Ratepayers for Affordable Clean Energy
CPUC Rulemaking 04-01-025
March 23, 2004

Addendum C:

Federal Preemption of the CPUC

California's jurisdiction over LNG terminals as well as new coastal pipelines, gas drilling, and seabed methane strip mining is seriously threatened. Certain LNG developers are encouraging federal regulators to pre-empt the California Public Utilities Commission, the Bush Administration has nearly passed a Federal Energy Bill that would have preempted California's jurisdiction over energy development on its coastline, and some FERC officials have claimed they, not the CPUC, already have jurisdiction over LNG terminals in Long Beach and anywhere else.[1]

The most glaring example of this effort is on the Port of Long Beach, which is the largest container port of the western hemisphere and provides about 70% of Pacific Rim imports into the United States, and has a dense low-income urban population density. The success of the developer of the LNG terminal indicates the readiness of the Bush Administration to become the

[1]This document was prepared with the assistance of Bry Myown.

energy developer of California's coastline, which has been under a voter-mandated drilling ban for decades, by the FERC or Department of the Interior.

On October 30, 2003, the CPUC informed Mitsubishi-backed LNG Developer Sound Energy Solutions that the CPUC had voted to assert its jurisdiction over Sound Energy Solutions as a "public utility, requiring it to apply to the CPUC for a Certificate of Public Convenience and Necessity ("CPCN") before starting any construction of an LNG terminal2 on the port of Long Beach, California, a community of 9000 residents per square mile.

On February 23, 2004, the CPUC filed a "Notice of Intervention and Protest of the Public Utilities Commission of the State of California with the Federal Energy Regulatory Commission, charging Mitsubishi LNG developer Sound Energy Solutions with not complying with state law requiring a certificate of Public Convenience and Necessity before commencing construction of its LNG facility:

> "Under applicable state law, SES is a California public utility. See California Public Utilities Code §§ 216, 221, 222, 227, 228. SES intends to utilize its proposed facility to process LNG into natural gas to be sold "in California's non-core natural gas markets." Because its proposed operations and activities make SES a public utility, SES is required to apply for and receive a certificate of public convenience and necessity ("CPCN") from the CPUC prior to commencement of construction of its proposed facility. California Public Utilities Code §§ 1001, *et seq.*"[2]

[2]Harvey Y. Morris, Principal Counsel, California Public Utilities Commission, "Notice of Intervention and Protest of the Public Utilities Commission of the State of California," Federal Energy Regulatory Commission, Docket No. CP-04-58-000, February 23, 2004, p.3.

The CPUC said it had no intention of regulating the price of LNG in California but rather " the siting and safety of SES's proposed LNG facilities in California; and, in case of an emergency (i.e. a natural gas shortage in California), the need for natural gas to be transported to core residential customers or electric generation units (with just compensation to SES). The CPUC staff also stated that the CPUC is concerned about 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 (which could result in market power of affiliate abuse issues). The CPUC already regulates these subject areas, as well as many other subject areas, with regard to other natural gas utilities in California."[3]

> "In addition, considering all of the adverse impacts on the California ratepayers, which have resulted from th California energy crisis, the potential exercise of market power is an area of concern for the State of California. The CPUC is charged with the duty of ensuring the California utilities do not engage in unjust, unreasonable, or improper practices. *See* Cal. Pub. Util. Code § 761." [4]

The CPUC stated that "SES's proposal does not involve interstate transportation or interstate sales of natural gas. SES's proposed LNG facilities would not interconnect with an interstate pipeline. SES's sale of natural gas would be within the State of California, and the transportation of the natural gas would be on an intrastate pipeline (i.e., SoCalGas), which is regulated by the CPUC, not the FERC." [5]

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[3]Harvey Y. Morris, "Notice of Intervention and Protest," Federal Energy Regulatory Commission, Docket No. CP-04-58-000, February 23, 2004, p. 5.

[4]Harvey Y. Morris, "Notice of Intervention and Protest," pp. 5-6.

[5]Harvey Y. Morris, "Notice of Intervention and Protest," pp.6-7.

On SES replied to the FERC,

> "The CPUC's assertion of state regulatory jurisdiction of these essential facilities at a time when California and our country as a whole is facing increased demand for, and limited supplies of, natural gas. Separate and differing regulation of natural gas import facilities by the numerous coastal and border states instead of the centralized and exclusive federal authority intended by ...the (Natural Gas Act) is bad law and worse policy. *The controversy is immediate, concrete and grave...The (FERC) has been granted plenary, flexible and exclusive jurisdiction over facilities for the importation of natural gas. That jurisdiction wholly preempts the CPUC's."* [6]

According to Deborah Schoch in the Los Angeles Times, February 27, 2004, but not corroborated by any FERC response to CPUC's motion, the FERC's Director of Internal Affairs, Kevin Cadden, claimed that the federal agency has jurisdiction over and may pre-empt, California regulatory authority over what could become the state's first LNG terminal ($400-million) setting up a possible conflict with state regulators. Following state claims of regulatory authority to protect Californians against the dangers associated with LNG terminals, federal energy regulators said that they - rather than California officials - have the ultimate say over whether a proposed gas plant should be built in Long Beach.

The Federal Energy Regulatory Commission is responsible for where onshore California LNG plants are built, a spokesman said. "The siting of the facility is ours," Cadden told Ms. Schock, in spite of the California Public Utilities Commission's assertion of jurisdiction to protect the public.

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[6]Thomas E. Giles, CEO, Sound Energy Solutions, "Answer of Sound Energy Solutions" in Federal Energy Regulatory Commission Docket No. CP04-58-000, March 9, 2004, p. 2.

In another development, Long Beach City Atty. Robert E. Shannon said the City Council will take a position on the LNG plant. Earlier, officials said the council was not expected to vote on the proposed facility, which already is backed by the city's port authority, which intends to finance a pipeline connecting Mitsubishi to SoCalGas.. Shannon said Thursday, "There have been some very significant safety issues raised, and it's very obvious that they need to be explored before anything substantive takes place here."

The Port of Long Beach has granted a Mitsubishi subsidiary, Sound Energy Solutions, the exclusive right to pursue plans to build the first such facility on the West Coast; four other terminals are operating in the United States. With LNG terminals rejected by the California Coastal Commission in 1977 there are no LNG terminals in the state of California.

Mitsubishi would convert the LNG back to gas at the Long Beach terminal, producing 700 million cubic feet of natural gas each day, enough capacity theoretically to fuel up to 3900 MW of peak capacity for new combined cycle power plants.

In the motion, the state commission asserted its right under state and federal law to approve the project, and said it had been trying since October to make Mitsubishi apply for PUC certification. It also questioned whether the federal energy agency has jurisdiction over the project, because the facility would not provide interstate shipments of gas that are regulated by the federal

government, but would only connect to intra-state pipelines.[7]

Federal Energy Bill

Apart from simply asserting preemptive authority, the Bush Administration's current Federal Energy Bill (11/09/03) would preempt all state control of a 200 Mile Energy Belt For Offshore Gas & Oil, and Seabed Methane - a bigger land grab than the Louisiana Purchase. The "Cubin" language in the current Federal Energy Bill describes alarming and dangerous developments in the Bush Administration's aggressive pro-fossil fuel policy, both foreign and domestic.

Proposing the largest land-grab in U.S. History, the obscure language of the legislation authorizes a major invasion of local and state jurisdictions whose governments seek to protect their own coastlines, as California voters did by approving a statewide ban on offshore oil drilling along its Pacific Ocean coastline.

The U.S. Secretary of the Interior would become an Energy Czar controlling energy development along a 200-mile strip of coastline surrounding the entire United States, a key provision of the "oil and gas title" of the final energy bill draft remains which would grant to the Secretary of Interior unilateral leasing, permitting, and regulatory authority over all U.S. ocean waters within the entire 200-mile Exclusive Economic Zone (EEZ) for a broad range industrial projects related

[7]Los Angeles Times, February 27, 2004.

to offshore Liquefied Natural Gas (LNG) facilities, sub sea oil and gas pipelines, offshore wind and wave energy facilities, and undefined "other" hydrocarbon and energy projects.

Senator Elizabeth Dole R-NC has recently joined Barbara Boxer, D-CA, in expressing their opposition to the proposed new revisions in the Energy Policy Act that would give added authority to the Secretary of the Interior to okay oil and gas support facilities off the nation's coast in a March 2 letter to their colleague, Pete Domenici, a Republican from New Mexico who chairs the Senate's Energy and Natural Resources Committee.

"Unfortunately, this legislation includes provisions that would seriously undermine long standing legitimate states rights, while causing potentially significant harm to ocean and coastal environments," they wrote. Dole and Boxer argue that the proposed revisions would arbitrarily grant authority to the Secretary of the Interior "over a broad range of oil and gas support facilities in the Outer Continental Shelf, including areas protected for many years by Presidential and Congressional moratoria."

Dole and Boxer also told Domenici that they would offer an amendment to take the revisions out of the bill.

Meanwhile, putting mounting pressure on California's Congressional delegation to embrace a new Liquefied Natural Gas (LNG) terminal somewhere along its voter-protected coastline, the Bush Administration has convinced many California politicians that the 2000-1 Energy

Shortages were real shortages, not contrived shortages caused by government-documented manipulation by gas and gas-fired electricity generation companies. Threatening a return to blackouts unless California increases its dependence on gas fired power plants for electricity generation (gas already powers 43% of all electricity here), the Administration's propaganda campaign has already led some California Democrats to declare more gas the solution to California's energy crisis.

Finally, also pre-empted also by the federal energy bill is the anticipated final report of the President's Commission on Ocean Policy (now due for release in January 2004), which is expected to recommend the creation of a new cabinet-level federal agency to manage ocean governance. Should the "Cubin" provision remain included in the final energy bill, its enactment will prematurely pre-empt any recommendation from the Commission on Ocean Policy by centralizing undue offshore authority within the Department of Interior, absent the necessary involvement of agencies more experienced with stewardship of living marine resources, such as NOAA.

The federal preemption bill is supported by the Bush administration less than a year since dropping its challenge to a court ruling halting oil and natural gas exploration off the central California coast. Facing a deadline to decide on an appeal to the Supreme Court, Interior Secretary Gale Norton said the administration wants to resolve the controversy over 36 offshore leases held by oil companies through negotiation, not lawsuits. "The administration supports the moratorium on new leasing off the California shore and respects the wishes of the people of

California," Norton had said in a statement made to the Associated Press just a year ago, on April 01, 2003.

California officials had been asking the administration to call off the litigation and buy back the leases after a December decision by a three-judge panel of the 9th U.S. Circuit Court of Appeals which had unanimously blocked any attempt to build the first new oil platforms off California's coast since 1994. No drilling to explore for oil deposits has been conducted since 1989.

Under the federal energy bill, the same Interior Secretary Gale Norton who claimed to respect the will of the California voters to ban offshore drilling, will pre-empt them for the express purpose of permitting and actively developing LNG terminals, coastal pipelines, drilling - and strip mining a methane-rich layer under the bottom of the sea - the main site of which is off the North Carolina coast.

Interestingly, the other state whole statewide moratorium on coastal drilling Washington is now seeking to pre-empt is North Carolina. [8]

There was an effort by some lawmakers last September to insert language into the Federal Energy Bill which would have threatened North Carolina's offshore drilling moratorium which has been in place since 1993. Senator Dole was instrumental in defeating the language. Jan

[8] Julia LeDoux, "Offshore Drilling rearing head again," Sentinel, March 12, 2004.

DeBlieu, Cape Hatteras Coastkeeper for the North Carolina Coastal Federation praised Dole for her "nonstop work to try to protect the coast from the bad provisions in this energy bill. She's really been a champion of North Carolina's right to say what happens off our shores. And her work with Senator Boxer is a model of bipartisan cooperation."

Assertion of Jurisdiction

In its assertion of jurisdiction, it is critical that the CPUC be alert to potential secondary and tertiary uses of LNG terminal locations that are even more threatening to the public safety, such as stripping and refining of LNG. It is very common in the oil and gas industry for a facility to use a lease or similar instrument as a means of obtaining initial advantage and then, at a later date, to unilaterally expand the use or scope of the work, facilities and business carried on at a site. The oil and gas industry track record shows that proponents of projects of this magnitude have frequently dodged an issue or proposed condition [on a lease] by saying that they need the flexibility, or that the condition would make the project uneconomic, even though no factual economic information is presented.

Respectfully,

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