

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Nopetro LNG, LLC

Docket No. CP21-179

**Request for Rehearing of Public Citizen, Inc.**

Public Citizen, Inc. requests rehearing of the Commission's March 25, 2022 Order granting Nopetro LNG's Petition for Declaratory Order that its proposed liquefied natural gas export facility is not subject to the Commission's jurisdiction. The Commission's Order committed two errors. First, the plain language of the Natural Gas Act, its legislative history and even the Commission's three-pronged test provide the Commission no discretion to decline oversight of Nopetro's proposed natural gas export facility. Congress has defined LNG terminals subject to the Commission's exclusive authority so expansively the Commission has no choice but to regulate any onshore facility (that is, one on land) engaged in the export of natural gas, regardless of whether it is liquefied, processed, or transported in boxes of Cracker Jack.

Second, the Commission's ruling that "onshore" as used in the Natural Gas Act is limited to a facility physically on the shoreline is contrary to the plain meaning of the statutory language, inconsistent with the statute's structure and purpose, and patently unreasonable. Congress consistently uses the term "onshore," particularly in statutes concerning oil and gas production and facilities, to refer "any land within the United States other than submerged land." So a facility located 50 or 500 or 2,000 miles from the shoreline—let alone quarter mile, like the proposed Nopetro facility—and that is engaged in exporting natural gas is subject to the exclusive authority of the Commission.

Because the Nopetro LNG export facility will perform multiple functions that are all listed in the Natural Gas Act's definition of "LNG terminal" (receive, load, transport and liquefy natural gas for export) and is located on land, it is unambiguously an onshore LNG terminal subject to the Commission's exclusive jurisdiction.

**Statement of Issues**

1. Congress made significant changes to the Natural Gas Act as part of the 2005 Energy Policy Act, handing FERC sweeping and exclusive authority over facilities

designed to import or export natural gas. These substantial Natural Gas Act reforms were enacted into law after FERC requested Congress to do so.

2. Section 311(c)(2)(e)(1) of the 2005 Energy Policy Act<sup>1</sup> amended Section 3 of the Natural Gas Act to declare that “The Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”<sup>2</sup>
3. Section 311(b) of the 2005 Energy Policy Act incorporated eight separate and distinct activities in its definition of “LNG terminal,” which covers “all natural gas facilities located onshore or in State waters that are used to *receive, unload, load, store, transport, gasify, liquefy, or process* natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—(A) waterborne vessels used to deliver natural gas to or from any such facility” [emphasis added].<sup>3</sup> Thus Congress defined export terminals include activities beyond liquefaction and LNG to encompass *any* onshore facility designed to export natural gas, because Congress understood that gas exports are a feature of foreign commerce requiring exclusive federal authority.
4. On February 15, 2005, FERC testified before the United States Senate Committee on Energy and Natural Resources, elaborating on state threats to its perceived exclusive authority over onshore natural gas import/export facilities, and asked Congress to confirm that FERC has exclusive jurisdiction over “foreign commerce” inherent in facilities exporting natural gas:

the U.S. Court Appeals for the Ninth Circuit is currently considering a challenge by the California Public Utility Commission to the exclusivity of the Commission's authority. It would be extremely helpful if Congress were to confirm the exclusive nature of the Commission's jurisdiction, in order to forestall further debate and judicial review. This would not mean that other Federal and state agencies with permitting responsibilities (e.g.,

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<sup>1</sup> [www.congress.gov/109/plaws/publ58/PLAW-109publ58.pdf](http://www.congress.gov/109/plaws/publ58/PLAW-109publ58.pdf)

<sup>2</sup> 15 USC §717b(e)(1) (emphasis added).

<sup>3</sup> 15 USC § 717a(11).

states acting under CZMA, or Clean Water Act-Section 401) would lose authority, but rather would be a recognition of the Commission's paramount role in this area of foreign commerce".<sup>4</sup>

5. Indeed, Congress had spoken before, inserting language into the conference report of the Commission's budget clarifying that FERC had exclusive authority over onshore LNG terminals, emphasizing the "foreign commerce" nature of any facility exporting natural gas:

On March 24, 2004, FERC issued a declaratory order asserting exclusive jurisdiction over the approval and siting of liquefied natural gas (LNG) terminals. FERC concluded that LNG terminals are *engaged in foreign commerce* and, as such, fall clearly within the authority granted to the FERC under Section 3 of the Natural Gas Act of 1938. The conferees agree on this point and disagree with the position of at least one State government agency that it should be the authority responsible for LNG terminal siting within its boundaries, rather than the FERC. *The Natural Gas Act clearly preempts States on matters of approving and siting natural gas infrastructure associated with interstate and foreign commerce.* These facilities need one clear process for review, approval, and siting decisions. *Because LNG terminals affect both interstate and foreign commerce, LNG facility development requires a process that also looks at the national public interest, and not just the interests of one State.* [emphasis added]<sup>5</sup>

6. The Natural Gas Act definition of "natural gas" – which is fully applicable to Section 3's provisions conferring jurisdiction with respect to exports – is equally broad, and not confined to whether or not the gas is liquefied. The NGA defines "Natural gas" as "either natural gas unmixed, or any mixture of natural and artificial gas."<sup>6</sup>
7. The Commission's description of Nopetro's natural gas export facility includes four of the specific defining terms of an "LNG terminal" subject to the Commission's exclusive authority (liquefy, receive, transport and load).

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<sup>4</sup> Printed page 40, [www.govinfo.gov/content/pkg/CHRG-109shrg20445/pdf/CHRG-109shrg20445.pdf](http://www.govinfo.gov/content/pkg/CHRG-109shrg20445/pdf/CHRG-109shrg20445.pdf)

<sup>5</sup> *Conference Report, to Accompany H.R. 4818*, Report 108-792, November 20 (legislative day, November 19), 2004, at printed page 964, [www.congress.gov/108/crpt/hrpt792/CRPT-108hrpt792.pdf](http://www.congress.gov/108/crpt/hrpt792/CRPT-108hrpt792.pdf)

<sup>6</sup> 15 USC § 717a(5)

8. The Commission states that Nopetro plans to construct and operate a natural gas liquefaction facility, consisting of up to three liquefaction trains, with the gas designated for export out of the United States.<sup>7</sup> The Commission states that liquefied natural gas (LNG) would be *received* by Nopetro’s liquefaction facility from a local distribution company, *liquefied* at the facility itself, *loaded* at the facility onto trucks using International Organization for Standardization (ISO) containers and *transported* via third-party truck operators roughly a quarter of a mile to a dock owned and operated by the St. Joseph’s Port. At the dock, the ISO containers would then be *loaded* onto marine vessels for export out of the United States via a crane owned by Nopetro. [emphasis added]<sup>8</sup>
9. The Commission concludes “that Nopetro’s construction and operation of the liquefaction and truck loading facility and proposed transloading operations . . . would not be subject to the Commission’s jurisdiction under section 3 or section 7 of the [Natural Gas Act] NGA” [emphasis added].<sup>9</sup>
10. In granting the Petition, the Commission purported to apply a three part test to determine whether Nopetro was “subject to the Commission’s jurisdiction: (1) whether an LNG terminal would include facilities dedicated to the import or export of LNG; (2) whether the facility would be located at or near the point of import or export; and (3) whether the facility would receive or sendout gas via a pipeline.”<sup>10</sup> Relying on these three tests, the Commission somehow concludes that Nopetro is not an LNG terminal, despite the facility clearly meeting all three tests.
11. On test #1, Nopetro has proposed to construct a facility that, in FERC’s own characterization, utilizes four of the actions included in the definition of “LNG terminal”: liquefy, receive, transport and load. Moreover, the Commission

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<sup>7</sup> Order, at 2.

<sup>8</sup> Order, at 2-3.

<sup>9</sup> Order, at 6.

<sup>10</sup> Order, at 9.

explicitly and repeatedly states that the facility will liquefy natural gas “for export.”<sup>11</sup> So the Nopetro LNG facility meets the Commission’s first prong.

12. On test #2, the Nopetro LNG export facility is located at or, at a minimum, near the point of export: the proposed facility encompasses a mere quarter mile between where Nopetro will receive natural gas from a pipeline; liquefy natural gas into LNG; transport that LNG via trucks to a dock; and load the LNG onto marine vessels for export out of the United States.
13. The Commission claims that its 2015 precedent in *Pivotal LNG, Inc.* determines that Nopetro LNG is not an “onshore” LNG terminal and therefore does not meet the second prong test. The language that the Commission relies upon in *Pivotal*: “. . . the LNG facilities owned by Pivotal and its affiliates are all located inland, and consequently are not capable of transferring LNG directly onto ocean-going, bulk-carrier LNG tankers.”<sup>12</sup> But the statute nowhere requires that an onshore facility be capable of transferring LNG directly onto oceangoing vessels, or that it be located exactly at (or even near) the point where such transfer occurs: It requires only that that facility be onshore, and that it carry out the specified functions with respect to natural gas that is exported. The Nopetro LNG export terminal is intended exclusively for that purpose, and if the Commission’s precedents require a more “direct” capability of transferring LNG to oceangoing tankers for export than the quarter-mile long process envisioned in Nopetro’s petition, they are contrary to the plain language of the statute.
14. The Commission misses the most important takeaway from *Pivotal LNG, Inc.*: Norman Bay’s outstanding dissent:

One might well wonder how a natural gas facility that is used to export gas and that must obtain an export license from the Department of Energy is not, from FERC’s perspective, an “export” facility within the meaning of the Natural Gas Act and thus not subject to FERC’s jurisdiction. If this inconsistency seems puzzling, that’s because it is. Logic, not to mention the plain language of the Act, compels a different result. Nevertheless, in

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<sup>11</sup> Order, at 2.

<sup>12</sup> 151 FERC ¶ 61,006, at 12.

*Emera CNG, LLC*, over my dissent, the Commission held that a natural gas facility used to export gas to the Bahamas was not an “export” facility because the gas from the facility had to be trucked 440 yards to the docks. Relying on the reasoning of *Emera*, Pivotal, which operates five LNG facilities in three different states, seeks a similar declaratory order. For the reasons I stated in *Emera*, I would deny Pivotal’s request as well. The central flaw in the majority’s reasoning is that it fails to address the plain language of the Natural Gas Act. The Act makes clear Congress’s intent to regulate the import and export of gas.<sup>13</sup>

15. The Commission concedes that the criteria for its third test (“whether the facility would receive or sendout gas via a pipeline”) “is met.”<sup>14</sup> So Nopetro LNG’s proposed export facility clearly meets all three of the Commission’s tests to determine jurisdiction.
16. The Commission also argues that “Nopetro’s liquefaction facility is not an LNG terminal subject to our jurisdiction under section 3 of the NGA because it is not located at the point of export such that LNG can be directly transferred to vessels for export.”<sup>15</sup>
17. In an effort to disavow jurisdiction over Nopetro LNG, the Commission’s Order offers an arbitrary and unsupported allegation that the word “onshore” in the Natural Gas Act only “applies to facilities that are located on or near the water or the coast.”<sup>16</sup> That interpretation is contrary to the plain statutory language and the structure and evident purpose of the Natural Gas Act, and is wholly unreasonable.
18. Congress’ use of the term “onshore” to qualify natural gas facilities subject to FERC’s “exclusive” jurisdiction simply differentiates FERC’s jurisdiction from that of the U.S. Coast Guard’s exclusive jurisdiction of natural gas exports from *offshore* deepwater ports. Indeed, this is bolstered by FERC’s 2005 congressional testimony, which included a section *Recommended Legislative*

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<sup>13</sup> Commissioner Bay Dissent, at page 1.

<sup>14</sup> Order, at footnote 21.

<sup>15</sup> Order, at 10.

<sup>16</sup> Order, at 12.

*Changes*, providing the Commission’s view on its jurisdictional outlook over onshore natural gas terminals:

The Commission has interpreted section 3 of the Natural Gas Act as conferring exclusive jurisdiction on the Commission with respect to the siting, construction, operation, and safety of LNG facilities onshore and in state water (*as distinguished from those offshore facilities that are within the Coast Guard’s jurisdiction*). [emphasis added]<sup>17</sup>

19. Just three years before granting FERC exclusive jurisdiction over onshore natural gas exports and imports, Congress passed the Maritime Transportation Security Act of 2002, extending the Deepwater Port Act of 1974 to “natural gas,” thereby clarifying Coast Guard exclusive jurisdiction over such offshore deepwater ports that involved the export or import of natural gas.<sup>18</sup>
20. The inclusion of the term “onshore” in the definition of “LNG terminal” simply complimented earlier amendments adding “natural gas” to offshore deepwater ports to ensure comprehensive and exclusive jurisdiction for the federal government over natural gas exports and imports from both onshore and offshore facilities.
21. The plain meaning of the term “onshore” with reference to facilities or activities is that they exist or occur on land. Congress uses the term “onshore” in a wide variety of statutes and uses it broadly to apply to lands that are not submerged, regardless of how far they may be from the coastline, in contradistinction to “offshore,” which refers to activities and facilities on or under water. For example, the Oil Pollution Act defines “onshore facility” as “any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land.”<sup>19</sup>

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<sup>17</sup> Printed page 40, [www.govinfo.gov/content/pkg/CHRG-109shrg20445/pdf/CHRG-109shrg20445.pdf](http://www.govinfo.gov/content/pkg/CHRG-109shrg20445/pdf/CHRG-109shrg20445.pdf)

<sup>18</sup> Section 106, [www.congress.gov/107/plaws/publ295/PLAW-107publ295.pdf](http://www.congress.gov/107/plaws/publ295/PLAW-107publ295.pdf)

<sup>19</sup> 33 USC § 2701(24).

22. Congress clearly intended FERC to have vast authority over *any* facility engaged in exporting natural gas located onshore (and in state-regulated waters), and provided the U.S. Coast Guard similar authority over offshore facilities. This distinction is also supported by language in Section 311(b) of the Energy Policy Act of 2005 that excludes “waterborne vessels used to deliver natural gas to or from any such facility” from FERC’s jurisdiction, as Congress had already granted the Coast Guard that responsibility.
23. Similarly, Congress has long delineated regulatory oversight of oil and gas extraction on public lands between onshore and offshore, with onshore activities covered by the Mineral Leasing Act of 1920, and offshore by the Outer Continental Shelf Lands Act. Just as with natural gas exports, onshore covers all lands onshore, not just extractive activities occurring near the shoreline. In the case of natural gas exports, it may be more likely for export facilities to liquefied or compressed natural gas to be sited near the shoreline, but being physically located at the shoreline is not required for purposes of jurisdiction of the Natural Gas Act. Congress was not interested where exactly onshore an export terminal was located, but rather in its purpose: if it is a facility used to export natural gas, than FERC has exclusive jurisdiction.
24. Indeed, the use of the word “onshore” in the Natural Gas Act amendments concerning LNG terminals in the 2005 Energy Policy Act is but one of more than 20 uses of “onshore” in that Act for a variety of different statutory authorities, all of which refer to facilities on land within the United States that are not submerged under water.<sup>20</sup> There is no suggestion in the statutory text that Congress intended a specialized, limited meaning of “onshore” in the Natural Gas Act’s definition of “LNG terminal” that is different from the ordinary meaning of the word as used in the many other parts of the same Energy Policy Act that employ it to describe facilities and activities on land.

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<sup>20</sup> [www.congress.gov/109/plaws/publ58/PLAW-109publ58.pdf](http://www.congress.gov/109/plaws/publ58/PLAW-109publ58.pdf)



25. The use of the term “onshore” to refer to facilities or activities on land throughout the 2005 Act, including in its amendments to the Natural Gas Act, is consistent with the general usage of that term not only in other statutes, but also to its construction by the federal courts, which regularly apply it to distinguish things that occur on land from those that occur offshore. *See, e.g., Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207 (2012) (addressing the circumstances in which an injury occurring “onshore”—that is, on dry land—are the “result” of offshore activities for purposes of the Outer Continental Shelf Lands Act); *United States v. Ward*, 448 U.S. 242 (1980) (referring to an oil drilling facility in Enid, Oklahoma, hundreds of miles from any coastline, as “onshore”); *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002) (referring to inland oil-processing plants located in Erath, Louisiana as “onshore”). Indeed, the Commission itself, in exercising authority over pipelines, appears to use the terms “offshore” and “onshore” to distinguish between parts of a pipeline system located underwater from those found on land, not to use “onshore” to refer to proximity to the shoreline. *See, e.g., Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61118 (2001).
26. The Commission has offered no explanation of why Congress would have used the term in a more restrictive manner in the Natural Gas Act’s definition of “LNG terminal” than in other statutes where it has its ordinary meaning. The language and structure of the provisions at issue, and their history, reveal an intent to give the Commission jurisdiction over export facilities, not to provide it with authority limited to protection of beaches or other littoral areas (a subject over which the Commission possesses no expertise). Limiting the Commission’s authority to facilities on the shoreline, as opposed to onshore facilities more generally, bears no relationship to the statute’s function of conferring regulatory authority with respect to export facilities because (as this case well illustrates), the extremely close proximity to the shoreline required by the Commission’s idiosyncratic definition of “onshore” has nothing to do with the determination of whether a facilities exclusive purpose is to receive, unload, load, store, transport, gasify, liquefy, or process gas that is exported.

## **Conclusion**

The 2005 amendments to the Natural Gas Act granted FERC “exclusive authority” over onshore LNG terminals. Congress defined such natural gas export terminals to include the most comprehensive set of natural gas export activities possible—extending FERC exclusive jurisdiction over any facility that prepares natural gas for export. The Commission’s bizarre contention that the inclusion of the term “onshore” constricts its ability to regulate natural gas export facilities that are not directly on the shore is unsupported by the factual record. The proposed Nopetro LNG facility will receive, load, transport and liquefy natural gas for export out of the United States, and is therefore an LNG terminal subject to the Commission’s exclusive jurisdiction.

Respectfully submitted,

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