 14 separate occasions to overrule *Border Pipe Line*; and (3) not only did Congress refuse to do so, it implicitly approved it in an equivalent amendment to the Federal Power Act in 1953.

In addition, even after *Distrigas*, the FERC continued to use its section 7 authority to certificate LNG facilities rather than rely upon the *Distrigas* section 3 theory. As the FERC acknowledges in its Rehearing Order at PP 23-24, ER 229-230, on remand from *Distrigas,* the FERC issued a section 7 certificate for the LNG facilities[14], and, in fact, all of the LNG facilities, which were constructed in United States in the 1970s and existed at the time when Congress passed the EPAct, were based upon section 7 certificates issued by the FERC. Because the FERC had commonly consolidated section 3 and section 7 applications, its section 3 authority had not "always been explicit," and consequently the FERC precedents

[14] *See Distrigas Corp.*, 58 FPC 2589, 2591-92, 2594 (1977).

and court precedents did not address section 3 by itself. *See* Rehearing Order at P 43, ER 239.[15]

The judicial cases leading up to the enactment of the EPAct were not clear that the FERC's practice was to regulate LNG facilities under section 3 instead of section 7 of the Natural Gas Act. *See, e.g., W. Virginia Pub. Serv. Comm'n v. DOE,* 681 F.2d 847, 856 n.38 (D.C. Cir. 1982) (typical applicant under section 3 of the Natural Gas Act also applied for a certificate of public convenience and necessity under section 7 of the Natural Gas Act); *Natural Gas Pipeline Co. v. FERC,* 765 F.2d 1155, 1161 n.9 (D.C. Cir. 1985) (the D.C. Circuit, in *dictum*, referred to section 3 for import authorization of LNG and section 7 for the FERC's independent authorization for any construction of facilities to receive LNG or transport the natural gas (from LNG) in interstate commerce); *So. Natural Gas Co. v. FERC,* 780 F.2d 1552, 1554 (11th Cir. 1986) (the court referred to separate

[15] In the Rehearing Order at PP 44-45, ER 240-241, the FERC refers to the one purported LNG precedent prior to 1992 of a case addressing only section 3. In *Pacific Indonesia LNG Co.*, 1 ERA ¶ 70,101 (1977), the DOE discussed section 3 authority, but in contrast to FERC here, the DOE did not claim it preempts CPUC authority over the LNG project. To the contrary, the DOE stated that California should have the right to decide whether the LNG facility proposed at Oxnard, California is acceptable. *Id.* at 70,521-22 and 70,532. Moreover, the FERC acknowledges the project was subsequently modified to be a combined section 3 and section 7 project and then was never built. The FERC never explains how this one case, which was moot more than 10 years earlier, could establish that in 1992 Congress knew of the FERC's section 3 practice, let alone that there was overwhelming evidence of acquiescence.

FERC orders under section 3 of the Natural Gas Act, authorizing importation, and under section 7 of the Natural Gas Act, authorizing the construction and operation of the facilities).

In 1992, it would therefore have been logical for Congress to assume that FERC – as Congress had intended – believed that FERC's authority to regulate LNG facilities arose pursuant to section 7. In view of the above, it is unreasonable to assume that at the time it enacted the EPAct, Congress had concluded that section 3 of the Natural Gas Act by itself had clearly provided for FERC regulation of the facilities used in the importation or exportation of LNG. Indeed, in 1992 the United States Supreme Court never addressed this issue, most circuit courts had not addressed the issue, D.C. Circuit cases referred to section 7 as well as section 3 for LNG facilities, and cases in other circuits were inconsistent with *Distrigas.* There is no reason in the present case to think that in enacting the amendments to section 3, Congress would have felt any need to expressly repudiate *Distrigas. See Ron Pair Enterprises,* 489 U.S. at 248-49. Moreover, and regardless of whether Congress in 1992 knew of *Distrigas*, the amendments to section 3 embodied in subsections (b) and (c) were sufficiently clear to negate any basis for FERC in a section 3 proceeding to have jurisdiction over the facilities utilized in the importation of LNG. *Ron Pair Enterprises,* 489 U.S. at 248-49

In the FERC's March 24 Order at PP 15, 16, 18 n.13, 20 n.17, ER 084-087, and Rehearing Order at P 46, ER 241, the FERC has referred to some of its own cases, its regulation and a DOE delegation order after 1992 to support the FERC's view as to its regulatory powers and siting authority over LNG facilities under section 3 of the Natural Gas Act. Obviously, Congress could not have been aware of these post-1992 cases when Congress passed the EPAct in 1992. Whether or not the FERC's more recent cases have stated that the FERC has this authority, this does not change the plain meaning of the language or the legislative history of the Natural Gas Act, as amended by the EPAct. The FERC cannot rely upon its own regulation and cases after 1992 to trump the plain meaning of the statute. *See Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 11 (D.C. Cir. 2002). As the United States Supreme Court stated in *Federal Maritime Commission v. Seatrain Lines, Inc.,* 411 U. S. 726, 745 (1973), "an agency may not bootstrap itself into in the area in which it has no jurisdiction by repeatedly violating its statutory mandate."

II. Even If FERC Has Authority To Condition Authorization Of SES's Imports With Requirements As To Its Facilities, That Would Not Confer Jurisdiction to FERC Over the Proposed Facilities

A. Congress Did Not Delegate to the FERC Jurisdiction to Preempt State Authority over Intrastate Facilities, Which Are Not Used for Sales or Transportation in Interstate Commerce

Assuming, solely for the sake of argument, that the FERC could still impose conditions upon its authorization of the importation of LNG, the FERC's

conditioning authority does not provide it with "jurisdiction" over the siting of intrastate LNG facilities which do not involve sales or transportation in interstate commerce. Congress did not delegate to FERC jurisdiction over purely intrastate natural gas facilities.

"The centerpiece of any preemption analysis is congressional purpose." *PG&E Co. v. California*, 350 F.3d 932, 942 (9th Cir. 2003). Congress enacted the Natural Gas Act in response to Supreme Court decisions involving interstate pipelines, which had held that the states could not regulate interstate transportation or wholesales) in interstate commerce. *See General Motors Corp. v. Tracy,* 519 U.S. 278, 288-90 (1997) . The purpose of the Natural Gas Act was to provide federal regulation of the interstate natural gas market, which the states could not regulate, but the Act "was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.'" *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 610 (1944). The Natural Gas Act "had no purpose or effect to cut down state power . . . The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Panhandle E. Pipeline Co. v. Pub. Serv. Comm'n of Indiana*, 332 U. S. 507, 517 (1947).

Consistent with this purpose, the Natural Gas Act delegated authority to the FERC over sales or transportation of natural gas or over natural-gas companies, but

only to the extent that it involved interstate commerce. As the United States Supreme Court explained in *Panhandle E. Pipeline Co.,* 332 U.S. at 516, section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), "determines the Act's coverage." The delegated authority under the Natural Gas Act to FERC (formerly known as the Federal Power Commission) is clear:

> Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.
>
> The omissions of any reference to other sales . . . in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act "'shall not apply *to any other . . . sale.*'"

Id. at 516 (emphasis in original).

The Supreme Court in *Panhandle E. Pipeline Co.* was focused upon the language concerning the "sale" in interstate commerce. However, based upon the wording in section 1(b) of the Natural Gas Act, the same finding also applies to the "transportation" in interstate commerce. The Act only delegated to the FERC authority over the "transportation of natural gas in interstate commerce," and Congress likewise added the explicit prohibition in section 1(b) that the Act, "shall not apply *to any other transportation.*" 15 U.S.C. § 717(b) (emphasis added.) Consequently, the FERC was not delegated jurisdiction over sales or transportation

of natural gas in foreign commerce or in intrastate commerce, and *Panhandle E. Pipeline Co*. established that there is no ambiguity in this language in section 1(b).

Section 1(b) governs whether or not the FERC was delegated jurisdiction over pipeline facilities, including the siting of pipeline facilities. This was made clear when the Supreme Court held that the phrase "facilities subject to the jurisdiction of the Commission" in section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), requires resort to section 1(b), which declares the provisions of the Act are to apply to: (1) the transportation of natural gas in interstate commerce, (2) wholesale sales of natural gas in interstate commerce, and (3) natural gas companies engaged in such transportation or sales. *See United Gas Pipe Line Co. v. FPC*, 385 U.S. 83, 86-87 (1966). Thus, transportation in interstate commerce and sales in interstate commerce are the "functions which subject the facilities to the provisions of the Act." *Id.*[16]

---

[16] As explicitly recognized in section 7(a) of the Natural Gas Act, 15 U.S.C. § 717f(a), natural gas pipeline facilities are considered "transportation facilities." LNG facilities are transportation facilities, as well. While the Natural Gas Act does not explicitly refer to LNG facilities, in the Natural Gas Pipeline Safety Act ("NGPSA"), Congress defined "liquefied natural gas pipeline facility" as being a "gas pipeline facility," and defined the term "gas pipeline facility" to include "the pipeline, the right-of-way, a facility, the building, or equipment *used in transporting gas or treating gas during its transportation.*" *See* 49 U.S.C. § 60101(a)(3)& (a)(14)(A)(2004) (emphasis added).

The lack of FERC jurisdiction over facilities affects safety jurisdiction under the NGPSA. Under the NGPSA, 49 U.S.C. § 60104(c), a state agency, such as the CPUC, which is certificated by the DOT pursuant to 49 U.S.C. § 60105, is authorized to adopt and enforce the DOT minimum safety standards, including the LNG siting standards, as well as adopt stricter standards for intrastate pipeline facilities. Intrastate gas pipeline facilities are defined as intrastate gas pipeline facilities and transportation not subject to the FERC's jurisdiction under the Natural Gas Act. *See* 49 U.S.C. § 60101(a)(9).

B. The FERC's Assertion of Jurisdiction in the Present Case Is Contrary to the Purpose and Coverage of the Natural Gas Act, Because There Is No Interstate Commerce Involved

In the present case, FERC concedes that the SES's proposed facilities are intrastate facilities located wholly within the State of California and that SES's proposal will not involve interstate commerce, interstate transportation, interstate pipelines, or interstate sales for resale of natural gas. March 24 Order at P 12, ER 083; Rehearing Order at P 12, ER 224; CPUC Rehearing Request at 7-10, ER 108-111. FERC further appears to acknowledge that its jurisdiction must be based on the transportation or sales from the proposed LNG facilities, when its states: "This case concerns our section 3 jurisdiction over the transportation of natural gas and the sale thereof in foreign commerce." Rehearing Order at P 63, ER 247. However, FERC commits legal errors by presuming that: (1) it was delegated

jurisdiction over transportation or sales in foreign commerce, when there is no interstate commerce involved; and (2) the transportation or sales from SES's proposed intrastate facilities would be in foreign commerce, as opposed to intrastate commerce.[17]

The FERC's assertion that it has been delegated authority over transportation and sales in foreign commerce (without any interstate commerce) is completely contrary to the purpose of the Natural Gas Act and section 1(b) of the Natural Gas Act, which explicitly limited the FERC's jurisdiction to transportation or sales of natural gas in "interstate commerce" and to no other transportation or sales. Although the CPUC's Rehearing Request at 29-33, ER 130-134, clearly raised this as in issue, the FERC's orders challenged herein never explicitly address the limits in section 1(b) on the FERC's jurisdiction. Instead, in its Rehearing Order, the FERC implicitly responds to section 1(b)'s limits by quoting the declaration of policy in section 1(a) of the Natural Gas Act, 15 U.S.C. § 717(a): "Federal regulation in matters relating to transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." Rehearing Order at P 63, ER 247. However, in light of plain meaning of the

[17]The price of SES's sales of LNG or natural gas from LNG has been deregulated. *See* 15 U.S.C. § 717b(b). Thus, the jurisdictional dispute involves the transportation on and from SES's proposed intrastate facilities into SoCalGas' intrastate facilities.

words in section 1(b) and the Supreme Court's explicit findings in *Panhandle E. Pipeline Co.,* 332 U.S. at 516, concerning the limited authority delegated to the FERC in section 1(b) of the Natural Gas Act, the declaration of policy in section 1(a) should be interpreted consistently with section 1(b) as not providing the FERC with authority over sales or transportation in foreign commerce or in intrastate commerce when there is no interstate commerce (i.e., "and" in section 1(a) was intended as a conjunction.)

In addition, it is well-established that these express limits on FERC's delegated authority in section 1(b) trump the policy declaration in section 1(a) of the Natural Gas Act if there were an inconsistency. In *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 596 (1945), the Supreme Court held that the declaration of policy in section 1(a) may not be used to take the express provision out of section 1(b). Similarly, in *FPC v. Southern California Edison Co.,* 376 U.S. 205 (1964), after noting that section 201(a) and section 201(b) of the Federal Power Act, 16 U.S.C. §§ 824(a) and (b), are the counterparts to section 1(a) and section 1(b) of the Natural Gas Act (*id.* at 211-14), the Supreme Court held that section 201(a) of the Federal Power Act was merely a policy declaration and cannot nullify express provisions in section 201(b). *Id.* at 215. *See, also, New York v. FERC,* 535 U.S. 1, 22 (2002).

The FERC's unilateral expansion of its jurisdictional powers based upon its views of a mere policy declaration flies in the face of the explicit limits on the FERC's delegated authority over sales or transportation (other than ones in interstate commerce) under section 1(b) of the Natural Gas Act. An agency may not confer power upon itself based upon federal policies, when there is a statutory limit precluding the agency's power to do so. *See Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. at 374-75.

C. The FERC May Not Use Its Conditioning Authority to Circumvent Limits on Its Delegated Authority under Section 1(b)

The FERC's reference to its "section 3 jurisdiction over the transportation of natural gas and the sale thereof in foreign commerce" (Rehearing Order at P 63, ER 247, is a complete mischaracterization of section 3, which does not mention transportation or sales, let alone facilities. As discussed above, section 3 provides the FERC with authority over imports and exports, and, in certain circumstances, conditioning authority over the imports and exports. The FERC's transportation jurisdiction is limited under section 1(b) of the Natural Gas Act to transportation in interstate commerce. Therefore, if only foreign commerce and intrastate facilities were involved, as the FERC contends, the FERC would not have jurisdiction over the transportation or facilities. S*ee, e.g., Border Pipe Line Co. v. FPC,* 171 F.2d at 150-52 (where company exported gas, but did not also engage in interstate

commerce, the FERC could not regulate the intrastate facilities or matters other than the fact of exportation).

In the 66 years since the enactment of the Natural Gas Act, no court has ever held that state regulation of intrastate natural gas facilities was preempted in a case that did not involve interstate commerce and natural-gas companies engaged in interstate commerce. Similarly, no court has ever held that the FERC's conditioning authority under section 3 has preempted state regulation of intrastate facilities. The FERC's decision in the present case to enlarge its own jurisdiction, in order to preempt state regulation over purely intrastate facilities, is unprecedented and unsupportable under the Natural Gas Act.[18]

The FERC relies upon *Distrigas Corporation v. FPC,* 495 F.2d at 1064, in which the court in *dictum* stated a theory as to how the FERC's regulatory authority to condition its approval of imports or exports under section 3 of the Natural Gas Act could be utilized to impose requirements upon sales or facilities.

---

[18] Every court case which the FERC has cited as precedent for the preemption of state regulation under the Natural Gas Act is a case involving interstate pipelines, which crossed state lines in order for interstate sales for resales or interstate transportation to take place. *See, e.g., Schneidewind v. ANR Pipeline Co*., 485 U.S. 293 (1988); *National Fuel Gas Supply v. Public Service Commission*., 894 F.2d 571 (2d Cir. 1990). Each case involved involved natural-gas companies, which are extensively regulated by the FERC pursuant to sections 1(b), 4, 5 and 7 of the Natural Gas Act , 15 U.S.C. §§ 717(b), 717c, 717d and 717f. They are irrelevant to the facts in the present case, which does not involve interstate transportation, interstate sales, interstate pipelines or natural-gas companies.

However, in *Distrigas,* 495 F.2d at 1058, the LNG facilities were proposed for sales and transportation in both "interstate and intrastate commerce." In addition, *Distrigas* was not a preemption case. Significantly, the court relied upon the conditioning authority provided in section 3, because the only explicit regulatory power directly provided to the FERC in that section is jurisdiction over imports and exports. *See Distrigas,* 495 F.2d at 1064. The FERC can withhold authorization over imports or exports if the conditions are not complied with, but the FERC cannot confer upon itself jurisdiction over the subject of all of its conditions. Indeed, one year after *Distrigas,* in *Henry v. FPC,* 513 F.2d 395, 402 (D.C. Cir. 1975), the court held that conditioning authority allows the FERC to *consider nonjurisdictional* matters and try to protect the public interest with such conditions. However, that does not create jurisdiction over nonjurisdictional facilities. *Id.* at 403-05.

Facilities subject to the FERC's jurisdiction require transportation in interstate commerce. *See United Gas Pipe Line Co. v. FPC*, 385 U.S. at 86-87. Moreover, the FERC's jurisdiction over transportation is limited by section 1(b) to transportation in interstate commerce and does not apply to any other transportation. The FERC cannot assume powers specifically denied to it by the words in section 1(b) and its legislative history. *See FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 509 (1948).

In view of the above, the FERC may not use its conditioning authority to expand its jurisdiction, such as by preempting substantive or procedural limits on the FERC's power under other sections of the Natural Gas Act. *See Associated Gas Distributors v. FERC,* 824 F.2d 981, 1014 (D.C. Cir. 1987); *Algonquin Gas Transmission Co. v. FPC,* 534 F.2d 952, 954 (D.C. Cir. 1976). Indeed, the FERC cannot use its conditioning authority to "intercede in a matter that Congress reserved to the State." *Altamont Gas Transmission Co. v. FERC,* 92 F.3d 1239, 1247 (D.C. Cir. 1996). Thus, in the present case, the FERC may not use its conditioning authority in section 3 to exceed the limits on its delegated authority under section 1(b) in order to preempt state regulation of intrastate facilities of public utilities located wholly within the state.

D. The FERC's Assertion of Jurisdiction over Foreign Commerce Is Arbitrary, Capricious and Not the Product of Reasoned Decisionmaking

1. The FERC's unexplained and unsupported departure from its previous precedent on foreign commerce is arbitrary and capricious

In addition to the FERC lacking jurisdiction over transportation in foreign commerce, the FERC's characterization of the transportation in SES's proposed LNG facilities as being in foreign commerce arbitrarily contradicts FERC's previous decisions. Upon remand from the the court's decision in *Distrigas,* 495 F.2d at 1066, the FERC found that foreign commerce involving LNG ended by

the time the LNG was released "from the flange of [the] ship in a stationary position . . . ." *See Distrigas Corporation*, 58 FPC at 2592. In that proceeding, the FERC held that the docking facilities, cryogenic lines, storage tanks, regasification facilities, and other facilities at the terminal in Massachusetts would provide natural gas from the LNG facilities to both interstate customers and to intrastate customers. *See id.* at 2592-93. [19] Based upon this rationale, in the present case (once the LNG is unloaded from the tankers onto SES's proposed intrastate LNG facilities), the transportation and facilities would be in intrastate commerce, because the activities will be solely in California and all parties agree that the present case will only involve sales and transportation to intrastate customers.

The FERC now contradicts its earlier position, and implies that the LNG remains in foreign commerce even after it is unloaded onto intrastate facilities and all activities take place wholly within the State of California. The FERC asserts that this " better distinguishes foreign from interstate commerce" (Rehearing Order at P 25, ER 230-231), and makes the additional conclusory statement that SES's proposed transportation and sales would be in foreign commerce. *See* Rehearing Order at P 63, ER 247. Nowhere does the FERC explain why the transportation solely in California on these intrastate facilities for sales to intrastate customers is

---

[19] On the other hand, when sales and transportation activities took place outside of the United States, the FERC found that they were in foreign commerce. *See Columbia LNG Corp.*, 48 FPC 723, 726 (1972).

not in intrastate commerce or why foreign commerce did not end once the LNG was unloaded off the tanker.

The FERC's current interpretation of what constitutes foreign commerce conflicts with its earlier interpretation of foreign commerce. The FERC's conclusory statements do not provide an adequate basis for departing from its prior published decisions, and, therefore, the FERC's orders are arbitrary and capricious. *See City of Fort Morgan v. FERC*, 181 F.3d 1155, 1163 (10th Cir. 1999). The express limitations on the FERC's powers in section 1(b) cannot be recast in the agency's attempt to effectuate new policies. *Id.*

2. The FERC's expansive interpretation of foreign commerce is contrary to Congress's limited occupation of its Commerce Clause powers with the enactment of the Natural Gas Act

As discussed above, the Natural Gas Act's purpose was to provide FERC jurisdiction over transportation of natural gas or sales thereof in interstate commerce or natural gas companies engaged in such transportation or sales, but not to dilute or handicap in any way state regulatory power. *Panhandle E. Pipeline Co. v. Pub. Serv. Comm'n of Indiana*, 332 U. S. at 517. Indeed, the Supreme Court rejected the argument that the Natural Gas Act occupied the entire field open to federal regulation. "The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take in only territory which this court had held the states could not reach." *Id.* at 519; *See also Panhandle E.*

Pipeline Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329, 334-35 (1951). ("Congress occupied only part of the field.") Congress limited even the authority it delegated to FERC by specifying, for example, that transportation or sales in interstate commerce were nevertheless exempt from FERC regulation if it involved "local distribution" or "production or gathering." *See* 15 U.S.C. § 717(b).

In this context, it is inconsistent with the Natural Gas Act's purpose and coverage, and arbitrary and capricious, for the FERC to now change its mind and declare in the present case that foreign commerce, as opposed to intrastate commerce, is involved after the LNG has been unloaded from the ship onto intrastate facilities, where it will first be stored, regasified into natural gas and transported only on intrastate pipelines. The FERC's overly broad view of foreign commerce has disregarded the meticulous care Congress chose in limiting its exercise of its Commerce Clause powers with the enactment of the Natural Gas Act and how Congress designed the Act to take no authority from State commissions. *FPC v. Hope Natural Gas Co.,* 320 U.S. at 610.

With nothing in the coverage section of the Act or 66 years of preemption cases to support it, FERC arbitrarily claims support for it exercising exclusive jurisdiction based upon a purported principle of preemption in foreign commerce clause cases, citing *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 448 (1979), to claim that foreign commerce is preeminently a national concern. March

24 Order at P 24 n.25, ER 089. In contrast to the Supreme Court's rejection of the state's attempt to tax *extraterritorial* values in *Japan Line,* the Supreme Court subsequently upheld the states' taxes in three foreign commerce clause cases where the taxpayer had an adequate *nexus* with the state and the tax was fairly apportioned to the services provided in the state. *See Barclays Bank PLC v. Franchise Tax Bd.,* 512 U.S. 298, 330-31 (1994); *Wardair Canada Inc. v. Florida Dep't. of Revenue*, 477 U.S. 1 (1986); *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159 (1983).

Principles involving foreign commerce clause cases recognize that states can regulate "local effects" involving the commerce. If the state tax "merely has foreign resonances, but does not implicate foreign affairs," the need for national uniformity should not be inferred. *Container Corp. of America*, 463 U.S. at 194. Indeed, the States' regulations protecting the health and safety of their citizens involving "local effects" of commerce has been considered primarily matters of local concern and withstood challenges under the Commerce Clause. State legislation may affect foreign or interstate commerce without constituting a regulation of it. *See, e.g., Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 442-44 (1960); *Duckworth v. Arkansas*, 314 U.S. 390, 394-95 (1941). Consequently, these cases support the state's regulation of activities, which take

place solely in California and which do not discriminate against foreign commerce, because the focus of the regulation has nothing to do with foreign affairs.

FERC has therefore not engaged in reasoned decisionmaking, because it has attempted to justify expanding its jurisdiction with preemption principles in foreign commerce clause cases, but the principles in these cases support state regulation of local effects from foreign commerce. Thus, FERC's expanding view of its limited juisdiction under the Natural Gas Act goes far beyond the preemption principles in foreign commerce clause cases, upon which it relies, as well as the language in the coverage section of the Act.

Whether or not the imported commodity, LNG, may be in foreign commerce, neither the FERC nor the CPUC propose to regulate the price or the import of the LNG or have any say over what country from which the LNG is imported. The subject of the regulation at issue is the siting and safety of SES's proposed facilities at the Port of Long Beach, which involves only local matters, not foreign affairs. SES is a California corporation, and its headquarters and principal place of business are in California. SES App. at 3, ER 006. SES's proposed facilities are in the State of California and are not near a border with another State or foreign nation and three miles away from even federal waters. CPUC Rehearing Request at 9, ER 110. SES's facilities would interconnect only with intrastate pipelines. SES App. at 4-5, ER 007-008. The hazards posed by the

location of these facilities are hazards posed only in this local area in the Cities of Long Beach and Los Angeles, California, and these facilities would not be posing hazards in other states or foreign nations. CPUC Rehearing Request at 9-10, ER 110-111. The analysis of the hazards involves unique, local conditions.[20]

In view of the above, the FERC orders are arbitrary and capricious and not the product of reasoned decisionmaking.

E. FERC's Purported Findings of a Need for Preempting State Safety Jurisdiction Are Not Based upon Record Evidence And Are Inconsistent with Provisions in the NGPSA

FERC stated that it was not FERC's intent to preempt environmental review pursuant to the California Environmental Quality Act ("CEQA") and FERC recognized the rights of certain state and local permitting authorities, although FERC declared that if, at the end of the State's CEQA review, the State issues orders that conflict with FERC's authorizations regarding the SES facilities, such orders are preempted. Rehearing Order at PP 5, 64-66, 90, 95-96, ER 221, 247-249, 257-259. Because the State has yet to complete its environmental review, the issue whether any State order implementing CEQA is preempted by federal law is

---

[20] SES proposes to construct LNG facilities on landfill with 27 active earthquake faults within approximately 100 miles on a site in California that is located in close proximity to residential and commercial neighborhoods. SES Resource Report No. 6 at 6-12, ER 038-044; CPUC Protest at 12-17, ER 062-067; Phelps Affidavit at 2-6, ER 074-078.

not ripe for review. *See Clinton v. Acequia, Inc.,* 94 F.3d 568, 572 (9th Cir. 1996); *American Ass'n of Med. Colleges v. United States*, 217 F.3d 770, 780 (9th Cir. 2000).

In contrast to FERC's intent not to preempt CEQA, the FERC is clear in its present intent to preempt the CPUC's safety oversight. Rehearing Order at P 74, ER 252. As the state agency with natural gas safety expertise, as well as authority under state law and certification from the DOT under federal law, the CPUC would be considering whether or not the site proposed by SES would pose too great a risk to the general public and/or whether sufficient safeguards could be employed to mitigate this risk for SES's proposed LNG facilities at the Port of Long Beach or an alternative site should be used.

The State's protection of the health and safety of its citizens "is at the core of its police power." *Sporhase v. Neb.,* 458 U.S. 941, 956 (1982). Nevertheless, the FERC asserts that it must have the exclusive right to decide the safety issues in order to give prospective applicants a "stable regulatory environment" and "such federal oversight can serve as a check on states' erecting unreasonable hurdles to LNG imports." Rehearing Order at PP 68-69, ER 249-250.

There is no justification for the FERC to assume the CPUC would be erecting unreasonable barriers. For any state to regulate the safety of LNG facilities, it must be certificated by the DOT and have adopted the federal safety

standards issued by the DOT over the siting, construction and operation of LNG facilities (i.e., 49 C.F.R. Part 193 (2004)) at the minimum. *See* 49 U.S.C. §§ 60104(c), 60105 (2004). The CPUC is certificated by the DOT, and in the CPUC's General Order No. 112-E, the CPUC has adopted the DOT's federal pipeline safety regulations, including the LNG safety regulations in 49 C.F.R. Part 193. *See* CPUC Rehearing Request at 58-59, ER 159-160.

There is absolutely no evidence in the record, let alone substantial evidence, that would support the FERC's claim that the states are erecting unreasonable hurdles to LNG imports. The CPUC has informed SES that it must apply for a certificate of public convenience and necessity, and the CPUC stated its primary concern was the siting and safety. The CPUC conceded that it could not regulate the imports of LNG or the price of LNG, but identified three other potential areas where its jurisdiction would apply over the company and not the facilities: an emergency need for on-site natural gas (with just compensation), if the company were to exercise market power or there was a transfer of ownership or merger. CPUC Protest at 3-6, ER 053-056. The CPUC’s view that given the population density and potential seismic problems at the proposed site, alternative sites in more remote areas should at least be considered (ER 062-067) is hardly unreasonable, because it is based upon the congressional mandate for LNG siting standards. *See* 49 U.S.C. § 60103(a)(2),(4),(6).

Indeed, FERC's justification for preempting all states on LNG safety requirements due to a need for "uniformity in regulatory treatment" to encourage investments in LNG facilities (*see* Rehearing Order at P 68, ER 249-250) is an impermissible justification, because it is contrary to the provisions in the NGPSA, in which Congress chose to promote safety and federalism principles rather than uniformity. First, in terms of LNG siting safety standards, Congress recognized that to ensure the safety of the general public, the various local conditions must be considered rather than a uniform, one-size-fits-all approach. Congress therefore mandated six different factors be considered in the LNG siting safety standards, and that such standards be "minimum safety standards." *See* 49 U.S.C. § 60103(a)(1)-(6).

Secondly, rather than preclude the states from considering the siting of LNG facilities, Congress contemplated FERC proceedings and state proceedings involving LNG safety standards, and Congress provided the Secretary of Transportation with authority to intervene and participate in the proceedings before the FERC or the DOT-certificated State authorities. *See* 49 U.S.C. § 60117(h)(3).

Thirdly, Congress authorized DOT-certificated state commissions to adopt more stringent LNG safety standards, than DOT's minimum standards, for intrastate LNG facilities, which are not FERC-jurisdictional facilities. *See* 49 U.S.C. §§ 60104(c), 60105. FERC has no authority to second-guess Congress'

wisdom by justifying FERC's attempt to exercise jurisdiction on all proposed intrastate LNG facilities, which will receive imported LNG, in order to prevent the states from having more stringent safety requirements.

It is also premature to presume any unreasonable hurdles by the CPUC or States in general, and FERC certainly has no evidence in this record to support these speculative findings. Indeed, contrary to the FERC's presumption of unreasonable state actions, the presumption is that state officials will perform legitimate functions that will not be unconstitutional. *See Lewis v. Younger*, 653 F.2d 1258, 1260 (9th Cir. 1980).

III. The FERC Has No Statutory Basis To Claim That The CPUC Is Preempted From Regulating SES As A California Public Utility

Putting aside the safety and environmental issues involving SES's proposed LNG facilities, there is the separate issue of jurisdiction over SES, the California corporation, whose proposed LNG project would make it a California public utility subject to the CPUC's jurisdiction under the definitions in sections 216, 221, 222, 227 and 228 of the California Public Utilities Code. Because the CPUC would have regulatory jurisdiction over the company, SES, as a California public utility, the CPUC would have authority over SES's conduct. The CPUC gave three examples of areas of its regulatory jurisdiction over SES, as a company: (1) in the event of an emergency, the CPUC could order SES to provide natural gas to core residential customers or electric generation units (with just compensation to SES);

(2) if SES were to engage in the exercise of market power, the CPUC could order SES to cease engaging in unreasonable practices, and (3) if SES intended to merge with another company, it would require CPUC approval. *See* CPUC Protest at 3-6, 17-18, ER 053-056, 067-068. [21]

The FERC appears to purport to preempt the CPUC's jurisdiction over SES, including its conduct as a California public utility, by claiming that SES's conduct is related to the "SES project," which the FERC claims to be under its exclusive jurisdiction. *See* March 24 Order at P 30, ER 091; Rehearing Order at PP81-82, 255-256. [22] The FERC also, however, refers to these issues as "premature." *Id.* To the extent that the FERC orders cannot be construed as preempting the CPUC's authority over SES, as opposed to SES's facilities, then the CPUC would agree that this last issue is not ripe. However, to the extent the FERC's claim of exclusive jurisdiction is intended to oust the CPUC from any regulatory jurisdiction over SES as a California public utility, then the CPUC submits this issue is ripe and the FERC has committed legal error.

---

[21] However, the CPUC acknowledged that it could not regulate the price or importation of LNG. CPUC Protest at 4, ER 054.

[22] In the FERC's subsequent order concerning the California Coastal Commission's request for rehearing, the FERC referred to its earlier orders as having found that the proposed SES project will not be a California public utility subject to CPUC jurisdiction. *See Sound Energy Solutions,* 108 FERC ¶ 61,155 at P 4 (August 5, 2004).

The FERC's orders commit legal errors for three different reasons. First, since FERC cannot regulate the company, it cannot preempt the CPUC's authority to do so. Because the FERC, the CPUC, and SES are in accord that the SES proposal will not involve interstate commerce, SES, would not be a "natural-gas company" under section 2(6) of the Natural Gas Act, 15 U.S.C. § 717a(6), so it would not be subject to the FERC's jurisdiction over natural-gas companies under section 1(b) of the Natural Gas Act. However, the CPUC's jurisdiction applies to the company, SES. For example, FERC has never cited any provision under the Natural Gas Act, which requires FERC approval for SES merging with another company. In contrast, section 854 of the California Public Utilities Code explicitly confers such authority on the CPUC. Thus, the FERC has no statutory authority to act on matters involving SES's conduct as a company, and with no power to act, the FERC cannot preempt state authority. *See Louisiana Public Service Commission v. FCC*, 476 U.S. at 374.

The second error is that the FERC acknowledges that it does not plan to impose conditions asserting jurisdiction over the company or its conduct at this time, but that it may in the future "revisit and revise SES's section 3 obligations." Rehearing Order at P 81, ER 255. This lack of exercise of federal authority cannot serve to preempt state law, which explicitly provides for such state authority.

In *Arkansas Electric Cooperative v. Arkansas Public Service Commission*, 461 U.S. 375, 384 (1983), the United States Supreme Court recognized that in certain cases, a federal agency's decision to forego regulation may preempt state regulation. However, in that case, the court found that "nothing in the language, history, or policy of the Federal Power Act suggests such a conclusion. Congress' purpose in 1935 was to fill a regulatory gap, not to perpetuate one." The same holds true for the Natural Gas Act, which likewise sought to fill a regulatory gap, not to perpetuate one. Indeed, the justification given in *Distrigas v. FPC* , 495 F.2d at 1064, for the FERC to assert such regulatory authority was that it was necessary to "fill the regulatory gap" consistent with the purpose of the Natural Gas Act "to protect consumers against exploitation at the hands of natural gas companies." *Id.* *Distrigas* further stated that such regulation was to be "complementary to that reserved to the States." *Id.*

The FERC's attempt to create a gap in regulation by preempting state regulation without adopting its own regulation is totally contrary to *Distrigas* and to the Natural Gas Act. It is therefore arbitrary, capricious and not the product of reasoned decisionmaking.

The third legal error is the arbitrariness of the FERC's findings in attempting to preempt the CPUC's jurisdiction over SES, the company. The FERC criticizes the CPUC for making its jurisdictional claims based on future events that are

purportedly "premature and speculative," and the FERC states its confusion as to how a future shortage of natural gas "can serve as a legal basis for the CPUC to claim jurisdiction" over SES. Rehearing Order at PP 81-82, ER 255-256. However, the legal basis for any CPUC assertion of jurisdiction over SES, as a California public utility, is based upon SES's proposed LNG project and state law, not speculative facts about conduct or shortages in the future. *See* Cal. Pub. Util. Code §§ 216, 221, 222, 227, 228, 701, 761, 854. In contrast, the FERC, while not at this time asserting jurisdiction over SES, as a company, has nevertheless attempted to preempt the CPUC from doing so, based upon the FERC's speculation that it may revisit this and impose conditions in the future under certain circumstances.

On the one hand, the FERC has issued a declaratory order in advance of its decision on the merits "in order to resolve the state and federal jurisdictional conflict by providing a vehicle for expedited court review" (March 24 Order at P 3, ER 080), and the FERC has insisted at this time that the FERC has "exclusive" jurisdiction over the SES project purportedly to preempt the CPUC from exercising jurisdiction over SES, as a California public utility. *See* March 24 Order at P 30, ER 091; Rehearing Order at PP 81-82, ER 255-256. On the other hand, when the CPUC has merely identified areas of its jurisdiction under state law, the FERC labels the CPUC's jurisdictional claims as being "premature and speculative."

Rehearing Order at PP 81-82, ER 255-256. This contradictory position by the FERC is arbitrary, capricious and not the product of reasoned decisionmaking.

CONCLUSION

For the above-mentioned reasons, the CPUC respectfully requests that this Court reverse FERC's orders asserting exclusive jurisdiction.

Respectfully submitted,

January 3, 2005

Randolph L. Wu
Arocles Aguilar
Harvey Y. Morris

By: ______________________
Harvey Y. Morris

Attorneys for Petitioner
California Public Utilities Commission
505 Van Ness Avenue, Room 5138
San Francisco, California 94102
(415) 703-1086

CERTIFICATION OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1

I certify that pursuant to Federal Rule of Appellate Procedure. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 13,849 words.

Dated: January 3, 2005

____
Harvey Y. Morris

STATEMENT OF RELATED CASES

Appellants are unaware of any case pending in this Court that is related within the meaning of Ninth Circuit Rule 28-2.6, except for *Californians for Renewable Energy, Inc. v. FERC,* N0. 04-73650, which is already consolidated with the CPUC's petition for review.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused copies of the foregoing "OPENING BRIEF OF PETITIONER CALIFORNIA PUBLIC UTILITIES COMMISSION" to be served upon the parties to these proceedings before this Court by sending to each party two copies thereof in the U.S. mail, postage prepaid, addressed as follows:

Stephan C. Volker, Esq.
Joshua A.H. Harris, Esq.
Law Offices of Stephan C. Volker
436 - 14th St., Suite 1300
Oakland, CA 94612

Dennis Lane, Solicitor
Robert H. Solomon, Deputy Solicitor
Room 9A-01
Federal Energy Regulatory Commission
888 First St., NE
Washington, D.C. 20426

Jeffrey M. Petrash
AMERICAN GAS ASSOCIATION
400 North Capitol Street, NW
Washington, DC 20001

Lisa M. Tonery, Esq.
Adam H. Sheinkin
King & Spalding LLP
1185 Avenue of the Americas
New York, NY 10036

Julia Rankin Richardson
VAN NESS FELDMAN, P.C.
1050 Thomas Jefferson St. NW
7th Floor
Washington, DC 20007

William Allen Mogel
Dorsey & Whitney, LLP
1001 Pennsylvania Ave., NW
Ste. 400 South
Washington, DC 20004

Frank R. Lindh
PACIFIC GAS & ELECTRIC COMPANY
P.O. Box 7442
San Francisco, CA 94120-7442

Douglas F. John
JOHN & HENGERER
1200 17th St., N.W.
Suite 600
Washington, DC 20036-3013

Bruce Allen Connell, Esq.
CONOCOPHILLIPS COMPANY
600 North Dairy Ashford, CH1012
Houston, TX 77079

Jason Fredrick Leif
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002-2712

Dated at San Francisco, California, this 3rd day of January, 2005.

____
Nancy Salyer

STATUTORY ADDENDUM