ORAL ARGUMENT IS NOT YET SCHEDULED

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

No. 06-1097

KEYSPAN LNG, L.P.,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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April 16, 2007

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

All parties appearing before the Commission and this Court are listed in Petitioner's Rule 28(a)(1) certificate.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *KeySpan LNG, L.P.*, 112 FERC ¶ 61,028 (July 5, 2005); and

2. *KeySpan LNG, L.P.*, 114 FERC ¶ 61,054 (January 20, 2006).

C. Related Cases:

This case has not previously been before this Court or any other court. There are no related cases pending judicial review.

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Beth G. Pacella
Senior Attorney

April 16, 2007

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GLOSSARY

1985 Memorandum of Understanding	FERC and Department of Transportation Memorandum of Understanding Regarding LNG
Algonquin	Algonquin LNG, Inc.
Commission	Federal Energy Regulatory Commission
Eascogas	Eascogas LNG, Inc.
EIS	Environmental Impact Statements
FERC	Federal Energy Regulatory Commission
Initial Order	*KeySpan LNG, L.P.*, 112 FERC ¶ 61,028 (2005)
KeySpan	KeySpan LNG, L.P.
LNG	Liquefied natural gas
Memorandum	FERC and Department of Transportation Memorandum of Understanding Regarding LNG Facilities
NFPA standards	2001 National Fire Protection Association standards
NGA	Natural Gas Act
Pipeline Safety Act	Natural Gas Pipeline Safety Act
Rehearing Order	*KeySpan LNG, L.P.*, 114 FERC ¶ 61,054 (2006)

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STATEMENT OF THE ISSUE

The issue presented for review is whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably determined, under Natural Gas Act ("NGA") section 3, that KeySpan LNG, L.P.'s ("KeySpan") proposal to convert its existing liquefied natural gas ("LNG") storage facility into an LNG import facility, without making necessary improvements to meet current safety standards, was not consistent with the public interest.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in Addendum I to this Brief.

STATEMENT OF THE CASE

This proceeding involved the Commission's decision, under NGA § 3, 15 U.S.C. § 717b, not to authorize KeySpan's proposal to convert its LNG storage facility into an LNG import facility, without upgrading existing components of the proposed facility to meet current LNG safety standards. Upon review of the entire record, including extensive Draft and Final Environmental Impact Statements ("EIS"), the Commission found KeySpan's proposal for a new LNG import terminal inconsistent with the public interest because it would not meet current federal safety standards required of all other new LNG import facilities in the United States. *KeySpan LNG, L.P.*, 112 FERC ¶ 61,028 (2005) ("Initial Order"), JA 454-71, *order on reh'g*, 114 FERC ¶ 61,054 (2006) ("Rehearing Order"), JA 424-34.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Under NGA § 7(c)(1)(A), 15 U.S.C. § 717f(c)(1)(A), an entity must obtain from the Commission a certificate of public convenience and necessity before engaging in the transportation or sale of natural gas subject to the jurisdiction of

the Commission or constructing or operating any facilities for those purposes. *See*, *e.g.*, *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 7-8 (1961) (Commission obligated "to evaluate *all* factors bearing on the public interest" in considering NGA § 7 certificate application).

A separate provision of the NGA, section 3, 15 U.S.C. § 717b, addresses natural gas imports. Under NGA § 3, "no person shall . . . import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so." NGA § 3 further provides that "[t]he Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed . . . importation will not be consistent with the public interest." Moreover, "[t]he 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 . . . ." *Id.* *See Distrigas Corp. v. FPC*, 495 F.2d 1057, 1064 (D.C. Cir. 1974) (finding that "[u]nder [NGA] Section 3, the Commission's authority over imports of natural gas is at once plenary and elastic," and that the Commission "may deny import authorization altogether").

Three federal agencies share primary responsibility and authority in the approval, oversight, safety and security of the LNG import process: FERC, the Coast Guard, and the Department of Transportation. Final EIS, R. 498 at 4-105, JA 265. The Department of Transportation is responsible for promulgating and

enforcing minimum safety standards for onshore LNG facilities. FERC has authority over the actual siting, construction, and operation of onshore LNG import terminals.[1] The Coast Guard has authority over LNG facilities that affect the safety and security of port facilities and navigable waterways.

In 1985, FERC and the Department of Transportation entered into a Memorandum of Understanding Regarding LNG Facilities ("1985 Memorandum of Understanding" or "Memorandum"). The Memorandum explains that, while the Department of Transportation has "exclusive authority to promulgate Federal safety standards for LNG facilities used in the transportation and associated storage of LNG in or affecting interstate or foreign commerce, . . . under the Natural Gas Act, the FERC exercises authority to impose more stringent safety requirements than [the Department of Transportation]'s standards when warranted by special circumstances at any LNG facility within FERC's jurisdiction." Agreement Regarding Liquefied Natural Gas, 50 Fed. Reg. 20,275 at 2 (May 15, 1985) (*see* Pet. Br. at Addendum B-2).

[1] In 1977, section 301(b) of the Department of Energy Organization Act, Pub. L. No. 95-91, 42 U.S.C. § 7101 *et seq.*, transferred the regulatory functions of NGA § 3 to the Secretary of Energy. The Secretary subsequently delegated to the Commission the authority to approve or disapprove the siting, construction and operation of particular natural gas import facilities. Initial Order at n.2 (citing Department of Energy Delegation Order No. 00-004.00, 67 Fed. Reg. 8,946 (2002)).

Then, in 2004, to ensure that all safety and security issues are adequately and seamlessly addressed, FERC, the Department of Transportation, and the Coast Guard entered into an Interagency Agreement to coordinate review of proposed LNG facilities to "ensure[] a seamless safety and security review by the three federal agencies." R. 498 at 4-105, JA 265. In accordance with the agreement, the Commission is the lead agency in preparing the EIS, which analyzes environmental, safety, security and design issues regarding the proposed facilities as required by the National Environmental Policy Act of 1969.

II. Events Leading To The Challenged Orders

A. Eascogas' LNG Import Application

In 1972, Eascogas LNG, Inc. ("Eascogas"), a corporation created and jointly owned by Algonquin Gas Transmission Company and other companies, filed an NGA § 3 application for authority to import LNG for delivery to a proposed LNG facility to be located in Providence, Rhode Island at the site of KeySpan's instant proposal. *Algonquin Gas Transmission Co. v. FERC*, 809 F.2d 136, 137 (1st Cir. 1987); *Eascogas LNG, Inc.*, 50 FPC 2075, 1973 FPC LEXIS 5 at *6 (1973). Before the administrative hearings and environmental and safety review were completed on that application, Eascogas informed the Commission that two LNG supply contracts central to its proposed project would become cancelable, leading

to substantially increased LNG prices, if the Commission did not conditionally approve the project before January 1, 1974. *Id.* at *10-14.

As the United States was experiencing "a national energy emergency," the Commission determined that it was necessary, before that date, to issue an order providing limited conditional approval for the project. *Id.* at *4, *17-21. As "the record [was] undeniabl[y] incomplete," the Commission could not yet determine "whether the entire project, in all of its particulars, [was] in the public interest," but explained that it would "make that judgment promptly, when [it could] do so on the basis of the entire hearing record." *Id.* at *35. Thus, the Commission provided limited approval of the project "expressly condition[ed] upon [the Commission's] final conclusions pertaining to environmental – including safety – considerations," *id.* at *24-25, and "such terms and conditions as the Commission may impose," *id.* at *36-37, *39. *See also Algonquin Gas Transmission Co.*, 31 FERC ¶ 61,221 at 61,438, *order on reh'g*, 33 FERC ¶ 61,083 (1985), *aff'd sub nom. Algonquin Gas*, 809 F.2d 136.

Because the Eascogas contracts "included price escalation provisions pegged to world oil prices[,] . . . [w]hen the price of oil later skyrocketed, the LNG project became economically impossible," and "Algonquin terminated the project." *Algonquin Gas*, 809 F.2d at 138; *see also Algonquin Gas*, 31 FERC at 61,438. As a result, the Commission never finally acted on Eascogas' NGA § 3 LNG import

facility application, and "[n]o Eascogas LNG was ever imported or sold." *Id.*; *see also* Rehearing Order at P 3, JA 424-25 (explaining that the Eascogas project "became uneconomic and the facilities were never authorized or constructed").

B. Algonquin's LNG Storage Project

As KeySpan explained:

> [T]he LNG storage facilities currently owned and operated by [KeySpan] . . . were originally constructed by Algonquin LNG, Inc. ("[Algonquin]") in the early 1970s on a site owned by Providence Gas Company ("Providence Gas"), a local distribution company. [Algonquin] agreed to build and operate, for 30 years, delivery and storage facilities that would provide Providence Gas 348,000 barrels of LNG storage capacity. *See Algonquin Gas Transmission Co.*, 31 FERC ¶ 61,221 (1985). Federal Power Commission . . . authorization was not required for the construction or operation of the original facilities because they were used to provide intrastate service to a local distribution company. *See Algonquin LNG, Inc.*, 52 FPC 731 (1974).

KeySpan Data Request Response, R. 127 Response No. 1 p. 2, JA 56; *see also* Rehearing Order at P 3, JA 424 ("The Commission's authorization was not required for the original construction and operation of the storage facility because the facility was only used to provide intrastate service").

Construction of Algonquin's LNG storage facility was completed in December 1973, and consisted of "one 600,000 barrel above ground storage tank; a barge unloading dock; an LNG truck unloading and loading station; three LNG pumps; three 33.4 million cubic feet per day direct-fired vaporizers; control and

equipment buildings; process piping; and other related facilities." *Algonquin Gas*, 31 FERC at 61,439; *see also* Initial Order at P 7, JA 455. In 1974,

> [b]ecause the facility had additional storage capacity, [Algonquin] sought and received Commission authorization to provide LNG storage services on an interstate basis to Providence Gas and other customers under a series of limited term certificates . . . . In 1992, . . . FERC issued [Algonquin] a blanket [NGA § 7] certificate under 18 C.F.R. § 284.221 of the Commission regulations to provide firm and interruptible storage service and storage-related transportation on an open access basis.

KeySpan Data Request Response, R. 127 Response No. 1 p. 2, JA 56; *see also* Initial Order, 112 FERC at P 7, JA 455; *Algonquin LNG, Inc.*, 60 FERC ¶ 61,127, *order on reh'g*, 61 FERC ¶ 61,292 (1992); *Algonquin LNG, Inc.*, 52 FPC 731 (1974).

In 2002, KeySpan acquired Algonquin. Initial Order at P 9, JA 455. Under its NGA § 7 certificate, KeySpan provides up to 150,000 dekatherms per day of firm and interruptible storage services to Consolidated Edison Company of New York, KeySpan Energy Delivery New England, and New England Gas Company. *Id.* at P 10, JA 455. LNG is delivered to the storage facility by truck, and KeySpan redelivers the gas via a displacement agreement with New England Gas Company for use primarily as a winter peaking supply. *Id.*

C. KeySpan's Application

On April 30, 2004, KeySpan filed an NGA § 3 "application for authorization of a[n] [LNG] Terminal" in Providence, Rhode Island. R. 1 at 1, JA 2. KeySpan explained that it "currently own[ed] and operate[d] an LNG storage facility in Providence and propose[d] to upgrade that facility by converting it to an LNG Terminal capable of receiving marine deliveries and augmenting the facility's existing vaporization system." *Id.*; *see also id.* at 8, JA 9 (same).

While the existing facilities "operate on a single-cycle annual basis, provid[ing] storage service to three customers who transport LNG to the storage tank by truck and take redelivery of LNG by truck or in vaporized form for use primarily as a winter peaking supply," KeySpan noted, the "upgrades will permit the facility to receive marine deliveries of LNG, to offer LNG terminalling service, and to redeliver vaporized LNG into the New England market on a baseload basis via an interconnection" with Algonquin's pipeline system. R. 1 at 8, JA 9.

D. Comments

Several parties submitted comments on KeySpan's application, asserting, among other things, that KeySpan's proposal should be disapproved unless the existing facility's storage tank and impoundment system, which would be incorporated into and used as part of the new LNG import facility, meet current safety standards. *See, e.g.*, City of East Providence, Rhode Island Comments, R.

78, JA 37-42; Rhode Island Attorney General Comments, R. 97, JA 43-53; Ferguson Perforating & Wire Company Comments, R. 44 at 1, JA 30.

E. The Environmental Analysis

After conducting an extensive analysis regarding environmental and safety matters and considering all comments presented in the proceeding, the Commission issued a Draft EIS, and then a Final EIS, on November 30, 2004, and May 20, 2005, respectively. R. 319, R. 498. In accordance with the 2004 Interagency Agreement, the Department of Transportation participated in the preparation of both the Draft EIS, R. 319 at 1-2, JA 70, and the Final EIS, R. 498 at 1-2, JA 233. *See also* Initial Order at P 31, JA 459 (same).

The EISs explained that, "[s]ince commencing operations in May 1974, under its initial authorization, the [KeySpan] facility has provided winter storage services with the tank filled exclusively by LNG truck, with the exception of a single cargo from the 30,000 barrel LNG Barge *Massachusetts* in July 1974." Final EIS, R. 498 at 4-114, JA 274. The instant proposal would "convert the existing KeySpan LNG facility to an LNG terminal capable of receiving marine deliveries, augment the facility's existing vaporization capability, augment the supply of LNG to fill the region's LNG storage facilities to meet peak day needs (i.e., via truck delivery)[,] and provide 375 MMcfd of new, firm, reliable baseload supply of natural gas to meet the increasing energy demand in Rhode Island and

the New England region beginning with the 2005/2006 winter heating season." Final EIS, R. 498 at 1-3, JA 234.

While the EISs found that the proposal would provide new natural gas supply that would help meet expected energy demand increases, *id.*, public safety concerns associated with the proposal also needed to be evaluated and considered, Final EIS, R. 498 at 4-105, JA 265; Draft EIS, R. 319 at 4-83, JA 72. "LNG's principal hazards result from its cryogenic temperature (-260^0 F), flammability, and vapor dispersion characteristics." Final EIS, R. 498 at 4-106, JA 266; Draft EIS, R. 319 at 4-84, JA 73.

> Methane, the primary component of LNG, is colorless, odorless, and tasteless and is classified as a simple asphyxiant. Methane could, however, cause extreme health hazards, including death, if inhaled in significant quantities within a limited time. At very cold temperatures, methane vapors could cause freeze burns. Asphyxiation, like freezing, normally represents a negligible risk to the public from LNG facilities.
>
> When released from its containment vessel and/or transfer system, LNG will first produce a vapor or gas. This vapor, if ignited, represents the primary hazard to the public. LNG vaporizes rapidly when exposed to ambient heat sources such as water or soil, producing 620 to 630 standard cubic feet of natural gas for each cubic foot of liquid. LNG vapors in a 5 to 15 percent mixture with air are highly flammable. The amount of flammable vapor produced per unit of time depends on factors such as wind conditions, the amount of LNG spilled, and whether it is spilled on water or land. Depending on the amount spilled, LNG may form a liquid pool that will spread unless contained by a dike.

Final EIS, R. 498 at 4-106 through 4-107, JA 266-67; Draft EIS, R. 319 at 4-84, JA 73. Thus, the EISs determined, "[t]he KeySpan proposal could pose a potential hazard to public safety without strict design and operational measures to control potential accidents." Final EIS, R. 498 at 4-105, JA 265; Draft EIS, R. 319 at 4-83, JA 72; *see also* KeySpan Response to Comments on Notice of Intent to Prepare an EIS, R. 297 at 3, JA 60 (KeySpan stating that "[a]s the Commission acknowledged in the [Draft EIS for another proposed LNG facility], the operation of an LNG terminal poses a unique hazard that could affect the public safety without strict design and operational measures to control potential accidents") (internal quotation omitted)).

Despite these serious public safety concerns, and the fact that the existing storage tank, which was proposed to be incorporated into and used as part of the new LNG import facility, was designed and constructed in the early 1970s (before promulgation of the February 1980 Federal LNG Safety Standards in 49 C.F.R. Part 193), KeySpan's proposal did not include plans to upgrade the existing LNG storage tank to meet current LNG Safety Standards. Final EIS, R. 498 at 4-113 through 4-114, JA 273-74. "During more than 30 years of operation, the facility ha[d] provided[ed] winter storage services with the tank filled exclusively by LNG truck, except for a single barge cargo in July 1974." Final EIS, R. 498 at 4-165, JA 292; *see also* Draft EIS, R. 319 at 4-90, JA 75. As the proposal would change "the

historical mode of operations of the facility to a baseload import terminal, with the LNG storage tank filled weekly by LNG vessels," the EISs concluded that it would be necessary "for the existing LNG storage tank and facilities to be modified as necessary to meet the current LNG safety standards . . . ."[2] Final EIS, R. 498 at 4-165, JA 292; Draft EIS, R. 319 at 4-90, JA 75.

The proposed import facility's storage tank did not meet current safety standards because: (1) the impoundment site for the LNG storage tank was designed for only 100 percent, rather than 110 percent, of the tank contents; (2) thermal radiation and flammable vapor exclusion zones would extend offsite onto adjacent properties; and (3) a detailed evaluation by a seismic consultant would be required to determine if the storage tank complied with, or could be modified to comply with, 2001 National Fire Protection Association ("NFPA") standards, which increased the stringency and complexity of seismic requirements. Final EIS, R. 498 at 4-114 through 4-115, JA 274-75; Draft EIS, R. 319 at 4-91, JA 76.

[2] *See also* Final EIS, R. 498 at 5-1, JA 294 ("KeySpan LNG's current proposal to convert the facility into a baseload import terminal would not meet current federal safety standards. We believe that all new LNG import terminals should comply with current standards."). *Id.* at 4-114, JA 274 ("the facility upgrade proposed for the KeySpan LNG Project represent[ed] a significant modification to its historical mode of operation," and "provide[d] the opportunity to re-evaluate the existing facility and to raise the level of safety to that required for new LNG import terminals").

Accordingly, the Draft EIS recommended that KeySpan:

> perform an analysis of how its existing LNG storage and sendout facilities would comply with the current Federal Safety Standards, to include, but not be limited to: thermal radiation and flammable vapor exclusion zones; required impoundment capacity; seismic design requirements in the 2001 edition of NFPA 59A; and siting, design, and construction requirements. For those features of the existing facility that would not comply with the current safety standards, KeySpan LNG should include an evaluation of the design changes or other measures that would need to be applied to comply with current standards, along with a specific discussion of how each of the change(s) would achieve compliance.

Draft EIS, R. 319 at 4-91, JA 76.

KeySpan's January 24 and March 24, 2005 responses (R. 369, JA 110-53; R. 471, JA 181-91) explained that it would need to take the following measures to meet current safety standards:

> (1) replace anchor straps, increase inner floor thickness, or replace foundation for seismic requirements; (2) install in-tank pumps and eliminate bottom penetrations to reduce flammable vapor exclusion zones; (3) increase impoundment capacity; (4) add pressure and vacuum relief valves; and (5) acquire legal control of eight adjacent properties for thermal exclusion zones.

Final EIS, R. 498 at 5-1, JA 294; *see also* Final EIS, R. 498 4-115 through 4-116, JA 275-76. "KeySpan LNG concluded that it would not be feasible to make these modifications due to the high financial costs and the fact that making the modifications would require taking the existing facility out of service for two to three heating seasons." Final EIS, R. 498 at 5-1, JA 294.

III. The Challenged Orders

"Since the proposed LNG terminal facilities [would] be used to import natural gas from a foreign country, the construction and operation of the facilities and the location of the facilities require approval by the Commission under section 3 of the Natural Gas Act." Initial Order at P 27, JA 458; *see also* Rehearing Order at P 19, JA 428. "In examining LNG proposals," the Commission explained, its "most important duty is ensuring that the project that is authorized is safe and secure. [The Commission] will not authorize an LNG facility if [it] continues to have questions about safety." Initial Order at P 56, JA 462; *see also* Rehearing Order at P 19, JA 428.

"In this proceeding, for the first time, [the Commission was] presented with a proposal to construct a new LNG import facility which would incorporate an existing LNG facility." Initial Order at P 57, JA 462; *see also* Rehearing Order at P 20, JA 428. Agreeing with the findings of the Draft and Final EISs, the Commission determined that KeySpan's proposal to convert its existing LNG storage facility into a new LNG import terminal, without upgrading existing components to meet current LNG safety standards, would be inconsistent with the public interest under NGA § 3. Initial Order at PP 2-3, 29, 57-58, JA 454, 458, 462-63; Rehearing Order at PP 6, 19-20, 31, 33, JA 425, 428, 433.

While "KeySpan's proposal would provide a new source of reliable LNG imports in New England, where gas is critically needed," that was "outweighed by

the fact that KeySpan's proposal for a new LNG import terminal does not meet current federal safety standards" which are "required of all other new LNG import facilities in the United States." Initial Order at PP 29, 57, JA 458, 462. Specifically, "the impoundment site and thermal radiation and flammable vapor exclusion zones for the existing LNG storage facility do not meet current federal safety standards. Also, an evaluation of the storage tank is needed to determine if the tank meets current seismic requirements." Rehearing Order at P 20, JA 428.

The Commission acknowledged that, "[i]n addition to [the Commission's] responsibilities," the Department of Transportation promulgates minimum federal standards for the design and operation of LNG facilities. Initial Order at P 54, JA 462 (citing 49 C.F.R. Part 193); *see also id.* at P 58, JA 463. The Commission also recognized that, "[a]s part of its regulatory scheme, the [Department of Transportation] decided that facilities constructed before March 31, 2000 were not subject to its current construction standards . . . ." Initial Order at P 54, JA 462; *see also* Rehearing Order at P 18, JA 428.

Nonetheless, the Commission explained, "with respect to a request for Commission authorization to construct a new LNG import project, as is presented here," the Commission's "consideration of the proposal[] is conducted pursuant to [the Commission's] regulations and the criteria of the Natural Gas Act, not the

[Natural Gas Pipeline Safety Act ("Pipeline Safety Act")] or the [Department of Transportation]'s regulations." Rehearing Order at P 19, JA 428.

> [U]nder [the Commission's] regulatory scheme, the Commission must determine if LNG construction proposals are consistent with the public interest. As part of [the Commission's] determination, [it] must examine safety issues. [The Commission] ha[s] the authority to apply terms and conditions to ensure that the proposed construction and siting is in the public interest and the discretion to, instead, deny an application where we determine that it is not in the public interest to approve it.

Initial Order at P 58, JA 463; *see also id.* at P 56 and n. 23, JA 462, 470 and Rehearing Order at P 19 and n.6, JA 428 (citing *Distrigas*, 495 F.2d at 1064).

The Commission added that "the safety record of the LNG industry is excellent," in part because of "the array of safety requirements [the Commission] impose[s] in authorizing LNG facilities." Initial Order at PP 55, 57, JA 462; *see also id.* at P 56, JA 462; Rehearing Order at P 20, JA 428. To maintain that safety record, the Commission determined, the public interest required that current safety standards must be applied to all new LNG import facilities, including those incorporating portions of an existing storage facility. Initial Order at P 65, JA 464.

SUMMARY OF ARGUMENT

NGA § 3 provides the Commission broad authority over the siting, construction, and operation of LNG import facilities. This includes the authority to apply terms and conditions to ensure that the proposed project is in the public interest, and the discretion, instead, to deny an application where the Commission

determines its approval would not be consistent with the public interest. The Commission reasonably exercised its broad NGA § 3 discretion in determining that KeySpan's proposal to convert its existing LNG storage facility into an LNG import facility, without meeting current safety standards, would be inconsistent with the public interest.

The Commission's determination did not conflict with, or otherwise frustrate, the Pipeline Safety Act or the Department of Transportation regulations promulgated thereunder. The Pipeline Safety Act and Department of Transportation regulations address only *minimum* safety standards, above which other authorities may impose additional safety requirements. Indeed, the Department of Transportation worked cooperatively with FERC in preparing the Draft and Final EISs, which identified the safety concerns upon which the application was rejected.

Furthermore, the Commission reasonably found irrelevant the cases cited by KeySpan as purportedly being inconsistent with the Commission's determinations here. KeySpan's was the only application ever to propose converting an existing NGA § 7 LNG storage facility into a new NGA § 3 LNG import facility. Unlike KeySpan's proposal, the proposals in *Cove Point*, *Southern*, and *Trunkline* involved upgrades to previously-approved LNG import facilities. Likewise, unlike

KeySpan's proposal, neither *Algonquin* nor *Columbia* involved a proposal to construct and operate an LNG import terminal.

Finally, the Commission's decision to deny, rather than to authorize conditionally, KeySpan's application was reasonable in the circumstances here. KeySpan itself had asserted throughout the Commission proceeding that it would be both practically and economically impossible to make the changes necessary to meet current safety standards.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *E.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under that standard, the Commission's decision must be reasoned and based upon substantial evidence in the record. For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence. NGA § 19(b), 15 U.S.C. § 717r(b).

In addition, the Court "defer[s] to FERC's interpretation of its orders so long as the interpretation is reasonable." *Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004). Likewise, the Court defers to the Commission's reasonable interpretation of ambiguous provisions of the NGA. *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1165-66 (D.C. Cir. 1996).

II. The Commission Reasonably Determined, Under NGA § 3, That KeySpan's Proposal To Convert Its Existing LNG Storage Facility Into An LNG Import Facility, Without Meeting Current Safety Standards, Was Not Consistent With The Public Interest

KeySpan's was the first application to propose converting an existing NGA § 7 LNG storage facility into a new NGA § 3 LNG import facility. Initial Order at P 57, JA 462; *see also* Rehearing Order at P 20, JA 428. After reviewing the entire record, the Commission reasonably determined, under NGA § 3, that it was not "in the public interest to authorize the construction of such an import terminal, where the components do not meet the current federal safety standards required of all other new LNG import facilities in the United States." Initial Order at P 57, JA 462; *see also* Initial Order at PP 2-3, 29, 57-58, JA 454, 458, 462-63; Rehearing Order at PP 6, 19-20, 31, 33, JA 425, 428, 433.

KeySpan contends that "FERC is without authority to require that [KeySpan]'s existing facilities comply with new construction standards." Br. at 21 (capitalization in heading altered); *see also* Br. at 17-25. As explained below, KeySpan is incorrect.

A. The Commission Reasonably Interpreted The Broad Language Of NGA § 3 As Authorizing It To Require That All Components Of A Proposed New LNG Import Facility Meet Current Safety Standards

As the Commission explained, "[u]nder section 3 [of the NGA], the Commission is charged with authorizing the siting, construction, and operation of LNG import facilities." Initial Order at P 56, JA 462; *see also* Rehearing Order at P 19, JA 428. NGA § 3 provides the Commission with the broad "authority to apply terms and conditions to ensure that the proposed construction and siting is in the public interest and the discretion to, instead, deny an application where [the Commission] determine[s] that it is not in the public interest to approve it." Initial Order at P 58, JA 463; *see also id.* at P 56 and n. 23, JA 462, 470, and Rehearing Order at P 19 and n.6, JA 428 (citing *Distrigas*, 495 F.2d at 1064).

The Commission's broad authority under NGA § 3 has been confirmed by this Court, which has found that, "[u]nder [NGA] Section 3, the Commission's authority over imports of natural gas is at once flexible and plenary." *Distrigas*, 495 F.2d at 1064. "It is for the Commission in the first instance to determine, after reasoned consideration and on the basis of substantial evidence, whether and in what manner to exercise its flexible Section 3 power . . . ." *Distrigas*, 495 F.2d at 1066.

Thus, the Commission concluded that it was within its broad NGA § 3 authority to find the instant new LNG import facility proposal to be contrary to the

public interest because all of the facility's components would not meet current safety standards. The Commission's reasonable interpretation of this statutory provision, which the Commission has been charged with administering, should be upheld. *United Distribution*, 88 F.3d at 1165-66.

B. The Commission's Interpretation of NGA § 3 Does Not Conflict With The Pipeline Safety Act Or Department of Transportation Regulations

KeySpan asserts that the Pipeline Safety Act and Department of Transportation apply current safety standards only to LNG facilities constructed after March 31, 2001, and, therefore, the Commission is prohibited from applying current safety standards to the components of KeySpan's proposed new LNG import facility that were constructed before that date, *i.e.*, the storage tank and impoundment. Br. at 17-25, 33, 39. As explained above, however, the Commission evaluates an LNG proposal under the Commission's "regulations and the criteria of the Natural Gas Act, not the [Pipeline Safety Act] or the [Department of Transportation]'s regulations." Rehearing Order at P 19, JA 428.

In any event, contrary to KeySpan's belief, Br. at 21, the Commission's interpretation of NGA § 3 does not conflict with, or otherwise frustrate, either the Pipeline Safety Act or the Department of Transportation regulations promulgated thereunder. The Pipeline Safety Act requires the Secretary of Transportation to "prescribe *minimum* safety standards" for deciding on the location, design,

installation, and construction of a new LNG facility. 49 U.S.C. §§ 60103 (a) and (b) (emphasis added).[3] As the Department of Transportation, the agency responsible for implementing the Pipeline Safety Act, has found, the Department of Transportation's "standards set the *minimum* criteria that any applicant for a license to operate an LNG facility *must* meet." *U.S. Dep't of Transp., Re Petition for Rulemaking by the City of Fall River* at 5 (No. PHMSA-2004-19208, Oct. 25, 2006) (first emphasis added) (attached at Addendum II). "The pipeline safety law contemplates the imposition of additional safety and security requirements by other authorities . . . ." *Id.*

Furthermore, the Department of Transportation has explained, "it does not have the authority to make case-by-case determinations" regarding a proposed facility. *Id.* Instead, "[t]he appropriate licensing authority makes these determinations by conducting an extensive public fact-finding process to determine whether the proposed site and facility meet all applicable standards. This process frequently results in additional requirements specific to the site or facility." *Id.* For example, "FERC may require additional design requirements as it did in the case of the application to locate an LNG facility in Fall River." *Id.* (referring to

[3] KeySpan's brief omits the word "minimum" in discussing the Pipeline Safety Act and the Department of Transportation regulations promulgated thereunder. *See*, *e.g.*, Br. at 18 ("In the [Pipeline Safety Act], Congress gave [the Department of Transportation] the responsibility for prescribing the standards applicable to siting and construction of LNG facilities.").

Weaver's Cove Energy, L.L.C., 112 FERC ¶ 61,070 (2005), *order on reh'g*, 114 FERC ¶ 61,085 (2006), *appeal pending sub nom. City of Fall River v. FERC* (1st Cir. No. 06-1203)).[4] The Department of Transportation's "work with . . . Federal . . . licensing authorities ensures that their requirements do not *reduce* the level of safety provided by [Department of Transportation's] safety standards." *Id.* (emphasis added).

Thus, there is no basis to KeySpan's claim, Br. at 24-25, that the 1985 Memorandum of Understanding between FERC and the Department of Transportation, which explicitly recognizes that, "under the Natural Gas Act, the FERC exercises the authority to impose more stringent safety requirements than [the Department of Transportation]'s standards," Memorandum at 2, extends only to operation and maintenance standards, but not to matters such as the siting of an LNG facility. The Department of Transportation does not share KeySpan's belief.

[4] In *Weaver's Cove*, issued contemporaneously with the instant orders, the Commission approved an NGA § 3 application seeking to construct and operate a new LNG import facility in Fall River, Massachusetts.

Indeed, the Department of Transportation worked cooperatively with FERC in preparing the Draft and Final EISs, which identified the safety concerns upon which the application was rejected. Initial Order at P 31, JA 459. In particular, the Department of Transportation "reviewed preliminary sections of the Final EIS, and [its] comments [were] incorporated into" that document. Final EIS, R. 498 at 1-2, JA 233; *see also, e.g., id.* Appendix F at PM2-30, JA 302 (explaining that preparation of the EIS is a cooperative effort with other federal agencies); *id.* Appendix F at PM1-75, JA 300 ("The Commission is committed to close coordination with the Coast Guard and the [Department of Transportation] in reviewing applications for LNG facilities. The Commission has a long-standing Memorandum of Understanding (1985 Memorandum of Understanding) promoting coordination with the [Department of Transportation] on LNG facilities. Moreover, . . . the Commission signed an interagency agreement with the Coast Guard and the [Department of Transportation] to ensure the three agencies work together in a coordinated and comprehensive manner regarding our respective review and oversight of the land and marine issues associated with onshore LNG facilities").

KeySpan begrudgingly recognizes, as it must, that FERC has a role in overseeing "the safety and security of LNG import terminals," just as the Department of Transportation and the Coast Guard have complementary roles. Br.

at 24. Moreover, KeySpan recognizes that FERC may engage in "independent consideration of safety issues," as long as that consideration does not encroach on congressional directives. *Id.* Despite FERC's broad NGA § 3 authority to ensure that each proposal to import natural gas is "consistent with the public interest," KeySpan is attempting to deny FERC the ability to do anything more than simply rubber stamp Department of Transportation minimum safety standards. Thus, it is KeySpan, and not FERC, that inappropriately seeks to frustrate the effectiveness of a federal statute.

C. The Commission Appropriately Distinguished Its Precedent

KeySpan complains that the Commission's determination in this case was inconsistent with its precedent in *Cove Point LNG Limited Partnership*, 97 FERC ¶ 61,043, *order on reh'g and clarification*, 97 FERC ¶ 61,276 (2001), *order on reh'g and clarification*, 98 FERC ¶ 61,270 (2002), *Southern LNG Inc.*, 103 FERC ¶ 61,029 (2003), *Trunkline Gas Co., LLC*, 108 FERC ¶ 61,251 (2004), *order amending certificate*, 110 FERC ¶ 61,131 (2005), *Algonquin LNG, Inc.*, 79 FERC ¶ 61,139 (1997), *order on reh'g*, 83 FERC ¶ 61,133 (1998), and *Columbia Gas Transmission Corp*, 71 FERC ¶ 61,347 (1995). Br. at 25-35. In those cases, the Commission authorized LNG facility upgrades without requiring compliance with current safety standards. In KeySpan's view, "this case is indistinguishable from [those] earlier Commission cases." Br. at 27 (capitalization in heading altered).

The Commission reasonably found otherwise. Initial Order at PP 63-66, JA 463-64; Rehearing Order at PP 24-26, JA 430-31.

First, the Commission explained, unlike KeySpan's proposal here, the proposals in *Cove Point*, *Southern*, and *Trunkline* involved upgrades to previously-approved LNG import facilities. Initial Order at P 64, JA 463-64; Rehearing Order at P 24, JA 430. In contrast, the existing facilities at issue here had been authorized only to operate as an NGA § 7 LNG storage facility.[5] Initial Order at P 65, JA 464; *see also* Rehearing Order at PP 3, 25, JA 424-25, 430.

The Commission also found *Algonquin* and *Columbia* irrelevant, as neither involved a proposal, such as the one here, to construct and operate an LNG import terminal. Rehearing Order at P 26 and n. 15, JA 431; *see also* Initial Order at P 64, JA 464. *Algonquin* involved a proposal to construct a liquefaction plant at the KeySpan storage facility at issue here, and *Columbia* involved a proposal to

[5] KeySpan's statement that its existing facilities "received vessel deliveries of LNG," Br. at 32, should not be interpreted to mean that the existing facilities received LNG *import* deliveries. While the existing facilities did receive a single delivery by barge, in 1974, Final EIS at 4-114, JA 274, the existing facilities never received final NGA § 3 import authorization. *Algonquin Gas*, 809 F.2d at 138; *Algonquin Gas*, 31 FERC at 61,438 (explaining that the Commission never finally acted on Eascogas' NGA § 3 LNG import facility application, and "[n]o Eascogas LNG was ever imported or sold."). Accordingly, the 1974 barge delivery could have occurred only under the storage facility's NGA § 7 authorization.

construct a vaporizer unit at another existing LNG truck terminal. Rehearing Order at P 24, JA 430.

As the Commission explained, its public interest concern here -- that a **new LNG import** terminal be authorized only if it meets current federal safety standards, Initial Order at P 65, JA 464 -- was not at issue in any of the cited cases. This case is unique in that it represents the only time the Commission has been presented with a proposal to convert an existing NGA § 7 LNG storage facility into an NGA § 3 LNG import facility. Initial Order at P 57, JA 462; Rehearing Order at P 20, JA 428. The Commission's interpretation of its own orders was reasonable and, therefore, should be upheld. *Entergy*, 375 F.3d at 1209.

D. The Commission Reasonably Determined That The Application Should Be Denied Rather Than Conditionally Authorized

Next, KeySpan argues that "FERC failed . . . to provide a reasonable explanation for why it denied authorization to [KeySpan] instead of granting authorization subject to any terms and conditions FERC found 'necessary' and 'appropriate' to satisfy its concerns." Br. at 35; *see also* Br. at 35-39. To the contrary, the Commission fully supported its decision to deny, rather than conditionally authorize, KeySpan's proposal.

First, the Commission explained, "KeySpan has consistently asserted that it would be impossible from a practical and economic standpoint to make the changes necessary to meet the Commission's safety standards . . . ." Rehearing

Order at P 28 and n. 17, JA 431-32 (citing, *e.g.*, KeySpan's Comments on the Draft EIS, R. 369 at 3-20, 31, JA 112-29, 140; KeySpan's Supplemental Comments on the Draft EIS, R. 471 at 3-7, JA 183-87; KeySpan's Comments on the Final EIS, R. 511 at 3-4, 9-11, 16-17, JA 306-07, 312-14, 319-20).

For example, "KeySpan stated that, in order to meet the current seismic criteria for storage tanks, it would have to take the tank completely out of service for at least three heating seasons," and that "it was legally and contractually impossible to shut down the tank considering its certificated obligations to its three existing customers." Rehearing Order at P 28, JA 431-32. "In addition, KeySpan asserted that a shut down would cause a serious energy crisis in the region, since the existing facility provides 150,000 [dekatherms] of natural gas service to the New England market." *Id.*, JA 432.

"Moreover," the Commission pointed out, "KeySpan predicted that upgrading or replacing the tank would cost between $95 and $105 million. According to KeySpan, these sums far exceeded the estimated costs of the entire project, which it put at $75 million, and rendered meeting the safety standards uneconomical as well as impractical." Rehearing Order at P 29, JA 432 (citations omitted).

KeySpan further asserted that:

> bringing the facility up to current thermal radiation exclusion standards would also require taking the LNG tank out of service or, in the alternative, acquiring legal control of surrounding properties. KeySpan deemed the option of acquiring surrounding properties unworkable, since it lacked the power of eminent domain to take the needed land. Even if the numerous landowners and businesses on these properties would accept compensation and a fair market value could be determined, KeySpan asserted that the acquisitions would triple or even quadruple the cost of the project, making this alternative impossible as well.

Rehearing Order at P 30, JA 433.

On appeal, KeySpan asserts that "[h]ad FERC authorized the Project subject to necessary and appropriate conditions, it would have at least provided [KeySpan] with an opportunity to determine the feasibility and means of satisfying these concerns." Br. at 36; *see also* Br. at 37-39. In the proceedings below, however, KeySpan made clear that it already had made that determination, having stated that "an authorization so conditioned would be no authorization at all."[6] KeySpan's Comments on the Final EIS, R. 511 at 17, JA 320.

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[6] *See also, e.g.*, KeySpan's Comments on the Draft EIS, R. 369 at 20, JA 129 ("[KeySpan] concludes – and urges the Commission to find – that the proposed upgrade would not be practically or economically feasible"); KeySpan's Comments on the Final EIS, R. 511 at 3, JA 306 (explaining that meeting current safety standards "would require [KeySpan] to abandon service to existing customers for up to three heating seasons," which KeySpan is "legally and contractually *unable* [to do]. Nor would [KeySpan] propose to do so given the critical nature of the existing service. There are other impediments to meeting [current safety standards] (such as the need to acquire eight properties without the power of eminent domain), but in light of [KeySpan]'s inability to abandon

The Commission further explained that it could not, as KeySpan asserts, Br. at 36-37, conditionally approve KeySpan's proposal as it did the contemporaneously-reviewed proposal in *Weaver's Cove Energy*, 112 FERC ¶ 61,070, *order on reh'g*, 114 FERC ¶ 61,085. Rehearing Order at P 31-33, JA 433.

> Based on the record compiled to date, the Commission cannot authorize this project by conditioning it as [the Commission] did in the *Weaver's Cove* case. Weaver's Cove is proposing to construct an entirely new facility. In considering its application, we were able to analyze all aspects of its proposal and, having done so, imposed a number of safety-related conditions which must be satisfied prior to construction. KeySpan, on the other hand, did not propose any safety-related modifications to its existing facilities. . . . A proposal to upgrade KeySpan's existing facilities in conjunction with construction of the facilities proposed here would constitute a significantly different project than that analyzed by the Commission. Therefore, KeySpan has not provided the information regarding the necessary upgrades nor have we had the opportunity to analyze any of the details involved in upgrading the current facilities.

Rehearing Order at P 31, JA 433 (footnote containing citation omitted).

In addition, the Commission pointed out, "KeySpan states that it would need to take [its existing] facilities out of service for up to three years and interrupt service to its customers to comply with the new construction standards."

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service, those impediments are academic"); *id.* at 4, JA 307 (applying current safety standards "would render infeasible [the] project"); *id.* at 11 n.11, JA 314 (same); *id.* at 9, JA 312 ("imposing a condition on this Project that would require abandonment of service is tantamount to denying authorization – because [KeySpan] cannot legally meet the condition").

Rehearing Order at P 32, JA 433. "[I]n order to take the facilities out of service, KeySpan would have to propose for Commission analysis and authorization some alternative service arrangements for its customers for the time period the existing facilities are out of service, and the Commission would have to find that the arrangements are in the public interest." *Id.*

"For these reasons," the Commission found, "in order for the Commission to consider the appropriateness of issuing a conditional authorization in this proceeding to KeySpan, such as [it] did in *Weaver's Cove*, the record would require far more detailed information and analysis on the upgrades to the existing facilities and the impact of disrupting existing service (or consideration of alternative service)." Rehearing Order at P 33, JA 433.

The Commission emphasized, however, that its "reject[ion] of KeySpan's application" was "without prejudice to KeySpan's filing an amended application addressing the issues discussed above." *Id.* Moreover, the Commission stated, "[d]epending on the nature and timing of such a proposal, KeySpan could presumably use the relevant portions of the current record in that proceeding." Rehearing Order at n. 22, JA 433.

KeySpan also asserts that the only approval condition the Commission appropriately could have imposed "would have been to require [KeySpan] to seek a [Department of Transportation] determination of whether the Project would be

safe as proposed and, if not, to seek [Department of Transportation] approval for Project modifications that would ensure safety." Br. at 38. Such a condition, however, would have been superfluous, as "[t]he [Department of Transportation] participated in the preparation of the Final EIS," Initial Order at P 31, JA 459, "and [its] comments [were] incorporated into" that document, Final EIS, R. 498 at 1-2, JA 233. *See also* Final EIS, R. 498 Appendix F at CO4-5, JA 298 (explaining that "[s]ection 4.12 [of the Final EIS] presents a discussion of safety issues and the agencies' [including the Department of Transportation's] efforts to ensure the risks of LNG are low and manageable"). Thus, there is no merit to KeySpan's assertion, Br. at 39 n.55, that the Department of Transportation did not have an opportunity to comment on the safety requirements in this case in accordance with the 1985 Memorandum of Understanding.[7]

[7] Under the Memorandum, FERC is to "refer to [the Department of Transportation] for its review and comment any FERC proposed corrective action addressing LNG facility safety matters, whether or not in the form of certificate conditions, that differ from or are more stringent than [the Department of Transportation]'s safety regulations and standards." Memorandum at 2 (*see* Pet. Br. at Addendum B-2). In response, the Department of Transportation can "[t]ake whatever action [it] considers appropriate," including "commenting on the appropriateness of a particular safety standard proposed by the FERC with regard to a particular LNG facility or particular circumstances, or deciding that no action is necessary . . . ." *Id.* at 3 (*see* Pet. Br. at Addendum B-3).

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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D.C. Cir. No. 06-1097

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 7,858 words, not including the tables of contents and authorities, the certificates of counsel, or the addenda.

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