UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-73650 and 04-75240

CALIFORNIANS FOR RENEWABLE ENERGY, INC. and CALIFORNIA PUBLIC UTILITIES COMMISSION,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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STATEMENT OF JURISDICTION

The Federal Energy Regulatory Commission ("Commission" or "FERC") has subject matter jurisdiction in this case under Section 3 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717b. FERC indicated that the first order challenged on review "constitutes final agency," and was subject to the NGA's rehearing requirements. Excerpts of Record of California Public Utilities Commission ("ER") at 95, ordering para. (C); *see* NGA § 19(a), 15 U.S.C. § 717r(a).

The Commission agrees with Petitioners' statements regarding the statutory basis of this Court's jurisdiction and the timeliness of their petitions for review, except to the extent that Californians for Renewable Energy ("CARE") assert that the issues they raise on appeal were properly raised on rehearing before FERC. CARE Br. at 4 n. 1. As CARE failed to raise any of those issues on rehearing, this Court lacks jurisdiction to consider any CARE objection. NGA § 19(b), 15 U.S.C. § 717r(b).

STATEMENT OF THE ISSUE

Did FERC properly determine that it has exclusive jurisdiction under NGA § 3, 15 U.S.C. § 717b, over liquefied natural gas ("LNG") import facilities that Sound Energy Solutions ("SES") proposes to build and to operate in Long Beach, California?

STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in the addendum to this Brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSTIONS BELOW

This case involves a declaratory order by FERC that it has exclusive jurisdiction under NGA § 3 over SES's application to site, construct, and operate an LNG terminal in the Port of Long Beach, California, for the purpose of importing

LNG from foreign nations into the United States. "Declaratory Order Asserting Exclusive Jurisdiction," 106 FERC ¶ 61,279 (March 24, 2004), ER 80 at P 1[1] ("March 24 Order"). A declaratory order was required because the California Public Utilities Commission ("CPUC") filed a protest to SES's application, contending that the CPUC has exclusive jurisdiction over the siting and operation of the LNG terminal. *Id*. FERC issued a declaratory order in advance of a decision on the merits of the application "to resolve the State and Federal jurisdictional conflict" in a manner that could be reviewed expeditiously. *Id*. at P 3.

CPUC along with others sought rehearing of FERC's jurisdictional ruling, while CARE sought clarification and had earlier sought to stay further consideration of the application as well as to designate CPUC as "the lead state agency in conducting an environmental review." "Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order," 107 FERC ¶ 61,263 (June 9, 2004), ER 219 at P 1 ("June 9 Order"). Although denying the requests for rehearing, FERC reiterated its "goal to work cooperatively with the CPUC and other State and local authorities to protect the safety of residents and minimize adverse environmental impacts" *Id*. at P 2. To that end, FERC proposed to hold a technical conference on safety issues at which state and local authorities were invited to participate. *Id*.

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[1] P refers to the internal paragraph number within a FERC order.

Petitioners timely sought review of the March 24 and June 9 Orders, and the two petitions were eventually consolidated by this Court.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Framework

Section 3 of the NGA, 15 U.S.C § 717b, delegates to FERC jurisdiction over the importation (and exportation) of natural gas. NGA § 3(a) states that "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." That subsection also states that FERC "may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate," and may, after hearing and for good cause shown, issue supplemental orders as necessary or appropriate. NGA § 3(c) provides that importation of 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."

The Commission has delegated authority under NGA 7(c), 15 U.S.C. 717f(c), to determine whether the proposed construction and operation of facilities for the transportation or sale of natural gas in interstate commerce is in the present or future public convenience or necessity, and thus should be certificated. NGA § 1(c), 15 U.S.C. §717(c), the so-called Hinshaw Amendment, provides an exemption

"to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission."

B. Events Leading To The Challenged Orders

SES filed, on January 26, 2004, an application under NGA § 3 and FERC's regulations, seeking "authorization to site, construct, and operate" an LNG terminal in Long Beach. ER 5. The proposed LNG terminal "is designed to import LNG from Asia and abroad to the U.S. for sale in California's non-core natural gas markets, and to provide liquid vehicle fuel to customers in the LA Basin." ER 9. The terminal facilities will be built on a 25-acre portion of the now-closed Long Beach Naval shipyard, ER 12, and will include "an LNG ship berth, two storage tanks, an LNG truck loading facility, an LNG vehicle fuel storage tank, and associated facilities." ER 220 at P 3; *see* ER 13 (describing facilities). In addition, a 2.3-mile pipeline, which will be owned, constructed, and operated by the Port of Long Beach, is "required to link the LNG terminal to the existing SoCalGas line," will be "an essential component of the LNG terminal." ER 81 n. 1.

The CPUC submitted a protest to the application in which CPUC disagreed that SES "is currently in compliance with California state laws." ER 52-53. In particular, CPUC argued that "SES is required to apply for and receive a certificate of public convenience and necessity ("CPCN") for the CPUC prior to commencement of construction of its proposed facility." ER 53. CPUC stated that its protest does not suggest it is "opposed to LNG facilities in or near California" or that the CPUC would regulate "the price or importation of LNG." ER 54. CPUC stated that it would be "primarily concerned" with "the siting and safety of SES's proposed facilities in California," the rerouting of LNG "to core residential customers or electric generation" during natural gas shortages, and "the potential exercise of market power by SES, as well as the transfer of ownership of LNG facilities or merger between SES and another entity." ER 54-55. CPUC suggested that after SES filed a certificate application with CPUC, it "would be willing to work with the FERC to coordinate hearings in California." ER 61. This latter proposal was based on CPUC's view that "FERC does not possess sufficient authority to require conditions as part of any approval of SES's project, nor retain jurisdiction over the continuing operations of SES as a 'natural gas company' under the [NGA] because the gas never travels in interstate commerce." ER 68-89. Petitioner CARE did not seek to intervene or to protest.

B. The March 24 Order

The Commission recognized a disagreement between it and CPUC over who had jurisdiction regarding SES's proposal: "both agencies believe the proposed LNG import terminal to be under their authority." ER 80 at P 3. While finding it had exclusive jurisdiction over the terminal, FERC recognized "that cooperation among State and Federal authorities is needed to assess the SES proposal adequately." *Id*. In framing the jurisdictional question, FERC noted that it, "the CPUC and SES are in accord that the SES proposal will not involve interstate commerce." ER 83 at P 12. The parties disagreed whether FERC "can rely on NGA Section 3 to regulate the siting, construction, and operation of import facilities." *Id*.

The Commission indicated that for the past 30 years, it "has imposed 'the equivalent of [NGA] Section 7 certification requirements . . as to facilities' when exercising its delegated authority over the siting, construction, and operation of facilities used to import or export gas." ER 84 at P 15. CPUC's claim that passage of the 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)("EPAct"), and specifically NGA § 3(c) added by EPAct, "effectively removed what authority the Commission had to condition Section 3 authorizations" is similar to an argument in an earlier case that was rejected. ER 86 at P 18. Here, and in the earlier case, the Commission found the argument unconvincing because NGA § 3(a), where the conditioning authority lies,

remained unchanged, and if Congress intended "to remove Commission jurisdiction over the siting, construction, and operation of LNG import facilities,." FEC believed Congress "would have done so expressly." ER 86-87 at P 19.

The March 24 Order then explained how FERC's jurisdiction over "foreign commerce" under NGA § 3 was as exclusive as FERC's jurisdiction over interstate commerce. ER 89 at P 24. Exclusivity here meant that FERC will "exercise its flexibility under NGA Section 3 to regulate the LNG import terminal as well as the pipeline facilities that will deliver gas into state regulated factilities downstream." ER 90 at P 26. Exercise of federal authority was required to avoid a regulatory gap "because the facilities at issue will have no other function than to receive and deliver imported gas from the terminal directly into local facilities." *Id*. As such receipt and delivery is part of "foreign commerce," and NGA § 1(c)'s exemption does not apply to foreign commerce, only FERC has authority over the importation of LNG; thus, States lack authority over SES's terminal and, absent FERC's exercise of jurisdiction, a regulatory gap will exist. *Id*.

FERC found CPUC's concerns about problems unfounded. CPUC's concern that "SES might refuse to adhere to conditions of a Commission order modifying [SES's] proposal" was unwarranted because: (1) NGA § 3(a) gives such authority to FERC; (2) SES, having sought authorization from FERC, could not later disclaim FERC's authority if it dislikes the conditions; and (3) NGA § 20, 15 U.S.C. § 717s,

gives FERC authority to enforce its orders. ER 91 at P 28. As to curtailment concerns, the authority to direct how imports are used resides with the Secretary of Energy, *id*. at P 29 (footnote omitted), but the CPUC can "continue to direct gas flows on intrastate and local distribution lines." *Id*. Finally, market power concerns were "premature and speculative," and subject to Federal monitoring and control. *Id.* at P 30.

FERC has the "same regulatory authority" as CPUC to assure "the physical and economic safety of California residents and businesses." ER 92 at P 31. A recent interagency agreement between FERC, the Coast Guard, and the Department of Transportation ("DOT") identified which agency would take what responsibilities regarding safety concerns related to LNG terminals. ER 92-93 at P 32. Under the agreement, "the Commission will be the lead agency in conducting National Environmental Policy Act (NEPA) review and be responsible for preparing the environmental analysis and new project proposals." ER 93 at P 33. As NEPA review targets local concerns, "[t]he CPUC is expected to participate in the NEPA review process, along with State and local agencies with specific safety jurisdiction and other interested persons." *Id.*

All the safety factors noted in CPUC's protest "will be included for consideration as part of [FERC's] environmental review of the SES proposal, along with consideration of alternatives to the proposed project." *Id*. at n. 39. FERC's

considerable experience, both site-specific and general, with LNG safety issues would be brought to bear here. *Id*. at P 34. FERC along with the Port of Long Beach, as lead state agency, would prepare an Environmental Impact Statement/ Environmental Impact Report that "is expected to satisfy the requirements of both NEPA and the California Environmental Quality Act ["CEQA"]." ER 94 at P 35. As part of the process, FERC and Long Beach will prepare a public outreach plan "for issue identification and stakeholder involvement" as well as hold technical conferences and make site visits to identify and to analyze safety and security issues. *Id*. at PP 36-37. FERC expects that CPUC will have a continuing and important role in all facets of this process, including inspections as the terminal is constructed and brought into operation. ER 95 at PP 38-39.

C. June 9 Order

CPUC sought rehearing of the March 24 Order, specifying 56 alleged errors with that Order. ER 112-19. CARE, which had earlier sought a stay of further consideration of SES's application, filed for clarification or rehearing and requested that CPUC be designated as lead State agency for environmental review. ER 219 at P 1. Although the June 9 Order denied the requests for rehearing, for stay, and for designation of CPUC, FERC "reiterate[d its] goal to work cooperatively with the CPUC and other State and local authorities to protect the safety of residents and minimize adverse environmental impacts." *Id*. at P 2.

1. CPUC's Rehearing Request

CPUC's rehearing request "turns on the question of the extent of Commission jurisdiction under NGA section 3." ER 221 at P 6. After setting out the statutory language, the June 9 Order explains that "to obtain section 3 import/export authorization, two separate applications must be submitted, one to DOE/FE [*i.e.*, the Assistant Secretary for Fossil Energy of the Department of Energy] for authorization to import and export gas, and a second to the Commission for authorization to site, construct, and operate new import and export facilities." ER 223 at P 8 (footnotes omitted). In the case of LNG, "the DOE/FE function in approving import volumes is merely ministerial, because section 3(c) deems such imports to be consistent with the public interest." *Id*. at P 9 (footnote omitted). A separate NGA § 3 application to FERC is needed for approval "to site, construct, and operate new import and export facilities." *Id*.

CPUC reads NGA § 3(c) to require "not just DOE/FE, but the Commission as well, to deem SES'S LNG proposal to be consistent with the public interest and to grant SES's application without modification or delay." *Id*. at P 10. CPUC does not think that FERC has any "discretion to undertake a meaningful review of SES's application for new LNG facilities," and thus CPUC "finds no section 3 provision that grants the Commission jurisdiction to regulate new LNG facilities or services." ER 223-24 at P 10. As a result, FERC and the CPUC disagreed on: "(1) how to

distinguish foreign from interstate commerce, and the jurisdictional implications thereof; (2) the scope of section 3 and section 7 jurisdiction over LNG import terminals; and (3) whether the Commission may impose terms and conditions in connection with LNG imports." ER 224 at P 11.

While agreeing with CPUC that FERC's "NGA jurisdiction over interstate commerce does not apply in this case," the Commission did not agree that meant SES will be subject to CPUC regulation. *Id*. at P 12. Rather, the Commission found that its NGA § 3 authority over "foreign commerce holds priority over state authority over intrastate commerce." *Id*. FERC's jurisdiction over gas sold or transported in interstate commerce does not include importation of gas from a foreign country that is not transported outside one State. But FERC's jurisdiction over foreign commerce remains intact in those situations, and requires NGA § 3 approval for the importation and related facilities. ER 225 P 15.

The June 9 Order next addresses CPUC's argument that "foreign commerce regulation end[s] as LNG leaves the ship, but for SES, no [NGA] section 7 regulation [applies] because the LNG brought into the state never leaves the state; in other words, all SES facilities and services subject to the exclusive jurisdiction of the state." ER 227 at P 20. In reviewing the case law, the Commission found that its NGA § 3 jurisdiction did not end when the gas was offloaded from a ship, but extended to all facilities related to the importation: "'it is fully within the

Commission's power, so long as that power is responsibly exercised, to impose on imports of natural gas the equivalent of Section 7 certification requirements both as to facilities and . . . as to sales within and without the state of importation.'" ER 228 at P 22, quoting *Distrigas Corp. v. FPC*, 495 F.2d 1057, 1064 (D.C. Cir.), *cert. denied*, 449 U.S. 834 (1974); *see* ER 229 at P23 (quoting *Distrigas,* 495 F.2d at 1064, that NGA § 3 authority provides "flexibility far greater than would be the case were we to hold that imports are interstate commerce").

As to the point at which NGA § 3 authority ends and NGA § 7 authority begins, the Commission returned to the above-outlined demarcation by relying "exclusively on section 3 for LNG terminal facilities and operations, reserving its section 7 jurisdiction until the point at which regassified volumes reach the interstate grid." ER 230 at P 25. The NGA § 3 evaluation "'replicates the criteria [FERC] would apply under the substantially equivalent public convenience and necessity standard of section 7, including review under the National Environmental Policy Act ["NEPA"],'" and allows FERC "'to apply terms and conditions governing rates, practices, accounting, facilities, and financing as necessary and appropriate."" *Id*. n. 32 (citation omitted).

The Commission also disagreed with CPUC's claim that the addition of NGA § 3(c) by EPAct deprived FERC of the conditioning authority and flexibility recognized in *Distrigas*. ER 231 at P 26. "While the EPAct rendered the DOE/FE

import approvals for LNG and free-trade gas perfunctory, the Commission's authority to impose terms and conditions on the siting, facilities, and operations of importers was left intact." *Id*. CPUC asserted that "following the EPAct, federal section 3 jurisdiction over LNG and free-trade gas is reduced to DOE/FE's registering and rubberstamping all import applications . . . . [with] no regulatory role for the Commission under section 3 with respect to imports." ER 232 at P 28. FERC's jurisdiction would attach, under CPUC's theory, only after the LNG entered into an interstate pipeline, and then only under NGA § 7. *Id*.

FERC found CPUC's interpretation ignores the practical and historical application of NGA § 3. The absence of the word "facilities" from NGA § 3 does not mean FERC has no jurisdiction over import facilities: "The intent to import or export gas and the physical capability to convey the gas are two halves of a whole transaction. Siting, construction, and operation are means to the import end. Hence, section 3 has traditionally required authorization of both a plan on paper to move gas and a proposal to put facilities in place to make that happen." ER 235 at P 35.

The two halves were subject to separate approval. "In 1978, DOE delegated back to the Commission section 3 authority over siting and facilities, retaining the authority to approve, disapprove, and conditions import and export requests." *Id*. at P 36 (footnote omitted); *see* ER 237 at P 40 ("'the Secretary's delegation to FERC (rather than to [DOE) of] the power, recognized under section 3 since *Distrigas*, to

approve or disapprove the site, construction and operation of particular facilities, as well as the place of entry for imports,'" quoting *West Virginia PSC v. U.S. DOE*, 681 F.2d 846, 858 (D.C. Cir. 1982)). *West Virginia PSC* "determined that section 3 jurisdiction included authorization over both the proposed LNG terminal and a proposed 12.2-mile, 42-inch diameter pipe from the terminal to a SoCalGas line," and "included authority to impose 'Section 7 type' requirements as conditions to its approval under Section 3." ER 240-41 at P 45 (footnote omitted).

In another case involving a proposal "subject to [FERC's] section 3 foreign commerce jurisdiction, but not to [its] NGA interstate jurisdiction," FERC "reviewed the siting, facilities, construction, operation, and environmental impacts, and imposed terms and conditions consistent with the public interest under the umbrella of our plenary and elastic section 3 authority." ER 241 at P 46. FERC saw those cases as part of "the longstanding administrative practice of DOE and the Commission in implementing section 3 to consider and authorize both imports and the facilities to be used for importation." ER 242 at P 50.

Because that history was well known when EPAct was passed in 1992, the Commission reasoned that, had Congress intended to reduce NGA § 3 authority over siting, construction and operation, "Congress would have done so expressly, as it did in expressly curtailing DOE's discretion [in NGA § 3(c)] and in expressly treating gas imports as first sales [in NGA § 3(b)(1)]." ER 243 at P 50. Given that

Congress did not expressly limit FERC's authority, the Commission interpreted § 3(c), added by EPAct, in light of DOE's and FERC's separate roles in import authorizations: "the 1992 amendment impacted the federal review of the economic impact of imports, which was principally the concern of DOE, but did not alter the Commission role in assessing technical, safety, and environmental issues relating to the siting, construction, and operation of import facilities." ER 244 at P. 52.

On CPUC's preemption claims, *see generally* ER 245-47, FERC reiterated that its practice is "to conform our regulatory requirements to accommodate those of state and local authorities," but "if confronted with an irreconcilable conflict, federal law will preempt state and local law." ER 247-48 at P 64. To that end, FERC and the Port of Long Beach, as lead state agency, were preparing an environmental review designed to comply with both federal and California law that will lead to conditions in the approval designed to mitigate or to constrain any environmental and safety problems that arise. ER 249 at PP 65-66. On whether a regulatory gap exists, the June 9 Order found the question irrelevant: "we do not believe that our jurisdiction relies on uncovering a regulatory gap in need of filling." ER 251 at P 73. Rather, as Congress delegated regulation of LNG imports and exports, including facilities, to FERC, "the states are preempted from acting in these areas." *Id*.

CPUC argued that its role in implementing certain federal safety and environmental statutes should allow it to adopt standards for SES's proposal. ER

252-53. The Commission disagreed with CPUC's interpretation of its role; rather, in each case, FERC was the appropriate agency to evaluate whether the federal statute was being followed. *Id*. at PP 74-76; *see also* ER 257 at P 90 (clarifying that the outcome does not affect "state agencies that have been delegated authority to act pursuant to federal law" and that FERC would rely "on these states' efforts to confirm compliance with federal statutory requirements").

The Order also rejects CPUC's claim that a trial-type hearing is needed to ventilate safety and environmental issues. "We believe the most appropriate forum to address safety issues, including siting options, is the ongoing NEPA/CEQA review," during which CPUC's participation would help reach an informed decision. ER 254 at P 77. As to CPUC's concerns about possible exercise of market power by SES or about the need to direct gas during shortages in California, the Order reiterates that consideration of the former is "premature and speculative," and the latter involves situations where the Secretary of Energy has "emergency authority to direct gas flows." ER 255 at PP 81-82.

2. CARE's Clarification Request

CARE requested clarification that SES must comply with all federal, state, and local laws was granted, ER 258 at P 94. Although any state or local law undermining possible, future authorization of the proposal would be preempted, *id*. at P 95, a "rule of reason must govern both the states' and local authorities' exercise

of their power and an applicant's bona fide attempts to comply with state and local requirements." ER 259 at P 96. Simply because "additional state and local procedures or requirements can impose more costs on an applicant or cause more delay in construct[ion]" does not make it "unreasonable for an applicant to comply with both the Commission's and another agency's requirements." *Id*.

CARE requested a stay on the basis that SES's application was infirm without prior CPUC authorization. The Commission found, based on its NGA § 3 authority, that SES did not have to seek CPUC authorization, and thus SES's filing was not infirm. ER 261 at P 105 & n. 117. Likewise, the Commission found no impropriety in SES's negotiations with the Port of Long Beach regarding a potential lease of a terminal site in view of the lack of eminent domain authority under NGA § 3. ER 262 at P 106. CARE's request that FERC "ensure compliance with the Civil Rights Act [was] beyond the scope of [FERC's] jurisdiction." *Id*. at P 108.

The Commission also rejected CARE's contention that FERC would be "inclined to favor the interests of a foreign entity over California residents." Not only did Congress through passage of EPAct decide that LNG imports are consistent with the public interest, but also FERC's mandate in these cases "is to assess the merits of all proposals thoroughly and objectively." ER 283-84 at PP 110-11. Finally, the Commission denied CARE's request that the CPUC, not the Port of Long Beach, be designated lead state agency on grounds that the selection of a lead

agency under the CEQA "is a matter of California law, and this Commission has no input into that decision." ER 265 at P 116. To grant CARE's request would "intrude on a matter of state jurisdiction." *Id*.

SUMMARY OF ARGUMENT

FERC's statutory interpretation is reviewed under the *Chevron* test, which requires a court to decide whether the agency's interpretation is unambiguously forbidden or otherwise impermissible. For an agency interpretation to be overturned, the statute or legislative history must show Congress would not have sanctioned it. Following *Chevron* gives proper deference to the agency, while recognizing a court's *de novo* review of statutory construction. FERC's orders are reviewed under the arbitrary and capricious standard with FERC's factual findings conclusive, if supported by substantial evidence.

FERC's declaratory ruling here that it has exclusive jurisdiction over the siting and facilities related to SES's proposed LNG terminal follows from a practical and historical evaluation of NGA § 3 authority. Although § 3 does not contain the word "facilities," that omission does not plainly exclude FERC from exercising authority over LNG facilities. As a practical matter, a plan to import LNG cannot be implemented without the necessary facilities; the two parts are the halves of a whole transaction. Since the earliest LNG proposals, FERC has relied on

the conditioning language in § 3(a) as giving it authority to condition proposed LNG facilities as necessary or appropriate in the public interest.

Courts reviewing Commission orders that conditioned LNG facilities have uniformly ruled that FERC has such authority, which the courts have likened to NGA § 7 authority to condition certificates. After Congress created DOE and delegated NGA § 3 authority to it, DOE delegated siting and facilities authority back to FERC, while keeping authority to approve the importation of the gas. When EPAct was enacted, it added § 3(c), which the orders demonstrate places limits on DOE's authority to approve importation, but is silent on FERC's siting and facilities authority. This interpretation is consistent with congressional awareness of DOE's division of delegated authority and the then-existing case law, both of which upheld FERC's NGA § 3 authority to condition LNG facilities.

The legislative history shows also that Congress was concerned that importation of natural gas as a commodity be treated in the same manner as domestically-produced natural gas. That concern was satisfied by deeming such importation in the public interest, NGA § 3(c), thus making DOE's approval ministerial. At the same time, no evidence shows an intent to change FERC's authority over facilities, or that Congress wanted to remove FERC's power to condition proposed LNG facilities as a means to mitigate safety or environmental concerns. Thus, FERC's interpretation of congressional silence as not restricting

FERC's authority over LNG facilities is neither forbidden by NGA § 3 nor otherwise impermissible.

The challenged orders agree that SES's proposal will not involve interstate commerce and that FERC's NGA authority over sales or transportation in interstate commerce (assuming that SES does not modify its proposal so that some gas enters interstate commerce) is not implicated here. Nonetheless, FERC has jurisdiction over the proposed LNG facilities as foreign commerce. CPUC's assertion that this ruling is inconsistent with the Commission's *Distrigas* remand ruling fails to note the alternative theory of jurisdiction in that remand resting on NGA § 3. In that case and in this case, the Commission examined the particular facts to determine whether it was necessary or appropriate in the public interest to assert NGA § 3 authority. That the Commission came to different conclusions in light of the differing facts should not overshadow the consistent use of the same test in both cases. Thus, there is no contradiction between the instant case and the earlier one.

FERC's exercise of exclusive jurisdiction will not, as CPUC suggests, eliminate consideration of local safety and environmental concerns in the review. To the contrary, the orders below repeatedly indicate FERC's awareness that local concerns must and will be fully explored and considered in setting appropriate conditions for siting and facilities. FERC in conjunction with the Port of Long Beach, which California designated the lead state agency, will prepare the

environmental impact statement/report in compliance with both NEPA and CEQA. Further, FERC will rely on its experience and expertise in LNG safety issues to take a close look at the proposal, again in conjunction with other federal as well as state and local agencies. As required by the pertinent laws, these processes will be open to the public and FERC invited CPUC and other state and local authorities to participate fully in the process so that all local concerns will be fully examined.

As to CPUC's other concerns related to possible curtailment and market power situations, those matters are, at this time, speculative, and thus not ripe for review. In any event, on possible emergency curtailment situations, FERC spelled out a process in which the Secretary of Energy would exercise power to require that SES make imports available and the CPUC would determine how such gas would be distributed among California customers. On market power and merger issues that might arise, FERC has sufficient power to review such matters and prevent any abuses, but would look to state and local authorities to express their concerns. In sum, FERC's exercise of NGA § 3 authority here will not eliminate the important role that state and local authorities play in these matters.

This Court lacks jurisdiction to consider the issues raised by CARE. CARE failed to raise those issues on rehearing before FERC, and no good cause justifies that failure. As raising objections on rehearing is a statutory prerequisite to raising them on appeal, CARE's failure deprives the Court of jurisdiction.

ARGUMENT

I. STANDARD OF REVIEW

FERC's interpretation of the NGA is reviewed under the test set forth in *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under the *Chevron* test, a reviewing court must "decide (1) whether the statute unambiguously forbids the Agency interpretation, and, if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002); *e.g., Hemp Industries v. Drug Enforcement Admin.*, 357 F.3d 1012, 1015 (9th Cir. 2004). This Court has stated that it is "not in a position to reject [an agency's] interpretation 'unless it appears from the statute or its legislative history that the [agency's decision] is not one that Congress would have sanctioned.'" *Davis v. United States EPA*, 336 F.3d 965, 973-74 (9th Cir. 2003), quoting *Barnhart*, 535 U.S. at 845.

This structure means that deference is given to an agency's statutory interpretation, even though review is *de novo*. "The two-step *Chevron* framework thus allows this Court to defer to the Commission's interpretation of the statutory provisions it administers, but [the Court] remain[s] 'the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.'" *American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000)(citations omitted).

Court review "of a FERC decision is limited to whether the decision was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or not in accordance with the law, 5 U.S.C. § 706(2)(A)." *California Dept. of Water Resources v. FERC*, 341 F.2d 906, 910 (9th Cir. 2003)(citation omitted). FERC's factual findings are conclusive if supported by substantial evidence. NGA § 19(b), 15 U.S.C. § 717r(b).

II. FERC REASONABLY INTERPRETED NGA § 3

Petitioners contend that NGA § 3 does not give FERC jurisdiction over the siting, construction, and operation of LNG facilities; rather, Petitioners claim, FERC's authority is limited to approval of the importation itself. CPUC Br. 16 *et seq.*; CARE Br. 27 *et seq.*[2] Petitioners' reading ignores the practical and historical realities of FERC's exercise of its NGA § 3 authority; those realities reflect the fact that LNG importation cannot be accomplished without facilities constructed and operated for that purpose. As the Commission stated, they are "two halves of a whole transaction." ER 235 at P 35; *see also* 18 C.F.R. §§ 153.7 and 153.8 (2003) (an LNG application must include detailed description of facilities). FERC properly interpreted its delegated authority under NGA § 3 to encompass authority to approve and to condition the siting, construction, and operation of LNG facilities.

[2] The arguments presented by the briefs of Amici Indicated Members of Congress and of Amicus California Earth Corps largely repeat those made by the CPUC. FERC's answer to those amicus briefs is thus subsumed within the arguments responding to CPUC's assertions.

A. FERC's NGA § 3 Authority Extends to LNG Facilities

Petitioners assert that because NGA § 3 does not contain the word "facilities, "it is clear that Congress did not intend *this* section to provide the FERC with regulatory authority over facilities." CPUC Br. 18 (citation omitted; emphasis in original); CARE Br. 34 ("the first prong of the *Chevron* test is met here"). FERC disagreed "that section 3 is plain on its face," ER 234 P 35, given that the absence of the word "facilities" in the section "has been no barrier to including facilities as part of the import/export authorizations." ER 235 P 35 (footnote omitted). Indeed, as LNG import applications include "both a plan on paper to move gas and a proposal to put facilities in place to make that happen," *id*., it would be surprising if facilities were not part of the authorization process.

FERC's conclusion that the absence of the word "facilities" did not plainly preclude it from authorizing the siting, construction, and operation of LNG facilities is shared by courts and by DOE. As the language of NGA § 3(a) is unchanged since the NGA's enactment, *see*, 52 Stat. 822 (1938), the Commission properly analyzed prior court interpretations of that language. That analysis started with *Distrigas*, 495 F.2d at 1064, which stated: "In short, we find it fully within the Commission's power, so long as that power is reasonably exercised, to impose on imports of natural gas the equivalent of [NGA] Section 7 certification requirements both as to the facilities and . . . as to sales within and without the state of importation." ER 84

at P 15. Since *Distrigas*, the Commission "has imposed 'the equivalent of Section 7 certification requirement . . . as to facilities' when exercising its delegated authority over the siting, construction, and operation of facilities to import or export gas." *Id*.

Shortly after *Distrigas*, when DOE was created and delegated NGA § 3 authority by Congress, "DOE delegated back to the Commission section 3 authority over siting and facilities, retaining the authority to approve, disapprove, and condition import and export requests." ER 235 at P 36 (footnote omitted). Specifically, the DOE delegation to FERC "covered 'all functions under Section 3 of the Natural Gas Act to approve or disapprove the construction and operation of particular facilities and the site at which they would be located, and with respect to imports of natural gas, the place of entry.'" ER 236 at P 38. As FERC review was to follow after DOE had approved the importation itself, FERC was to "impose terms and conditions necessary to ensure [DOE's] authorization would not be inconsistent with the public interest." *Id*.; *see also* ER 237 at P 39 (FERC review would include "'consideration of any pipeline facilities to be constructed'" by the applicants) (footnote omitted).

Under this bipartite review process, FERC had the "power, recognized under section 3 since *Distrigas*, to approve or disapprove the site, construction and operation of particular facilities, as well as the place of entry for imports." *West Virginia PSC*, 681 F.2d at 858 n. 48; *see* ER 237 at P 40 (same). As subsequent

DOE delegations retained the same review structure, "the Commission may impose any or all of its [NGA] sections 4, 5, and 7 terms and conditions to ensure the import/export proposal is not inconsistent with the public interest." ER 238 at P 41.[3]

B. EPAct's Passage Did Not Rescind FERC's Authority

CPUC contends that nothing predating EPAct matters "in light of subsections (b) and (c) of section 3" being added as part of EPAct. CPUC Br. 18-19. According to CPUC, the addition of subsection (c) "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." *Id*. at 19. CPUC explains the unchanged language in NGA § 3(a) as "retain[ing] some of the FERC's authority to modify import applications, but *only* in situations where the imports or exports" involve non-Free Trade countries "or, in the case of LNG, if the LNG is exported." *Id*. at n. 10 (emphasis in original).

FERC found the CPUC's interpretation unreasonable. In FERC's view, "the 1992 amendment impacted the federal review of the economic impact of imports, which was principally the concern of DOE, but did not alter the Commission's role in assessing technical, safety, and environmental issues relating to the siting, construction, and operation of import facilities." ER 244 at P 52. CPUC claims two

[3] As to the comparability of NGA § 3 and § 7 authority, the Commission quoted from *Cia Mexicana de Gas v. FPC*, 167 F.2d 804 (5th Cir. 1948), "'the [section 3] authority of the commission to grant an export permit is certainly as broad as its authority under [section 7] certificate section.'" ER 238 n. 53.

problems exist with FERC's reading. First, CPUC asserts that "FERC's interpretation is unreasonable because it inconsistently interprets the same word in the same sentences in subsection 3(a) (i.e., 'Commission')" as referring to both FERC and to DOE. CPUC Br. 20. CPUC's assertion ignores that the division of NGA § 3(a)'s authority between DOE and FERC resulted not from this case, but from congressional transfer of NGA § 3 authority to DOE in 1977, and DOE's delegation back to FERC of one component of that authority (over siting and facilities). *See generally* ER 235-36 (discussing delegation of § 3 authority).

FERC's current interpretation simply follows the DOE delegation. As DOE's delegation orders were not subject to judicial challenge, CPUC's contrary claim is an impermissible collateral attack on those orders. *See* ER 87 n. 18. Given the validity of DOE's delegation of NGA § 3 authority over siting and facilities to FERC, while retaining authority over "'imports and exports of natural gas to the extent that they broadly concern energy policies on an international, national, and interregional scale,'" ER 235 at P 37, FERC's interpretation that NGA § 3(c) limits DOE's authority, but not FERC's, conforms to how NGA § 3 authority was being exercised at the time EPAct was enacted.

CPUC contends that "[i]t 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).” CPUC Br. 21. As Congress did not alter the language of NGA § 3(a) under which FERC had been exercising authority over siting and facilities since 1977 as part of EPAct, the Commission properly concluded that meant Congress intended FERC to continue to evaluate siting and facilities to assure they were necessary or appropriate in the public interest. ER 87 at P 19, relying on *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)(“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”).

FERC assumed that if Congress wanted to eliminate FERC’s authority to modify proposed siting and facilities, which “had [been] exercised without question for the previous 18 years,” Congress would have done so explicitly. ER 87 at P 19; *see West Virginia PSC*, 681 F.2d at 855 (“there is no reason to believe that the purposes behind the grant of broad regulatory authority [in NGA § 3] over the importation and exportation of natural gas are in any way inconsistent with the general purposes of the NGA – to protect the consuming public from exploitative practices of the natural gas companies”). As Congress did not, FERC properly interpreted that silence to allow continuation of the existing practice.

C. Automatic Approval Applies To Imported Gas, Not To Facilities

FERC found “no indication that Congress intended to remove Commission jurisdiction over the siting, construction, and operation of LNG import facilities.”

ER 86 at P 18 (footnote omitted). CPUC challenges that finding, claiming EPAct's legislative history "is not silent about FERC jurisdiction over facilities." CPUC Br. 22. CPUC views the legislative history as requiring "FERC's 'automatic' approval of certain imports and [giving] no indication that Congress envisioned section 3 authorizing FERC's regulation of facilities." *Id.* at 22-23. The legislative history on which CPUC relies, however, refers solely to automatic approval of importation of natural gas (the commodity), and does not address importation facilities.

Congressional concern focused on assuring that imported natural gas would be made available to customers on the same basis that domestic natural gas was. *See* H.R.Rep.No. 102-474 (I) at 177, *reprinted in* 1992 U.S.C.C.A.N. 1954, 2000 ("This section treats Canadian gas imports and liquid natural gas (LNG) imports more like domestic American natural gas production. * * * It makes the current import approval process purely automatic, so that this procedure – which domestic gas does not undergo – cannot cause any delays."); *see, e.g.*, 138 Cong. Rec. H11411 (Oct. 5, 1992)(Statement of Rep. Lent)("Now, imported gas, like domestic decontrolled gas, need not be licensed.").

Just because imported gas (the commodity) no longer needed to be licensed, that does not mean, as CPUC posits (Br. 24), that Congress "provided no discretion for the FERC under section 3 with regard to applications to import LNG." The legislative history makes clear, that while imported gas no longer needed to be

licensed, applications to import were to be treated no differently from applications to certificate facilities to convey domestic gas. *See* 1992 U.S.C.C.A.N. at 2000 (automatic procedure only applies if "domestic gas does not undergo" same procedure, but domestic gas facilities are subject to certification); 138 Cong. Rec. 11411 ("The purpose of these provisions is not to give imported natural gas an advantage, but to ensure a level playing field for imported gas.").

CPUC claims the legislative history "is not silent about FERC jurisdiction over facilities," but found "such authority as being pursuant to section 7 of the Natural Gas Act rather than section 3," and relies on 1992 U.S.C.C.A.N. at 2000-05 as "only referr[ing] to section 7 of the Natural Gas Act and section 311 of the Natural Gas Policy Act," and not to NGA § 3 for that proposition. CPUC Br. 22-23, It is hardly surprising that the cited legislative history pages do not address § 3, as those pages discuss "Optional [NGA § 7] Certificates for Certain Projects" (1992 U.S.C.C.A.N. at 2001, heading), which had "already been administratively developed by FERC," *id*., and to statutorily-developed section 311 pipelines. *Id*. at p. 2002. Thus, that those pages do not deal with § 3 facilities does not show Congress thought FERC's only conditioning authority resided in NGA § 7; rather, those pages address specified issues, and were silent on NGA § 3 issues.

It is telling, however, that Congress emphasized, even for the streamlined NGA § 7 and 311 procedures addressed on those page, that "FERC is authorized to

attach environmental routing and mitigation measures to them in the same manner as it does for traditional certificates." 1992 U.S.C.C.A.N. at 2001; *see also id*. at 2002 (311 pipelines "must comply with all state and Federal environmental and resource laws"); *id*. at 2003 ("FERC remains fully responsible for complying with its duties under NEPA"). In view of those admonitions, it is highly unlikely, had Congress not been silent on NGA § 3 siting, construction, and operation, that it would have completely eliminated FERC's conditioning authority, as CPUC asserts, over the important safety and environmental concerns related to LNG facilities without doing so expressly. ER 87 at P 19. Contrary to CPUC (Br. 25), the legislative history does not address FERC's conditioning authority over LNG facilities, and shows no evidence that Congress was eliminating the conditioning authority that FERC had by 1992 been exercising for nearly two decades.

D. Congress Was Aware FERC Exercised Authority Over Facilities

CPUC charges when EPAct was passed, it would "have been logical for Congress to assume that FERC . . . believed that FERC's authority to regulate LNG facilities arose pursuant to section 7," and thus "Congress would [not] have felt any need to expressly repudiate *Distrigas*." CPUC Br. 30. For this supposition, CPUC relies on cases that it claims leave it unclear whether FERC regulated LNG facilities under NGA § 3 or NGA § 7. *Id* at 29. Quite the opposite, those cases demonstrate that the courts saw NGA § 3 authority over facilities as the issue. In *West Virginia*

PSC, 681 F.2d at 856 n. 38 (cited CPUC Br. 29), the court noted a "'need to trace exactly what is within § 3 authority'" to delineate FERC's and DOE's separate delegations of authority. *Id* (citation omitted); *see also id.* at 853-55 & ns. 26-30 (discussion of § 3). In *Natural Gas Pipeline Co. v FERC*, 768 F.2d 1155, 1161 n. 9 (D.C. Cir. 1985)(cited CPUC Br. 29-30), the court referred to both *Distrigas* and *West Virginia PSC* as discussing the scope of § 3 authority.

As the June 9 Order notes, the 1978 DOE delegation to FERC covered "'all functions under Section 3 of the Natural Gas Act to approve or disapprove the construction and operation of particular facilities and the site at which they would be located, and with respect to imports of natural gas, the place of entry.'" ER 236 at P 38. In light of those clear statements in the relevant cases and in the DOE delegation that NGA § 3 authority over siting and facilities was being exercised by FERC, it would not have been logical for Congress to assume that FERC's authority over LNG facilities arose under NGA § 7, as CPUC asserts. CPUC Br. 30.

Further, DOE's express delegation of § 3 authority makes this case unlike *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989)(cited CPUC Br. 30), which involved "an exception to an exception, recognized by only a few courts and often dependent on particular circumstances," 489 U.S. at 246, and which did nothing "more than provide a bankruptcy court with guidance in the exercise of its equitable powers." *Id*. at 248. As Congress had given DOE that delegation power,

see West Virginia PSC, 681 F.2d at 853-54 n. 26, it is likely that Congress "would have felt the need expressly to repudiate it," *Ron Pair*, 489 U.S. at 248, had Congress felt DOE's delegation to FERC was invalid.

III. FERC'S AUTHORITY PREEMPTS STATE AUTHORITY OVER SES'S TERMINAL FACILITIES

Petitioners devote considerable space to a point that the challenged Orders do not contest, namely, that States, not FERC, have jurisdiction over the intrastate transportation of natural gas. CPUC Br. 31-41; CARE Br. 34-41. First, all parties agree that SES's application "will not involve interstate commerce." ER 83 at P 12.[4] FERC also does not dispute CPUC's argument that FERC's "NGA jurisdiction over interstate commerce does not apply in this case . . . provided none of the imported LNG departs the state, either physically or indirectly through deliveries or by displacement." ER 224 at P12. FERC and CPUC disagree, however, on what legal conclusion can be drawn from these agreed-upon points.

A. The Ruling Here Is Consistent With Prior FERC Cases

CPUC contends that "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

[4] This agreement is based on SES's as-filed application and proposed service; interstate commerce would not be involved so long as SES imports "stay within California (and that import volumes are not used to offset out-of-state deliveries by displacement, by backward- or forward-haul transactions)." ER 83 at P 12 n. 5.

SES's proposed intrastate facilities would be in foreign commerce, as opposed to intrastate commerce." CPUC Br. 35-36. That contention is based on CPUC's view that "foreign commerce regulation end[s] as LNG leaves the ship, but for SES, no section 7 regulation because the LNG brought into the state never leaves the state," which would mean "all SES facilities and services [are, under CPUC's view,] subject to exclusive jurisdiction of the state." ER 227 at P 20.

CPUC's view that foreign commerce ends when the LNG is released from the ship flange is based on its view that the *Distrigas* remand's treatment of terminal facilities should control here. CPUC Br. 42, citing *Distrigas Corp.*, 58 FPC 2589, 2592 (1977). CPUC's fails to note, however, that its reading focuses on only one of "two separate theories" as to why Distrigas' facilities and services were subject to FERC's jurisdiction, "either one of which would be enough to warrant jurisdiction over such sales and facilities." 58 FPC at 2591. CPUC espouses a theory resting on NGA § 7 jurisdiction, *id*. at 2592, but the alternative jurisdictional theory rests on NGA § 3 authority. "First, under Section 3 of the Natural Gas Act the Commission may authorize imports, subject to such conditions as are reasonable and supported by record evidence." *Id.* at 2591. The Commission then adopted the *Distrigas* ruling, 495 F.2d at 1062, that it is "'within the Commission's power, so long as that power is responsively exercised to impose on imports of natural gas the equivalent of Section 7 certification requirements both as to facilities and . . . as to sales within

and without the State of importation." 58 FPC at 2591-92; *see also Distrigas*, 495 F.2d at 1060 ("At the same time, the majority acknowledged that under Section 3 the Commission could take jurisdiction over Distrigas' proposed facilities and intrastate sales as part of the 'terms and conditions' of authorizing importation").

While the Commission chose to employ the NGA § 7 approach to the specific facts in *Distrigas*, it did not disavow the validity of its § 3 approach in the proper circumstances. *See id.* (noting decision as whether to apply § 3 turned on "whether it was 'necessary or appropriate' in the public interest that the Commission do so. The majority determined that it was not"). In the instant matter, FERC reached a different conclusion as to what is necessary or appropriate under § 3 "because the facilities at issue will have no other function than to receive and deliver imported gas from the terminal directly into local facilities." ER 90 at P 26. Further, exercise of § 3 authority over those facilities "serves an important public policy goal. The nation's energy needs are best served by a uniform national policy applicable to LNG imports." *Id*. at P 27; *see also* ER 249-50 at PP 68-69 (noting other public policy goals advanced by federal regulation). Those goals echo the public policy goals listed in *Distrigas* as justifying exercise of § 3 authority: "As a practical matter, this Commission seems to be the most appropriate forum on any level, local, State or Federal, to insure that the public interest is protected and a uniform set of conditions and regulations are applied to [LNG] project[s]." 58 FPC at 291.

In sum, and contrary to CPUC's claim (Br. 42), exercise of § 3 authority over the facilities here does not contradict the Commission's earlier position in *Distrigas*. Rather, in each case, the Commission applied the necessary or appropriate test to the particular circumstances to determine whether exercise of § 3 authority over the specific facilities best served the public interest.

B. FERC Will Fully Examine and Mitigate All Local Safety Concerns

CPUC asserts that "FERC's expanding view of its limited jurisdiction 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." CPUC Br. 46. It is unclear exactly what CPUC means by going far beyond preemption principles, as CPUC concedes that FERC has not invaded State CEQA authority, but "recognized the rights of certain state and local permitting authorities." *Id*. at 47. Apparently, CPUC is concerned that FERC's "present intent [is] to preempt the CPUC's safety oversight." *Id*. at 48. But FERC's ruling rests on its unchallenged interpretation of the Natural Gas Pipeline Safety Act ("NGPSA"), not on its authority under NGA § 3 or on general preemption principles.

Specifically, CPUC sought to regulate safety issues on grounds that SES is an "intrastate gas pipeline facility" under the NGPSA, but FERC found that term is defined as "'a gas pipeline facility and transportation of gas within a state not subject to the jurisdiction of the Commission under the Natural Gas Act.'" ER 252

at P 74, citing 49 U.S.C. § 60101(a)(9)(A)(2004). The Commission found SES's project is subject to FERC jurisdiction under NGA § 3, "and as such cannot qualify as an NGA-exempt facility subject to the CPUC's safety oversight." *Id*. This does not mean, as CPUC implies, the project will be free from safety regulation, but, rather, that SES "will be compelled to comply with DOT safety requirements," subject to DOT and FERC "oversight and enforcement responsibility." *Id.*

Further, this does not mean FERC is seeking "to prevent the states from having more stringent safety requirements" than DOT's minimum standards for LNG projects. CPUC Br. 51. FERC recognized that the NGPSA includes "location standards" for siting LNG facilities, *see* ER 253 at P 75 & n. 98 (listing six criteria), and indicated it would "confirm[] compliance with the NGPSA"s location standards when reviewing applications for LNG terminals." *Id* Further, FERC has "'the authority to impose more stringent safety requirements than DOT's standards when warranted by special circumstances.'" ER 254 at P 76 (footnote omitted). FERC expects to consider safety issues as part of its NEPA/CEQA review during which "CPUC's participation will ensure that its perspective becomes part of the record and the basis for an informed decision making." ER 254 at P 77.

Focus on the location standards means, contrary to CPUC's claim (Br. 50), that FERC will consider "various local conditions," and will not adopt a "uniform – one-size-fits-all approach." *See* ER 253 at P 75 n. 98(identifying local conditions to

be considered); ER 94 at PP 35-37 (describing actions already taken to assess local conditions). Further, FERC has coordinated with other federal agencies to assure that safety and security concerns at waterfront LNG facilities are fully explored and mitigated at any proposed site. *See* ER 92-93 at PP 31-33. That review is part of the NEPA/CEQA evaluation, which is necessarily targeted to local concerns.

Finally, FERC spends considerable resources on LNG safety matters. For the SES site, FERC "will perform a detailed review of the plant design, the operating procedures, and the various active and passive safety systems . . . . [will] apply the Federal siting criteria for exclusion zones around the terminal site and conduct a detailed review of the potential marine hazards." ER 93 at P 34. That review will draw from FERC's experience with "an independent assessment of the hazards of potential cargo releases from LNG vessels," and from FERC's assessment of the January 2004 LNG accident in Algeria as to its "potential safety implications for LNG facilities in the U.S." *Id.* Simply put, there is no reason to assume local safety concerns will be ignored unless CPUC controls such review. FERC is well aware and fully capable of assuring that local concerns are examined and mitigated here.

C. Other Concerns Can Be Addressed By FERC

CPUC asserts that only it can exert jurisdiction over SES in situations involving curtailment, potential exercise of market power by SES, and or a merger. CPUC Br. 51-52. First, none of those situations have been presented here, and,

therefore, as CPUC agrees (Br. at 52), this issue is not ripe for review. *See* ER 91 at P 30 ("at this time such concerns are premature and speculative") *and* ER 256 at P 82 (same). Second, "the Federal regulatory scheme can prevent and rectify market power abuses," can review potential mergers or transfers of NGA § 3 authorization, and allows the Secretary of Energy to direct gas flows during times of shortages. ER 91 at P 30 and ER 255 at P 82. On the latter point, FERC envisions federal-state cooperation to alleviate any hardship: "If SES were to horde supplies in an emergency, we could direct SES to make its supplies available to the intrastate market, after which the CPUC could direct gas flows on the basis of its curtailment priorities." ER 256 at P 82.

FERC's view of cooperative action belies CPUC's claim that FERC is seeking "to oust the CPUC from *any* regulatory jurisdiction over SES as a California public utility." CPUC Br. 52 (emphasis added); *see id*. at 54-55 (same). While FERC's exclusive jurisdiction applies to the project, that does not mean CPUC has no role. "Thus, this Commission, not the CPUC, has exclusive jurisdiction over the proposed import project. The March [24] Order, however, acknowledged the CPUC's role in ensuring safe and reliable utility services for California customers, guarding California customers against market power abuses, and minimizing adverse environmental impacts of in-state energy projects." ER 220-21 at P 4; *see also* ER 247 at P 64 ("To the extent we can, it is our practice to

conform our regulatory requirements to accommodate those of state and local authorities").

Nor is there any force in CPUC's assertion FERC created a regulatory gap "by preempting state regulation without adopting its own regulation." CPUC Br. 54. Without FERC exercising its jurisdiction over the LNG facilities, a regulatory gap will exist, not because FERC created one, but because a state lacks authority to regulate foreign commerce. ER 251 at P 73. While NGA § 1(c) exempts certain transactions that occur entirely within a single state from interstate commerce jurisdiction by FERC, that section does not exempt those transactions from FERC's NGA § 3 jurisdiction over foreign commerce. *See* ER 90 at P 26 ("the exemption contained in NGA Section 1(c) removes NGA jurisdiction over interstate commerce, but not over foreign commerce. Thus, the LNG facilities proposed by SES cannot be regulated by the State."). Accordingly, FERC exercised the flexibility granted it by NGA § 3 to regulate the proposed LNG facilities "because the facilities at issue will have no other function than to receive and deliver imported gas from the terminal directly into local facilities." *Id.*

IV. THIS COURT LACKS JURISDICTION TO HEAR CARE'S ISSUES

NGA § 19(b), 15 U.S.C. § 717r(b), states in part: "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is

reasonable ground for failure to do so." CARE's entire argument on appeal (CARE Br. 23-58) consists of newly formulated objections that were not presented by CARE in its 3-page application for rehearing before FERC. CARE Excerpts of Record ("CARE ER") at Tab 14, pp. 179-A to 179-C. As to the issues raised by CARE's rehearing, those issues were addressed by the Commission and either were not raised on appeal (request for compensation) or were decided in CARE's favor (clarification that an applicant must comply with all federal, state and local laws).

CARE seeks to avoid the impact of NGA § 19(b)'s jurisdictional prerequisite on grounds that it was not represented by counsel below. CARE Br. 4 n. 1. But that does not constitute the required good cause to justify CARE's failure to raise its current objections. CARE's rehearing request states it was filed pursuant to, in part, 18 C.F.R. § 385.713 (2003), *see* CARE ER at 179-A. Section 385.713 sets forth the requirements for a rehearing request, and, in particular, indicates the specificity needed: "State concisely the alleged errors in the final decision or final order." As CARE relied on that section in filing its rehearing and the specificity condition is not obscured in legalese, the lack of an attorney does not constitute good cause for CARE not to have raised any and all errors that it now claims on appeal. Further, as CARE admits (Br. 4 n. 1), the issues it now raises on appeal were presented below by CPUC prior to the March 24 Order, and thus were known to CARE before it

filed for rehearing. CARE could have reiterated those arguments in its rehearing, had it desired to bring them to FERC's attention.

As no good cause exists to justify CARE's failure to raise on rehearing the points it now makes on appeal, this Court lacks jurisdiction to consider CARE's arguments on them. *E.g.*, *High Country Resources v. FERC*, 255 F.3d 741, 745 (9th Cir. 2001).[5]

CONCLUSION

For the reasons stated, the challenged orders should be upheld in all respects.

Respectfully submitted,

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[5] FERC would not object in these circumstances if the Court were to treat CARE's brief as an intervenor brief in support of the issues that CPUC raises.

STATEMENT OF RELATED CASES

Respondent has no related cases to add to those listed by Petitioner CPUC.