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Does FERC's Denial of Authority to Construct Jordan Cove Signal a More Rigorous Test for Future LNG Projects?

On March 11, 2016, the Federal Energy Regulatory Commission (FERC) denied an application by Jordan Cove Energy Project, L.P. (Jordan Cove) for authority under Section 3 of the Natural Gas Act (NGA) to site, construct, and operate a facility at Coos Bay, Oregon, for the exportation, principally to Asia, of liquefied natural gas (LNG). In that same order, FERC denied a related application by Pacific Connector Gas Pipeline, L.P. (Pacific Connector) for an NGA Section 7 certificate to construct and operate a 232-mile, 36-inch diameter upstream pipeline to supply natural gas to Jordan Cove. As discussed below, the Commission's denial of a Section 7 certificate for Pacific Connector was a fairly routine application of its Certificate Policy Statement, balancing the benefits of the proposed project against its adverse impacts. Importantly, the denial of the Jordan Cove application extends to Section 3 proposals a similar balancing of benefits and impacts, raising questions as to how the Commission might address future applications for Section 3 authorization to construct LNG facilities that are not supported by contracts for service on the proposed facilities.

The Commission's Application of the Section 7 Balancing Test

In denying Pacific Connector's certificate application under Section 7, FERC applied its "Certificate Policy Statement." Under the Certificate Policy Statement, "the Commission balances the public benefits against the potential adverse consequences." FERC "will approve an application for a certificate . . . only if the public benefits from a proposed project outweigh any adverse effects." In this context, FERC indicated it takes a "proportional approach" in balancing "the impact of the proposed project on the relevant interests . . . against the benefits to be gained from the project." If a project will affect a large number of interests adversely or if it will have a strong adverse effect on a particular interest, a greater showing of need and public benefits will be required for project approval.

FERC's primary focus was on the pipeline proposal's impact on landowners and communities given the Pacific Connector's need for eminent domain -- which is available for interstate pipelines under NGA Section 7 but not for LNG terminals under NGA Section 3. FERC's order demonstrates that if eminent domain will be necessary for securing some land rights, a more substantial demonstration of need and public benefits will be required to overcome the impact on land rights. The best way to demonstrate need for a project is through evidence of long-term precedent agreements or service agreements, although FERC will also consider other evidence such as "demand projections, potential cost savings to consumers, and comparisons of projected demand with the amount of capacity currently serving the market."

FERC found there was little or no evidence of need for the proposed pipeline. Pacific Connector had no executed precedent agreements, only non-binding term sheets that might lead to precedent agreements. Nor had it conducted an open season which could have provided some indication of demand. The Commission thus found insufficient evidence of need to justify giving Pacific Connector the power of eminent domain.

FERC also refused to find that Pacific Connector was necessary on the strength of the Department of Energy's (DOE) approval of Jordan Cove's LNG export application. FERC found no precedent for approving the project on this basis. FERC's order is a reminder that the issues considered by DOE in determining whether to permit the export of LNG are different from the issues considered by FERC in determining whether to approve the construction of pipeline facilities needed to export LNG.

Impact on LNG Terminal Authorizations Under Section 3

Consistent with its denial of a certificate to Pacific Connector, FERC denied Jordan Cove a Section 3 license to construct its proposed LNG terminal. FERC stated that while the Certificate Policy Statement does not specifically apply to the construction of export facilities authorized under NGA Section 3, FERC is nonetheless required to conclude that authorization of such facilities will not be inconsistent with the public interest. In support, FERC cited a prior case in which it had concluded that "the rationale of balancing benefits against burdens to determine the public interest is the same" in Section 3 and Section 7 proceedings.[1] Applying that rationale here, FERC observed that because it would not authorize the Pacific Connector pipeline, which was the only source of gas for the LNG terminal, the terminal would have no feed gas. FERC accordingly found that Jordan Cove, without feed gas, would produce no benefit to offset the impacts resulting from its construction and was therefore inconsistent with the public interest.

It will be interesting to see how FERC applies "the rationale of balancing benefits against burdens to determine the public interest" in future cases involving proposed LNG terminals under Section 3. One question is whether FERC will require a lesser showing of benefits under Section 3 because eminent domain is not available under Section 3, and thus the burdens imposed on the public by a Section 3 are presumably lower than under Section 7. In addition, Pacific Connector's lack of signed precedent or transportation service agreements was key to FERC's rejection of its Section 7 application. An issue that bears watching in future FERC cases is whether FERC will place similar importance on the need for precedent agreements for either liquefaction service or LNG sales and purchase agreements in deciding whether to approve applications to construct new LNG terminals under Section 3.

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[1] *AES Sparrows Point LNG, LLC,* 126 FERC ¶ 61,019, at n.21 (2009).

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