

LIQUEFIED NATURAL GAS IMPORT TERMINALS: JURISDICTION OVER SITING, CONSTRUCTION, AND OPERATION IN THE CONTEXT OF COMMERCE CLAUSE JURISPRUDENCE

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I. INTRODUCTION

On March 24, 2004, the Federal Energy Regulatory Commission (the FERC or the Commission) issued a declaratory order in response to an application by a firm called Sound Energy Solutions (SES). The order asserted exclusive jurisdiction over the siting, construction, and operation of a proposed liquefied natural gas (LNG) importation terminal in the Port of Long Beach, California.¹ This controversial decision marked the first occasion in which the Commission claimed exclusive jurisdiction over aspects of a proposed LNG project that did not involve the sale for resale or transportation of LNG in interstate commerce.

This article analyzes the legal bases for the FERC's exercise of jurisdiction over LNG importation facilities. In the ongoing debate over where the jurisdictional lines should be drawn between the states and the federal government in this area of regulation, it examines how Commerce Clause jurisprudence factors into the analysis.

The siting, construction, and operation of LNG import terminals that engage in wholly intrastate activities have an effect on interstate commerce. However, the Natural Gas Act (NGA) and prevailing case precedent do not provide for federal jurisdiction over natural gas import terminals on this basis. Given the increasing demand for natural gas in the United States and industry forecasts projecting an important future role for LNG in meeting this demand, it is incumbent upon Congress to enact legislation providing for such jurisdiction to allow for uniform regulation in this area of national concern.

This article is organized into six parts. A brief introduction to this article begins in Part I, above. Part II describes what LNG is and why its import matters to state and federal policy-makers. Part III traces the steps taken by the FERC in broadening the scope of its jurisdiction over LNG import projects, beginning with the Natural Gas Act of 1938 through the Commission's recent pronouncement in the *Sound Energy Solutions* case. In Part IV, the Commerce Clause is studied in the context of both traditional Commerce Clause cases and "negative" or "dormant" Commerce Clause cases. Part V demonstrates the siting, construction, and operation of LNG import terminals that have an effect on

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1. *Sound Energy Solutions*, 106 F.E.R.C. ¶ 61,279 (2004), *reh'g denied*, 107 F.E.R.C. ¶ 61,263 (2004).

interstate commerce. It pulls together the Commerce Clause jurisprudence with the laws at issue in the *Sound Energy Solutions* debate, including the NGA and the California Public Utilities Code. Conclusions are set out in Part VI.

This article does not take a position on the central issues currently litigated in the *Sound Energy Solutions* case, issues which at press time were on appeal before the United States Court of Appeals for the Ninth Circuit. In its order denying applications for rehearing of the March 24 order, the Commission stated that the disputed issues were: "(1) how to distinguish foreign," interstate, and intrastate commerce from one another, "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."² To place this article in context, a survey of the law in those areas is included.

The author believes that SES's proposed facilities, though involving purely intrastate commerce, ought to be subject to the interstate commerce jurisdiction under the NGA on the ground that they would affect interstate commerce. The Commission held that because no interstate commerce would be involved in the *Sound Energy Solutions* case, its NGA jurisdiction over interstate commerce under section 7 does not apply. Instead, it found that SES's proposed facilities are subject to the Commission's NGA section 3 foreign commerce jurisdiction.³ As noted, the focus of the article is whether the Congress may confer on the Commission jurisdiction to regulate the siting, construction, and operation of intrastate LNG import facilities on the ground that such intrastate activities have an effect on interstate commerce. It also considers whether the state laws asserted in *Sound Energy Solutions* conflict with the dormant Commerce Clause.

The author concludes that the siting, construction, and operation of all LNG import facilities constitute activities that have an effect on interstate commerce. Thus, an amendment of the NGA providing for federal jurisdiction over purely intrastate LNG import facilities may be supported on this basis under the Commerce Clause. It is unclear whether the California law at issue in the *Sound Energy Solutions* case contravenes the dormant Commerce Clause. While the California law is facially neutral, it may place an impermissible burden on interstate commerce in the regulation of LNG import facilities. However, fair arguments can be made that the burden on interstate commerce is outweighed by the benefits to state regulation in this area. This article is written in the context of the FERC's ongoing development of a comprehensive policy to foster long-term LNG import facilities in order to meet the increasing demand placed on this nation's natural gas supply.

2. *Sound Energy Solutions*, 107 F.E.R.C. ¶ 61,263 at 62,159 (2004). Another matter which will be considered on review is whether Congress already occupies this field of regulation, requiring federal preemption under the Supremacy Clause. Discussion on this matter is limited to a brief description of the issue for completeness.

3. *See* *Border Pipe Line Co. v. FPC*, 171 F.2d 149, 150-151 (D.C. Cir. 1948) (providing for separate NGA sections for jurisdiction under foreign commerce and interstate commerce powers).

II. WHAT IS LNG AND WHY IS IT ATTRACTIVE?

LNG is natural gas that has condensed into liquid form after having been cooled to a temperature at or below minus 260° F.⁴ In its liquid state, it occupies a substantially smaller volume of space than its gaseous form, allowing it to be stored and transported more efficiently than natural gas. When it is warmed, LNG “regasifies” and is suitable for use in the same manner as conventional natural gas.⁵ Although LNG has been in commercial use since the 1940s, LNG imports have, until recently, been low because LNG was too expensive to compete with low-priced domestic natural gas. According to a January 28, 2004, Congressional Research Service Report for Congress (CRS Report), in 2002 LNG imports accounted for only one percent of total U.S. natural gas consumption. However, owing to rising natural gas prices, current price volatility, and the possibility of domestic shortages, the demand for LNG imports has sharply increased.⁶ The CRS Report also speaks of the increase in natural gas demand owing to environmental concerns relating to other energy sources and the widespread building of natural gas-fired electricity generation.⁷ Because domestic supply has been unable to keep up with the demand for natural gas, prices have soared and remain volatile.

LNG has become an attractive alternative to natural gas, and it will constitute an increasing proportion of U.S. natural gas supply. Industry analysts project that “[t]otal net [LNG] imports [could] supply 21 percent of total U.S. natural gas consumption in 2010 (5.5 trillion cubic feet) and 23 percent in 2025 (7.2 trillion cubic feet)”⁸ Nearly all of the increase in net imports, from 3.5 trillion cubic feet in 2002, is expected to consist of LNG. Currently, there are five active LNG import terminals in the United States located at: Everett, Massachusetts; Lake Charles, Louisiana; Cove Point, Maryland; Elba Island, Georgia; and Penuelas, Puerto Rico. Several additional projects have been proposed and are under consideration for approval before federal regulators.

There are safety hazards associated with LNG terminals that create strong local opposition to new projects. The most serious hazards include explosions, pool fires, and threats of terrorism.⁹ Most recently, an accident in January 2004 at Algeria’s Skikda LNG terminal killed or injured more than 100 workers. But while the debate over the safety hazards associated with LNG terminals continues, it is unlikely that the nation’s interest in LNG as a resource to mitigate the shortfall in domestic natural gas production will wane.

Demand for natural gas continues to increase. On June 10, 2003, W.J.

4. PAUL W. PARFOMAK & AARON M. FLYNN, CONG. RESEARCH SERV., ORDER CODE RL32205, LIQUEFIED NATURAL GAS (LNG) IMPORT TERMINALS: SITING, SAFETY AND REGULATION CRS-2 (Jan. 28, 2004), available at <http://www.urban-renaissance.org/urbanren/publications/LNG.pdf>.

5. *Id.* at CRS-2.

6. PARFOMAK & FLYNN, *supra* note 4, at CRS-2.

7. *Id.* at CRS-3.

8. ENERGY INFO. ADMIN., REASSESSMENT OF LIQUEFIED NATURAL GAS SUPPLY POTENTIAL (2004), available at http://www.eia.doe.gov/oiaf/archive/aeo04/issues_3.html. “[T]he [Annual Energy Outlook 2004] reference case projects that net imports of LNG will exceed net imports of natural gas from Canada by 2015.” *Id.*

9. PARFOMAK & FLYNN, *supra* note 4, at CRS-5–CRS-6.

“Billy” Tauzin, Chairman of the House Committee on Energy and Commerce, said in a statement before the full committee that “[n]early 23 percent of [this country’s] primary energy requirements [are met with] natural gas.”¹⁰ Others testified that the Energy Information Administration expects this figure to increase to fifty-two percent by the year 2025. Also by 2025, total natural gas consumption is expected to increase to thirty-five trillion cubic feet (Tcf).¹¹ However, domestic gas production is expected to increase at a slower pace than consumption over the forecast period, rising from 19.5 Tcf in 2001 to 26.4 Tcf in 2025.¹² Thus, in order to address natural gas supply concerns, the FERC has adopted policies that encourage and support LNG import projects. Most recently, in December 2002 the FERC announced in *Hackberry LNG Terminal, L.L.C.*¹³ that it would not require LNG terminals to comply with open access rules at the point where tankers offload LNG.¹⁴ In its order, the FERC acknowledged that its previous open access requirements may have had the unintended effect of deterring investment in new LNG facilities. It found that “the public interest will be served by allowing the introduction of new imported LNG to supplement natural gas supplies for our nation’s natural gas markets at competitive prices.”¹⁵

III. A SURVEY OF LNG JURISDICTION

A. *The Natural Gas Act*

In 1972, the Commission (then known as the Federal Power Commission) determined that LNG is “natural gas,” as the term is defined in section 2(5) of the NGA.¹⁶ It concluded that it has jurisdiction over LNG to the same extent that it has jurisdiction over the sale and movement of other natural gas. Section 1 of the NGA sets out the scope of federal jurisdiction over the natural gas industry:

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.¹⁷

10. *Natural Gas Supply and Demand Issues: Hearing Before the House Comm. on Energy and Commerce*, 108th Cong. 1 (2003) (opening statement of Chairman Tauzin), available at <http://energycommerce.house.gov/108/action/108-26.pdf>.

11. *Id.* at 18 (prepared statement of Guy F. Caruso, Adm’r, Energy Info. Admin., Dep’t of Energy).

12. *Natural Gas Supply and Demand Issues: Hearing Before the House Comm. on Energy and Commerce*, 108th Cong. 18 (2003) (prepared statement of Guy F. Caruso, Adm’r, Energy Info. Admin., Dep’t of Energy).

13. *Hackberry LNG Terminal, L.L.C.*, 101 F.E.R.C. ¶ 61,294 (2002).

14. *Id.* at 62,180.

15. 101 F.E.R.C. ¶ 61,294 at 62,176.

16. *Distrigas Corp.*, 47 F.P.C. 752, 755–756 (1972). See also Natural Gas Act of 1938, 15 U.S.C. § 717a(5) (2000) (“‘Natural gas’ means either natural gas unmixed, or any mixture of natural and artificial gas.”).

17. Natural Gas Act of 1938 § 1, 15 U.S.C. § 717(b)(2000).

A “natural-gas company” is defined in section 2(6) of the NGA as “a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.”¹⁸ “Interstate commerce” is defined in the act under section 2(7) as “commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.”¹⁹

In *Panhandle Eastern Pipe Line Co. v. P.S.C. of Indiana*, the United States Supreme Court ruled that statutory exemption of “any other transportation or sale of natural gas,” includes intrastate transportation and direct retail sales, and local distribution of gas, which are subject to state regulation.²⁰ Thus, the FERC’s jurisdiction is limited to: the sale of natural gas in interstate commerce for resale; the transportation of natural gas in interstate commerce; and “natural-gas companies” which are engaged in one or both of the first two activities.²¹

In 1954, Congress amended the NGA to carve out an exception to the FERC’s plenary authority over natural gas companies that engage in the sale of natural gas interstate for resale or interstate gas transportation. Section 1(c) of the NGA was added to exempt “Hinshaw pipelines” from the Commission’s jurisdiction, subjecting those entities instead to regulation by a state commission.²² A Hinshaw pipeline is a natural gas pipeline that receives all of its out-of-state gas from facilities that are

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.²³

The Act states that such matters are “primarily of local concern.”²⁴ However, Hinshaw pipelines “can . . . come under FERC authority when [they] engage in activities that go beyond the intrastate transport of gas.”²⁵ In limited circumstances, a Hinshaw pipeline can engage in activities that would otherwise subject it to comprehensive FERC jurisdiction while maintaining its status as a Hinshaw pipeline.²⁶

The import and export of natural gas is regulated under section 3 of the NGA, enacted June 23, 1938. Section 3 provides, in part, that:

[N]o person shall export . . . or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for

18. Natural Gas Act of 1938 § 2(6), 15 U.S.C. § 717a(6) (2000).

19. Natural Gas Act of 1938 § 2(7), 15 U.S.C. § 717a(7) (2000).

20. DAVID J. MUCHOW & WILLIAM A. MOGEL, *ENERGY LAW AND TRANSACTIONS* § 83.01 at 1 (2004) (citing *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm’n*, 332 U.S. 507, 516 (1947)).

21. *Panhandle E. Pipe Line Co.*, 332 U.S. 507. See also *Distrigas*, 47 F.P.C. 1465 (1972).

22. Natural Gas Act of 1938 § 1(c), 15 U.S.C. § 717(c) (2000).

23. *Id.*

24. 15 U.S.C. § 717(c) (2000).

25. *Consumers Energy Co. v. FERC*, 226 F.3d 777, 779 (2000) (alteration in original) (quoting *Pub. Utils. Comm’n of Cal. v. FERC*, 143 F.3d 610, 615 (D.C. Cir. 1998)).

26. *Id.* at 779.

hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. The Commission may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.²⁷

Thus, the Commission's authority over LNG importation under section 3 of the NGA includes the authority to impose terms and conditions as necessary and appropriate to ensure that the proposal is in the public interest. Additionally, under section 7 of the NGA a natural gas company is required to obtain from the Commission a Certificate of Public Convenience and Necessity (CPCN) before it may construct, acquire, or operate any facilities used in the sale or transportation of natural gas subject to the Commission's jurisdiction.²⁸ In 1947, the Commission claimed it had exclusive jurisdiction to authorize the construction and operation of proposed natural gas importation and exportation facilities in the *Border Pipe Line* case.

B. Border Pipe Line Co.

In *Border Pipe Line Co. v. Federal Power Commission (Border Pipe Line)*, Border Pipe Line filed an application on February 11, 1942, for a CPCN pursuant to section 7²⁹ of the NGA.³⁰ It sought authorization to construct and operate natural gas facilities located wholly within the State of Texas, for the transportation of natural gas to a point near the Rio Grande River, where the applicant would sell the natural gas to a company in Mexico.³¹ The Commission authorized the applicant, pursuant to section 3 of the NGA, to export natural gas from the United States to Mexico. A presidential permit was also issued to the applicant, authorizing the construction, operation, maintenance, and connection of the facilities to be located at the United States' border with Mexico.³²

On February 13, 1947, the Commission issued a CPCN finding that the applicant, by virtue of its operations described above, would be engaged in the transportation of natural gas in interstate commerce within the meaning of that term as used in the NGA. The Commission ruled that the applicant would be a "natural-gas company" within the meaning of the Act, and that because its facilities were used for interstate commerce, as defined in the Act, it would be subject to all the federal regulatory provisions applicable to "natural-gas companies" under the NGA, including the requirements of section 7.

27. Natural Gas Act of 1938 § 3, 15 U.S.C. § 717b(a) (2000).

28. Natural Gas Act of 1938 § 7, 15 U.S.C. § 717f(c)(1)(A) (2000).

29. Section 7 of the NGA provides in relevant part that:

(c)(1)(A) No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. . . .

15 U.S.C. § 717f(c)(1)(A).

30. *Border Pipe Line Co.*, 8 F.P.C. 773 (1949).

31. *Id.*

32. *Border Pipe Line Co.*, 8 F.P.C. 773.

On appeal the United States Court of Appeals for the District of Columbia Circuit set aside the FERC's order, noting that the operation at issue was wholly local, and that it was only because of the applicant's "sales for foreign commerce that the Commission [sought] to control all of its activities."³³ The court held that "interstate commerce" and "foreign commerce" have always been distinct ideas, and that "[i]nterstate commerce' does not include foreign commerce, unless Congress by definition for purposes of a particular statute includes them both in the single expression."³⁴ The court observed that Congress has frequently done so and held that Congress is perfectly familiar with those distinct concepts. The court stated that Congress' use of those terms is informed, deliberate, and ought to be observed.³⁵

The court turned to the legislative history of the NGA to resolve the dispute. It found that foreign commerce was specifically included in the original bill that served as the foundation for the final enactment of the NGA, with one title, "or from or to any place in the United States to or from a foreign country" included in a section that defined the applicability of that part of the proposed Act.³⁶ However, that title was omitted in the final enactment. The court interpreted "interstate commerce" not to include foreign commerce, stating "[w]e cannot write into an act of Congress a provision which Congress affirmatively omitted."³⁷ The court ruled that the Commission inappropriately sought to control all of Border Pipe Line's operations on the basis that its sales were for foreign commerce. The court reasoned that because Border Pipe Line's operations did not include transportation of natural gas in interstate commerce, or wholesale sales of natural gas in interstate commerce, its operations were wholly local and were not subject to the Commission's jurisdiction under the NGA.

C. *Distrigas*

The Commission did not extensively address the issue of jurisdiction over import and export activities again until 1972. In *Distrigas Corp.* (*Distrigas* or Opinion No. 613), *Distrigas* had applied for authorization under section 3 of the NGA to import LNG from Algeria.³⁸ This case brought before the Commission the first occasion on which a U.S. company proposed to import large quantities of foreign LNG for an extended period of time.³⁹ *Distrigas* sought authority to import from Algeria up to six shiploads (later increased to fourteen shiploads) of LNG annually for a term of twenty years.⁴⁰ The proposal would have enabled *Distrigas* to offer its customers peak-shaving services.⁴¹ The LNG was to be delivered by ship to *Distrigas* at facilities that it would construct in Everett, Massachusetts and Staten Island, New York. *Distrigas* would have taken title to the

33. *Border Pipe Line Co. v. FPC*, 171 F.2d 149, 151 (1948).

34. *Id.* at 150.

35. *Border Pipe Line Co.*, 171 F.2d at 151.

36. *Id.*

37. *Border Pipe Line Co.*, 171 F.2d at 152.

38. *Distrigas Corp.*, 47 F.P.C. 752, 754 (1972).

39. *Id.* at 760.

40. 47 F.P.C. at 754.

41. *Id.* at 755.

LNG at the ship's flange at the point of delivery in the United States.⁴²

In *Distrigas*, the Commission concluded that it has jurisdiction over LNG to the same extent that it has over the sale and movement of other natural gas.⁴³ It also held that Distrigas' proposed activity was akin to that of a producer or gatherer of natural gas and its sales in interstate commerce of natural gas for resale were subject to Commission regulation.⁴⁴ Thus, to the extent Distrigas proposed to sell natural gas in interstate commerce for resale, it was a "natural-gas company."⁴⁵

The Commission asserted that the importation or exportation of natural gas is within its jurisdiction under section 3 of the Act.⁴⁶ Citing to the *Border* case, however the Commission stated that importation or exportation of natural gas is not transportation or sale in interstate commerce under the NGA.⁴⁷ In this case, the Commission held that foreign commerce ceased when the LNG and title thereto were delivered to the Distrigas facilities in Massachusetts and New York.⁴⁸ For the purposes of its import and export activities and its intrastate sales and operations, the Commission concluded that Distrigas was not a natural-gas company under the Act and was not subject to those requirements of the Act that applied to natural-gas companies.⁴⁹ Under its "producer or gatherer" interpretation of Distrigas' activities, the FERC concluded that Distrigas' transport or sales of LNG that were solely intrastate were outside of the Commission's jurisdiction and did not require a certificate under section 7 of the NGA.⁵⁰

The Commission concluded that Distrigas' proposed importation was in the public interest and granted its application under section 3. The Commission also noted that under section 3 of the NGA, after approval of an application to import LNG, the FERC "may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate."⁵¹

The Commission stated "our decision to leave . . . purely intrastate activities outside our jurisdiction allows the Commission maximum discretion in discharging, over the long term, its responsibility to assure interstate customers adequate supplies of gas at the lowest reasonable price."⁵² Noting the severity of the gas shortage at that time, and holding a pessimistic outlook for the future state of domestic gas reserves, the Commission underscored its intent to create a policy

42. 47 F.P.C. at 754.

43. *Id.* at 755-756.

44. *Distrigas Corp.*, 47 F.P.C. 752, 756 (1972).

45. *Id.* at 755.

46. 47 F.P.C. at 758. The Commission asserted that it could, under section 3 of the NGA, take jurisdiction at the ship's flange at the point of delivery in the United States as the "terms and conditions" for authorizing the import of LNG, but elected not to do so. *Id.* at 760-761.

47. 47 F.P.C. 765.

48. *Id.* at 756.

49. *Distrigas Corp.*, 47 F.P.C. 752, 756 (1972).

50. *Id.* at 756.

51. 47 F.P.C. at 765.

52. *Id.* at 763.

aimed at mitigating the seriousness of the natural gas shortage. Although it described the timely development of this country's domestic resource base "of utmost importance," the Commission noted that "we must allow and even encourage . . . the development of new and supplemental supplies of natural gas, including the importation of foreign LNG."⁵³

In *Distrigas*, the Commission stated that its opinion would provide the needed encouragement, serving to invite venture capital into the development of LNG import projects, "so long as there is a shortage of natural gas or so long as they are competitive with other supplies of natural gas or alternative fossil fuels . . ."⁵⁴ However, the Commission emphasized that the gas supply picture could change, and "if at any time more attractive supply sources for the interstate market become available, the terms upon which imported LNG will be authorized for the interstate market may be adjusted accordingly."⁵⁵ The Commission noted that the *Distrigas* case represented only the first step in the development of a comprehensive Commission policy on long-term imports of LNG.⁵⁶

The Commission chairman and one commissioner dissented from the majority's decision, arguing that under section 3 of the NGA, the public interest could adequately be served only if the Commission exercised complete jurisdiction over all of *Distrigas*' proposed operations. As a policy matter, the dissent argued that if the Commission did not assert comprehensive jurisdiction over the importation of LNG, a regulatory gap would be created, placing "an impossible burden on [the] state regulatory commissions."⁵⁷ In addition, the dissent argued that *Distrigas*' operations constituted "interstate commerce" as the term is defined in the NGA, which included "commerce between any point in a state and any point outside thereof . . ."⁵⁸ According to the dissent, because the LNG first enters the United States from extraterritorial waters and then enters the state of importation (i.e. New York or Massachusetts), the LNG is in interstate commerce. "Thus, the importation of natural gas and its subsequent intrastate sale requires a certificate under Section 7, inasmuch as 'interstate commerce' contemplates 'foreign commerce.'"⁵⁹ The dissent further argued that to the extent the *Border* decision held that "foreign commerce" is not "interstate commerce," that decision was in error.⁶⁰

After Opinion No. 613 was issued, *Distrigas* proceeded to construct its LNG facilities in Massachusetts and New York. The company applied to the Commission for section 3 authorization to import additional quantities of natural gas, and also sought section 7 certification of interstate sales of gas imported under Opinion No. 613. Since the issuance of Opinion No. 613, the makeup of the Commission had changed (two members having resigned and not been replaced), and

53. 47 F.P.C. at 763.

54. *Id.* at 764.

55. *Distrigas Corp.*, 47 F.P.C. 752, 764 (1972).

56. *Id.* at 760.

57. 47 F.P.C. at 780.

58. *Id.* at 779-780.

59. 47 F.P.C. at 780.

60. *Id.* at 783.

the two dissenting members in *Distrigas* were now part of the majority.⁶¹ In response to *Distrigas*' applications, the new Commission issued an order holding that section 7 certification was required for all of *Distrigas*' facilities and directing *Distrigas* to submit the appropriate applications.⁶² The Commission reasoned that although in its original application *Distrigas* sought to engage in primarily intrastate commerce, its new applications proposed new and increased sales outside the states of importation, and consequently its facilities in New York and Massachusetts would be used for the sale and transportation of natural gas in interstate commerce.⁶³

Distrigas challenged the Commission's order on appeal, arguing that the FERC's attempt under section 3 to apply section 7 certification requirements to the facilities that *Distrigas* had proposed to utilize to receive, store, and distribute LNG for sales in both interstate and intrastate commerce contravened the *Border* decision.⁶⁴ The issue was whether the *Border* holding barred the Commission from requiring section 7 certification of *Distrigas*' facilities. The Commission argued that the statutory language and legislative history of the NGA were too ambiguous to make conclusive determinations regarding the extent to which the regulatory scheme applicable to interstate commerce was intended to also apply to foreign commerce.⁶⁵ Alternatively, if the *Border* case could not be distinguished, the Commission argued *Border* should be overruled on the basis that comprehensive regulation over LNG importation is required to protect consumers. The states, the Commission argued, cannot be trusted with the responsibility to exercise the necessary regulatory authority.

The court declined to overrule the *Border* case. It concluded that although the language and legislative history of the Act are not unambiguous, Congress had had fourteen subsequent opportunities to enact legislation overruling the court's *Border* construction of the NGA but refused to do so.⁶⁶ The court pointed out that in 1953 Congress amended the Federal Power Act (FPA) to include the *Border* interpretation, thereby implicitly approving it.⁶⁷ Finally, the Court clarified that if it believed the *Border* interpretation of the NGA would create the regulatory gap described by the Commission, then it would reconsider the *Border* holding. Noting that the FERC's regulatory authority is "broadly complementary to that reserved to the States, so that there would be no 'gaps' for private interests to subvert the public welfare[.]" the Court was not convinced

61. *Distrigas Corp. v. FPC*, 495 F.2d 1057, 1061 (1974).

62. *Distrigas Corp.*, 49 F.P.C. 1145 (1973).

63. See *Distrigas Corp.*, 495 F.2d at 1061. However, in its application for rehearing, *Distrigas* argued that it planned no material change in its proportion of interstate to intrastate sales. Thus, *Distrigas* claimed that the Commission failed to supply a rational or factual basis to support its conclusion regarding jurisdiction. *Distrigas*' petition for rehearing was denied.

64. *Id.* at 1057. *Distrigas* also contended that because the FPC disclaimed jurisdiction over the facilities when it originally granted *Distrigas* its application for authorization to import natural gas, it was barred from exercising such jurisdiction now. *Distrigas Corp.*, 495 F.2d at 1058.

65. *Id.* at 1062.

66. *Distrigas Corp.*, 495 F.2d at 1063.

67. *Id.*

that a regulatory gap would be created or that the consumers' interests would be threatened if the *Border* decision were allowed to stand.⁶⁸

The court further reasoned that the Commission's authority over imports of natural gas under section 3 of the NGA is elastic. The Commission may authorize imports subject to no conditions, it may deny import authorization altogether, or it may grant an application for import authorization subject to "terms and conditions" that the Commission finds "necessary or appropriate" to serve the public interest.⁶⁹ The court concluded:

[W]hile imports of natural gas are a useful source of supply, their potentially detrimental effect on domestic commerce can be avoided and the interest of consumers protected only if . . . the Commission exercises with respect to them the same detailed regulatory authority that it exercises with respect to interstate commerce in natural gas.⁷⁰

The court concluded that it was within the Commission's power, in acting under section 3, to impose the equivalent of section 7 certification requirements on imports of natural gas, both as to the facilities and as to interstate and intrastate sales.⁷¹ It added that "Section 3 supplies the Commission not only with the power necessary to prevent gaps in regulation, but also with flexibility in exercising that power . . ."⁷² It held that the Commission had jurisdiction under the NGA to issue the challenged order directed to Distrigas, and that its exercise of this authority was not precluded by the Commission's previous disclaimer of jurisdiction in Opinion No. 613.⁷³

D. Regulatory Reform

In 1977, the regulatory functions of section 3 of the NGA were transferred from the Commission to the Secretary of Energy under section 301(b) of the Department of Energy (DOE) Organization Act.⁷⁴ In 1984, the Secretary of Energy delegated to the Commission the authority to approve or disapprove the siting, construction, and operation of facilities subject to the NGA.⁷⁵ The FERC also regulates the construction of new domestic facilities related to the import and export of natural gas. The DOE retained the authority to authorize the importation of natural gas.⁷⁶ Thus, the DOE authorizes the import and export of gas, and the Commission regulates the siting and construction of facilities used for im-

68. *Distrigas Corp. v. FPC*, 495 F.2d 1057, 1064 (1974) (footnote omitted).

69. *Id.*

70. *Distrigas Corp.*, 495 F.2d at 1064.

71. *Id.*

72. *Distrigas Corp.*, 495 F.2d at 1064.

73. *Id.* at 1059. However, the court remanded the case to the FPC for further proceedings as a prerequisite to its imposition of section 7 requirements.

74. Department of Energy Organization Act § 301(b), Pub. L. No. 98-91 (1983), 42 U.S.C. § 7101 (2000).

75. Delegation Order No. 0204-112, *Delegation Order No. 0204-112 to the Federal Energy Regulatory Commission*, F.E.R.C. STATS. & REGS. ¶ 9913 (1984), 49 Fed. Reg. 6684, rescinded by Delegation Order No. 00-04.000, *Delegation Order No. 00-04.000 to the Federal Energy Regulatory Commission*, F.E.R.C. STATS. & REGS. ¶ 9918 (2001), 67 Fed. Reg. 8946 (2002) (reissuing authorities contained in previous delegation orders).

76. Delegation Order No. 00-04.000, *Delegation Order No. 00-04.000 to the Federal Energy Regulatory Commission*, F.E.R.C. STATS. & REGS. ¶ 9918 (2001), 67 Fed. Reg. 8946 (2002).

ports and exports and has authority to approve or disapprove the place of entry for imports and place of exit for exports.⁷⁷

On May 28, 1997, the Commission issued Order No. 595, which updated and revised the FERC's regulations governing the filing of applications under section 3 of the NGA.⁷⁸ This was the first time that these regulations were significantly revised since the Commission's predecessor, the Federal Power Commission, had recodified them in 1947.⁷⁹ The regulations in Order No. 595 were revised to reflect changes to the Commission's authority made pursuant to the DOE's delegation orders and other intervening legislation that took effect since the NGA was enacted in 1938.

In 1992, Congress passed the Energy Policy Act (EPA), adding subsections (b) and (c) to section 3 of the NGA. Subsection (b) provides that:

With respect to natural gas which is imported into the United States from a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, and with respect to [LNG]

(1) the importation of such natural gas shall be treated as a "first sale" within the meaning of section 3301(21) of this title; and

(2) the Commission shall not, on the basis of national origin, treat any such imported natural gas on an unjust, unreasonable, unduly discriminatory, or preferential basis.⁸⁰

Subsection (c) provides, in part, that the importation of gas referred to in subsection (b) or the exportation of gas to a nation with which there is in effect a free trade agreement "shall be deemed to be consistent with the public interest, and applications for such importation or exportation shall be granted without modification or delay."⁸¹ This amendment would serve as the basis for questioning the Commission's authority in *Dynegy* to regulate importation terminals.

E. *Dynegy*

In 2001, for the first time, the Commission's jurisdiction over LNG import/export facilities was challenged. The challenge was made in *Dynegy LNG Production Terminal L.P. (Dynegy)*.⁸² In a petition for a declaratory order, *Dynegy LNG Production Terminal (Dynegy)* requested that the Commission disclaim jurisdiction over the siting, construction, and operation of an LNG import facility to be constructed by *Dynegy*, in light of the EPA's amendment to section

77. Delegation Order No. 0204-111, *Delegation Order No. 0204-111 to the Administrator of the Economic Regulatory Administration*, F.E.R.C. STATS. & REGS. ¶ 9912 (1984), 49 Fed. Reg. 6684 (1984); Delegation Order No. 0204-127, *Delegation Order No. 0204-127 to the Assistant Secretary for Fossil Energy*, 54 Fed. Reg. 11,436 (1989). See also *Sound Energy Solutions*, 106 F.E.R.C. ¶ 61,279 (2004).

78. Order No. 595, *Applications for Authorization to Construct, Operate, or Modify Facilities Used for the Export or Import of Natural Gas*, [Regs. Preambles 1996-2000] F.E.R.C. STATS. & REGS. ¶ 31,054 (1997), 62 Fed. Reg. 30,435 (to be codified at 18 C.F.R. § 153).

79. *Id.*

80. Natural Gas Act of 1938 § 3, 15 U.S.C. 717b(b) (2000).

81. 15 U.S.C. 717b(c).

82. *Dynegy LNG Prod. Terminal L.P.*, 97 F.E.R.C. ¶ 61,231 (2001).

3 of the NGA.⁸³ Dynegy planned to construct and operate an LNG receiving and gasification facility at the site of its liquefied petroleum gas terminal in Hackberry, Louisiana. Dynegy planned to utilize the existing dock and ship berthing structure, installing an LNG tank and the necessary vaporization facilities. Dynegy planned to construct a header pipeline connecting the plant to multiple interstate pipelines. The Commission rejected Dynegy's request for a declaration of no jurisdiction, finding that there was no proof that Congress, in enacting the EPA, intended to remove Commission jurisdiction over the siting, construction, and operation of LNG import facilities.

Dynegy argued that the EPA had amended section 3 to provide that the importation of natural gas and LNG shall be treated as a first sale, and that first sales are outside the Commission's jurisdiction under the Natural Gas Policy Act of 1978, as amended by the Natural Gas Wellhead Decontrol Act.⁸⁴ According to Dynegy, the Commission's jurisdictional authority over import facilities stemmed strictly from the conditioning authority that it relied upon in *Distribugas*.⁸⁵ Because FERC must now grant applications to import LNG "without modification or delay," Dynegy argued the Commission was stripped of its jurisdiction over the importation of LNG and similarly could not exercise jurisdiction over the siting, construction, and operation of facilities used to import LNG.⁸⁶

The Commission agreed that the Natural Gas Wellhead Decontrol Act eliminated regulation of all first sales of natural gas under the NGA. However, the Commission rejected Dynegy's interpretation that in enacting the EPA, Congress intended to repeal the Commission's jurisdiction over the siting, construction, and operation of LNG facilities. The Commission reasoned that the EPA had left section 3 of the NGA intact, adding "only that imports and exports to countries that are parties to a free trade agreement and imports of LNG must be approved by the [DOE] without condition or delay."⁸⁷

The Commission asserted that the EPA was intended to amend section 3 of the NGA to allow imported gas to share the same deregulated status as a commodity that the Natural Gas Wellhead Decontrol Act had earlier applied to first sales of domestic gas.⁸⁸ The Commission relied on the legislative history of the

83. *Id.*

84. See Natural Gas Policy Act of 1978 Title VI § 601(a)(1)(C), Pub. L. No. 95-621, 92 Stat. 3350 (1978), amended by Natural Gas Wellhead Decontrol Act of 1989 § 3(b)(7), Pub. L. No. 101-60, 103 Stat. 157 (1989).

85. See also Notice of Intervention and Protest of the Public Utilities Commission of the State of California, *Sound Energy Solutions* (2004) (No. CP04-58-000).

86. Dynegy also argued that the end of Commission jurisdiction over LNG importation means that LNG facilities are no longer subject to National Environmental Policy Act review. However, Dynegy submitted that the siting, design, installation, construction, initial inspection, initial testing, operation, and maintenance of the facilities used in the transportation of LNG would be subject to regulation under the jurisdiction of other federal agencies, including the Department of Transportation, the United States Coast Guard, the Environmental Protection Agency, the Federal Aviation Administration, the Army Corps of Engineers, the Fish and Wildlife Service, and the National Marine Fisheries Service. *Dynegy LNG Prod. Terminal, L.P.*, 97 F.E.R.C. ¶ 61,231, 62,050-62,051 (2001).

87. 97 F.E.R.C. ¶ 61,231, at 62,053.

88. The Commission noted that the need to amend the statutes to ensure equal treatment of gas as a commodity followed the Commission's decision in *Salmon Resources Ltd.*, 50 F.E.R.C. ¶ 61,101 (1990), *reh'g*

Act, stating that the amendments to the NGA were intended to ensure that Canadian gas imports and LNG imports were treated in the same manner as domestic natural gas production. The amendments accomplished this by giving first-sale status to imports so that, just as first sales of domestic gas, the imported gas supplies are not subject to the Commission's jurisdiction; by barring Federal or state regulators from imposing new tests, rate adjustments, or standards for import projects that domestic gas projects are not subject to; and by declaring the importation of gas consistent with the public interest, such that such applications are granted without modification or delay.⁸⁹

The Commission relied on the *Distrigas* case in support of its assertion that the Commission's authority to exercise section 3 jurisdiction over LNG facilities remains strong notwithstanding the court's refusal to overturn the *Border* holding.⁹⁰ The Commission presupposed that Congress was aware of the *Distrigas* ruling when it enacted the amendments to the NGA and asserted that the language in the EPA, the legislative history of the Act, and statements by members of Congress reveal no intent to remove Commission jurisdiction over these matters. Thus, the Commission denied Dynegy's request that the Commission disclaim jurisdiction over the siting, construction, and operation of its import facility.⁹¹

Following the *Dynegy* ruling, the Commission issued an order in November 2002 which granted preliminary authorization under section 3 of the NGA for Southern LNG, Inc. (Southern LNG) to expand its existing LNG import terminal located at Elba Island, Georgia.⁹² Although Southern LNG had filed for authorization under section 3 and section 7, the Commission stated "[o]ur assessment of the proposal under the public interest standard of Section 3 replicates the criteria we would apply under the substantially equivalent public convenience and necessity standard of Section 7"⁹³ The Commission held that it was unnecessary to consider the section 7 application because the Commission is authorized under section 3 to apply terms and conditions that are necessary to ensure that the proposed expansion meets the public interest. Accordingly, it authorized the expansion under section 3, finding that the proposed expansion was consistent with the public interest.⁹⁴

denied, 51 F.E.R.C. ¶ 61,148 (1990). In that case, the Commission "found that marketers [who sold] imported gas for resale in interstate commerce were required to obtain a [CPCN] [while] marketers who made first sales of domestic gas . . . were exempt from the certificate requirements as a result of the Wellhead Decontrol Act." See *Dynegy LNG Prod. Terminal, L.P.*, 97 F.E.R.C. ¶ 61,231, 62,503 n.33 (2001).

89. *Id.* at 62,053.

90. In the *Dynegy* order, the Commission expressed its intent again to urge the court on review of its order to overturn the *Border* decision. 97 F.E.R.C. at ¶ 62,055 n.39.

91. The Commission denied Dynegy's alternative request that its petition be treated as an application for import authority and that the Commission issue a declaratory order authorizing the importation without imposing conditions on the project. The Commission asserted that such applications must be submitted to the Department of Energy, because the Commission does not authorize imports. *Id.* at 62,055.

92. *Southern LNG Inc.*, 101 F.E.R.C. ¶ 61,187 (2002).

93. 101 F.E.R.C. ¶ 61,187, at 61,738.

94. *Id.* at 61,742.

1. Sound Energy Solutions

In a declaratory order issued on March 24, 2004, on application of a firm called Sound Energy Solutions (SES), the Commission asserted that it has exclusive jurisdiction over the siting, construction, and operation of LNG import terminals, including purely intrastate sales, facilities, and operations.⁹⁵ In that case, SES filed an application under section 3 of the NGA for the authority to construct and operate an LNG terminal in the Port of Long Beach, California for the purpose of importing LNG into the United States.⁹⁶ The Public Utilities Commission of the State of California (CPUC) filed a notice of intervention and protest, arguing that jurisdiction over the proposed project rests with the CPUC, not the Commission.

The CPUC asserted that it is a constitutionally established agency charged with the responsibility for regulating natural gas corporations within the State of California.⁹⁷ The CPUC argued that SES's proposed operations, in which it intends to utilize the Long Beach facility to process LNG into natural gas to be sold in California's non-core natural gas markets, make SES a public utility. Under California law, a public utility is required to apply for and receive a certificate of public convenience and necessity (CPCN) from the CPUC prior to commencement of construction of the LNG facility.⁹⁸ The CPUC protested the application on the basis that SES had not fully complied with California law.

Although it had no intention to regulate the price or importation of LNG, the CPUC maintained that it had jurisdiction over the siting and safety of the proposed facility. It was also concerned with issues such as the need for natural gas to be transported to core residential customers or electric generation units, the exercise of market power by SES and the transfer of ownership of LNG facilities or any potential merger between SES and another entity. The CPUC argued that it already regulates those subject areas with regard to other natural gas utilities in California.

The Commission in its Declaratory Order noted that the Commission, the CPUC, and SES agreed that the SES proposal would not involve interstate commerce.⁹⁹ The disagreement concerned the extent to which the Commission could rely on NGA section 3 to regulate the siting, construction, and operation of import facilities. The CPUC asserted that SES's proposed LNG facilities would in-

95. *Sound Energy Solutions*, 106 F.E.R.C. ¶ 61,279 (2004). In the Declaratory Order, the Commission stated that it acted in advance of its decision on the merits of the SES proposal in order to resolve the State and Federal jurisdictional conflict by providing a vehicle for expedited court review of its determination. The Commission denied requests for rehearing of the March 24 order on June 9, 2004. At press time, the SES case was pending appeal before the United States Court of Appeals for the Ninth Circuit.

96. 106 F.E.R.C. at 61,279.

97. Notice of Intervention and Protest of the Public of the Public Utilities Commission of the State of California, *Sound Energy Solutions* (2004) (No. CP04-58-000).

98. The CPUC claims that SES is a California public utility under California Public Utilities Code §§ 216, 221-222, 227-228.

99. The Commission stated "[p]rovided the 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), there will be no interstate activity, and SES will not require NGA Section 7 certificate authorization for its facilities or services." *Sound Energy Solutions*, 106 F.E.R.C. ¶ 61,279, 62,021 n.5 (2004).

terconnect with an intrastate pipeline (SoCalGas), a Hinshaw pipeline subject to the CPUC's jurisdiction and exempt from the FERC's jurisdiction. SES's sales of natural gas would take place within the State of California. The CPUC argued that SES would not be a "natural-gas company" as defined under the NGA because it would not be engaged in the transportation of natural gas or the sale for resale of such gas in interstate commerce. Although the CPUC conceded that SES must file an application with the FERC or DOE for authorization to import LNG, the CPUC argued that under section 3(c) of the NGA, SES's application must be approved without modification or delay. The CPUC argued that section 3 of the NGA does not address the siting, construction, or operation of LNG facilities, and questioned the basis on which the FERC would have authority to regulate the intrastate operations of SES's facilities within the State of California.¹⁰⁰

In its declaratory order, the Commission conceded that the case precedents affirming its exclusive jurisdiction over LNG import deal principally with cases of interstate commerce, whereas the SES proposal concerned foreign commerce.¹⁰¹ The Commission stated it had no intent to interfere with California's "clear jurisdiction" over SoCalGas's facilities that are exempt from FERC jurisdiction under section 3(c) of the NGA.¹⁰² The Commission relied on *Japan Line, Ltd. v. County of Los Angeles*, in which the United States Supreme Court held that foreign commerce is "pre-eminently a matter of national concern."¹⁰³ The Commission could not distinguish that holding on the principle of preemption in foreign commerce cases from the matter before it. Thus, it ruled, "[t]o the extent California's assertion of State authority proves inconsistent or incompatible with [the FERC's] Federal mandate. . . State authority must give way."¹⁰⁴

On June 9, 2004, the Commission issued an order denying requests for rehearing of the March 24 Order, denying a request for stay, and clarifying its prior order.¹⁰⁵ The Commission underscored that its order "serves the public interest by providing uniform federal oversight of siting, construction, operation, and safety of facilities to be used to import foreign LNG to meet the nation's critical energy needs."¹⁰⁶ Relying in part on its reasoning in the March 24 Order, the Commission held that "because importing LNG is a matter of foreign commerce, not intrastate commerce, importing LNG is subject to federal, not state, control."¹⁰⁷ However, the following examination of Commerce Clause jurispru-

100. The CPUC points out that there are specific regulations conferring the FERC with jurisdictional authority over facilities of a natural-gas company. However, SES did not apply for authorization pursuant to section 7 of the NGA. Notice of Intervention and Protest of the California Public Utilities Commission of the State of California at 8 n.5, *Sound Energy Solutions* (2004) (No. CP04-58-000).

101. *Id.* at 8-9.

102. Notice of Intervention and Protest of the Public Utilities Commission of the State of California at 10-11, *Sound Energy Solutions* (2004) (No. CP04-58-000).

103. *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979).

104. *Sound Energy Solutions*, 106 F.E.R.C. ¶ 61,279, 62,017 (2004).

105. *Sound Energy Solutions*, 107 F.E.R.C. ¶ 61,263 (2004).

106. *Id.*

107. 107 F.E.R.C. ¶ 61,263.

dence demonstrates that Congress could elect to regulate the wholly intrastate activities of LNG import terminals because those activities have an effect on interstate commerce.

IV. COMMERCE CLAUSE JURISPRUDENCE

A review of United States Supreme Court Commerce Clause cases demonstrates that Congress may exercise its plenary commerce power to regulate the siting, construction, and operation of LNG import facilities that have an effect on interstate commerce. Although the Supreme Court recently retreated somewhat from its expansive interpretation of the federal commerce power, it narrowed the scope of power only within the context of “non-economic” or “noncommercial” activity.¹⁰⁸ Commerce Clause cases generally fall into two categories. Traditional Commerce Clause cases deal with an affirmative exercise by Congress of its plenary authority to regulate interstate commerce. The “negative” or “dormant” Commerce Clause cases deal with the extent to which the Commerce Clause precludes state legislation in the regulation of interstate commerce. Activities having an effect on interstate commerce currently fall under the domain of federal commerce power. Under negative Commerce Clause jurisprudence, the Supreme Court may find that state and local laws that burden interstate commerce or have a discriminatory effect on interstate commerce are unconstitutional, leaving legislation concerning such matters up to Congress.¹⁰⁹

The Commerce Clause delegates to Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹¹⁰ Beginning with *Gibbons v. Ogden*, the Supreme Court has cast a wide net in defining “interstate commerce,” characterizing as such all commercial intercourse “among” two or more states, excluding only activities that occur entirely within the borders of one state and which do not have an effect on interstate commerce.¹¹¹ A brief description of Chief Justice Marshall’s landmark opinion is worth including here, as the *Gibbons* case would serve as the precedent underpinning the Supreme Court’s broad expansion of federal commerce power in later years.

A. *Gibbons*

In *Gibbons*, the court held that a New York law creating a steamship monopoly for traffic between New York and New Jersey violated the Commerce Clause.¹¹² In determining whether the New York law regulating navigation over its waters was repugnant to the Constitution and void, the court gave weight to the plain meaning of the language used in the Constitution in order to circum-

108. See *United States v. Lopez*, 514 U.S. 549 (1995).

109. However, under the “market participant” exception, an otherwise unconstitutional law may remain in effect if the state is acting as a market participant, rather than market regulator. See *Reeves v. Stake, Inc.*, 447 U.S. 429 (1980); *South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82 (1984).

110. U.S. CONST. art. I, § 8, cl. 3.

111. *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824).

112. See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

scribe the boundaries of the commerce power.¹¹³ The *Gibbons* court held that “[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”¹¹⁴

The court held that “commerce with foreign nations” encompasses “every species of commercial intercourse between the United States and foreign nations.”¹¹⁵ However, as to “commerce among the States,” the court held that “[t]he word ‘among’ means intermingled with[,]” crossing the external boundary line of one state to reach the interior of another state.¹¹⁶ The Court underscored that the words of the Commerce Clause cannot be interpreted to include within the meaning of “among the States,” commerce which is completely internal within one state and which “does not extend to or affect other States.”¹¹⁷ Rather, “[s]uch a power would be inconvenient, and is certainly unnecessary.”¹¹⁸ Thus, the Marshall court held:

Comprehensive as the word “among” is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.¹¹⁹

The Marshall court defined commerce power as the power to regulate. This power, “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”¹²⁰ However, “[t]he wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances. . . the sole restraints on which they have relied, to secure them from its abuse.”¹²¹

113. “We know of no rule for construing the extent of [any given] powers, other than is given by the language of the instrument which confers them, taken in connexion [sic] with the purposes for which they were conferred.” *Id.* at 189.

114. *Gibbons*, 22 U.S. at 189–190.

115. *Id.* at 193.

116. *Gibbons*, 22 U.S. at 194.

117. *Id.*

118. *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824).

119. *Id.* at 194–195.

120. *Gibbons*, 22 U.S. at 196.

121. *Id.* at 197.

B. The Interstate Commerce Act and Sherman Antitrust Act

After the *Gibbons* decision, for nearly a century the Supreme Court's cases rarely dealt with the extent of Congress' power under the Commerce Clause. Instead, they focused on the negative Commerce Clause,¹²² or the limit on state legislation that discriminated against interstate commerce or otherwise unduly burdened interstate commerce.¹²³ In *Cooley v. Board of Wardens* the United States Supreme Court established that Congress may cede regulatory powers to the States.¹²⁴ Although it had little opportunity to define what affirmative exercise of commerce power by Congress would be permitted as "necessary and proper," the concept of sovereignty and the status of statehood were frequently tested before the Supreme Court.¹²⁵

The courts were prompted to examine the federal authority to exercise commerce power following Congress' adoption of the Interstate Commerce Act¹²⁶ in 1887 and the Sherman Antitrust Act, enacted in 1890.¹²⁷ The early cases introduced under these statutes did little to bolster Congress' power under the Commerce Clause, as the Court "adhered to its earlier pronouncements, and allowed but little scope to the power of Congress."¹²⁸ In restraining acts of Congress under the Commerce Clause, it drew from earlier negative Commerce Clause cases that held that activities such as production, manufacturing, and mining were beyond the reach of the federal commerce power.¹²⁹ However, the court also held that if interstate and intrastate commerce activities were sufficiently intermingled so that effective regulation of interstate commerce required incidental regulation of intrastate commerce, then such regulation may be authorized under the Commerce Clause.¹³⁰ "Even while important opinions in this line

122. Also known as the "dormant" Commerce Clause.

123. "During this period there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states." *Wickard v. Filburn*, 317 U.S. 111, 121 (1942).

124. In *Cooley*, an existing act of Congress had stated that the harbors and ports of the United States shall "continue to be regulated in conformity with the existing laws of the states," or "with such laws as the states may . . . hereafter enact." *Cooley v. Bd. of Wardens*, 53 U.S. 299, 317 (1852). The Court held that "the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots. and that although Congress has legislated on this subject, its legislation manifests an intention . . . not to regulate this subject, but to leave its regulation to the several States." *Id.* at 320.

125. *Filburn*, 317 U.S. at 121. See also *Lopez*, 514 U.S. at 553 (citing *Veazie v. Moore*, 55 U.S. 568 (1853) (upholding state-created steamboat monopoly involving regulation of wholly internal commerce)); *Kidd v. Pearson*, 128 U.S. 1, 17, 20–22 (1888) (upholding state prohibition on manufacture of intoxicating liquor because commerce power does not extend to purely intrastate activity); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923)) (States not free to levy taxes in a manner that discriminates against interstate commerce).

126. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.).

127. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1–8 (2000)).

128. *Filburn*, 317 U.S. at 121–122 (citation omitted).

129. *Lopez*, 514 U.S. at 554 (citing *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (manufacture exempt from federal commerce authority); *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (mining exempt from federal commerce authority)).

130. See *Shreveport Rate Cases*, 234 U.S. 342 (1914) (Congress has the power to regulate both interstate and intrastate rates of railroad company that discriminated against interstate commerce by charging higher rates for interstate travel than for intrastate travel).

of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*.¹³¹

C. *Wrightwood Dairy Co.*

After nearly a century of negative Commerce Clause jurisprudence following *Gibbons*, the Supreme Court began to shape the breadth of Congress' affirmative commerce power. In 1942, the Court in *Wrightwood Dairy* held that the intrastate distribution of products in competition with interstate commerce was subject to federal regulation under the Commerce Clause.¹³² In *Wrightwood Dairy*, the respondent had purchased milk from producers located entirely within the state of Illinois and processed the milk in Chicago, without intermingling it with any milk that crossed state lines. The respondent sold and distributed the processed milk solely within Illinois. Under the Agricultural Marketing Agreement Act of June 3, 1937,¹³³ the Secretary of Agriculture was authorized to issue marketing orders which fixed the minimum prices to be paid to producers of milk and other commodities.¹³⁴ It provided that the Secretary "shall regulate . . . only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof."¹³⁵

The Court held that Congress is empowered "to regulate the price of milk distributed through the medium of interstate commerce," and that "it possesses every power needed to make that regulation effective."¹³⁶ Citing to *Gibbons*,¹³⁷ the Court noted that Congress' power over interstate commerce is plenary, and "the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."¹³⁸

The Court also relied on a string of precedent upholding Congressional power over inextricably commingled commodities, some of which were moving interstate and others intrastate.¹³⁹ The reach of Congressional power over commerce was extended further under the Sherman Act in cases where competitive practices that were wholly intrastate had an injurious effect on interstate commerce.¹⁴⁰ The Court reasoned that "[s]o too the marketing of a local product in competition with that of a like commodity moving interstate may so interfere with interstate commerce or its regulation as to afford a basis for Congressional

131. *Filburn*, 317 U.S. at 122.

132. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 126 (1942).

133. Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. § 608c (1937).

134. *Wrightwood Dairy Co.*, 315 U.S. at 116.

135. *Id.*

136. *Wrightwood Dairy Co.*, 315 U.S. at 118-119.

137. *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824).

138. *Wrightwood Dairy Co.*, 315 U.S. at 119.

139. *Id.* at 119. See e.g., *United States v. N.Y. Cent. R. Co.*, 272 U.S. 457, 464 (1926).

140. *Wrightwood Dairy Co.*, 315 U.S. 110, 119-120.

regulation of the intrastate activity.” Thus, the test of federal power “is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take”¹⁴¹

In *Wrightwood Dairy*, the Court recognized that the marketing of intrastate milk that competes with milk shipped interstate has an impact on price regulation of the latter.¹⁴² In the milk industry, the unregulated sale of the intrastate milk tends to reduce the sale price received by handlers and the amount that they in turn pay producers. This is the case because the unregulated handler selling milk can pay producers much less than the minimum price set in the order regulating milk of that particular class, and yet pay an amount equal to or more than the uniform price prescribed by the regulatory scheme for all producers.¹⁴³ Thus, the unregulated handler has a competitive advantage over others in the sale of the class of milk in which he primarily deals, forcing his interstate competitors to leave the market or reduce prices to producers in order to remain competitive.

The Court held that the Congressional power to regulate intrastate commerce is not limited to those activities that also involve interstate commerce. Rather, “[i]t is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of Congressional power.”¹⁴⁴ In the *Wrightwood Dairy* case, the Court concluded that the power to regulate the price of milk moving interstate includes the power to regulate intrastate transactions to the extent necessary to make the regulation of the interstate commerce effective. It determined that the regulation under section 8c of the Agricultural Marketing Agreement Act of the price of milk moving in interstate commerce would be ineffective without also regulating the price of competing intrastate milk. Therefore, the Act was upheld as a valid exercise of federal commerce power.

D. *Wickard*

In *Wickard v. Filburn*, the Supreme Court held that Congress may exercise its commerce power over an activity even if the activity at issue is local and may not be regarded as commerce, “if it exerts a substantial economic effect on interstate commerce.”¹⁴⁵ It held that a wheat marketing penalty imposed on a farmer under an amendment to the Agricultural Adjustment Act of 1938 constituted regulation that was within Congress’ commerce powers. The purpose of the statute was to control the volume of wheat moving in interstate and foreign commerce to avoid surpluses and shortages that result in “abnormally low or high wheat prices and obstructions to commerce.”¹⁴⁶ Under the quota system, the marketing of wheat subject to penalty included wheat disposed of by feeding to livestock that were sold and wheat or wheat-fed livestock that was consumed

141. *Id.* at 120.

142. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 120 (1942).

143. That uniform price was based on the average price for the several combined classes of milk. *Id.* at 121.

144. *Wrightwood Dairy Co.*, 315 U.S. at 121.

145. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

146. *Id.* at 115.

on the farmer's premises.

Under the statute, the appellee's crop was subject to an acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat per acre. Appellee operated a small farm on which he raised a small acreage of wheat that was used in part for the following purposes: to sell, to feed to poultry and livestock on the farm (some of which was sold), to make flour for home consumption, and to retain for the following seeding.¹⁴⁷ The appellee sowed twenty-three acres and harvested 239 bushels from his 11.9 excess acres of land, subjecting appellee to a penalty of forty-nine cents per bushel.

The Court eliminated the distinction between a direct and indirect effect on interstate commerce that in prior cases had been held to limit Congress' authority over intrastate aspects of a regulated interstate activity.¹⁴⁸ In particular, it rejected the theory that production, manufacturing, and mining are strictly local and thus not subject to regulation under the commerce power because their effects upon interstate commerce were only indirect. The Court further held that whether the regulated activity was categorized as production, consumption, or marketing is not controlling. Rather, the actual effect of the activity upon interstate commerce is paramount to determining whether the federal commerce power was properly exercised, regardless of whether it had an effect that was direct or indirect.¹⁴⁹

The *Wickard* Court underscored that the power to regulate commerce includes the power to regulate the prices of commodities "and practices affecting such prices."¹⁵⁰ It noted that absent any regulation, the price of wheat would be affected by world conditions, such as the decline in the export trade. To provide relief for growers, measures were designed to protect the domestic price of wheat. However, the consumption of home-grown wheat has an effect on interstate commerce, because wheat consumed on the premises fulfills a need that would otherwise be met in the market. In this regard, home-grown wheat competes with wheat in commerce.¹⁵¹ The Court held that it was inconsequential whether the contribution of one individual to the demand was little, because this "contribution, taken together with that of many others similarly situated, is far from trivial."¹⁵² Thus, the Court declared the amendment to the Agricultural Adjustment Act a valid exercise of commerce power by Congress.

E. Modern Commerce Clause

After *Wickard*, the Supreme Court expanded the commerce power to embrace activities that were not strictly economic or commercial in character. In 1941, the Court held that the Fair Labor Standards Act, which prohibited the shipment of goods in interstate commerce that were produced in violation of

147. *Filburn*, 317 U.S. at 114.

148. *Id.* at 120.

149. *Filburn*, 317 U.S. at 120.

150. *Id.* at 128.

151. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942).

152. *Id.* at 128 (citing *NLRB v. Fainblatt*, 306 U.S. 601, 606 (1939)).

minimum wages and maximum hours set for employees under the Act, was a valid exercise of commerce power.¹⁵³ In a later series of cases the Court held that title II of the Civil Rights Act of 1964 was a valid exercise of Congress' power to regulate interstate commerce insofar as it prohibited hotels and restaurants from refusing to serve travelers on the basis of their race.¹⁵⁴ This body of precedent led some to believe that the federal commerce power could conceivably be used to regulate almost any aspect of American life. However, in 1995, the Supreme Court returned to a strict interpretation of the Commerce Clause in its landmark ruling in *United States v. Lopez*,¹⁵⁵ requiring a more traditional economic or commercial link to the regulated activity.

In *United States v. Lopez*, the Supreme Court, for the first time in nearly sixty years, held that an exercise of federal legislative power exceeded the scope of the Commerce Clause.¹⁵⁶ Under the Gun-Free School Zones Act of 1990, it was a federal offense "for any individual knowingly to possess a firearm . . . at a place that the individual knows, or has reasonable cause to believe, is a school zone."¹⁵⁷ The Court noted that the statute had "nothing to do with 'commerce' or any sort of economic enterprise[.]"¹⁵⁸ and was not an essential part of a larger regulation "in which the regulatory scheme could be undercut unless the intrastate activity were regulated."¹⁵⁹ Thus, the Court held that notwithstanding the history of precedent for an expansive interpretation of the federal commerce power, "these modern-era precedents. . . confirm that this power is subject to outer limits."¹⁶⁰

The *Lopez* Court stated that Congress may regulate three broad categories of activity under the Commerce Clause. First, Congress may regulate the use of the channels of interstate commerce.¹⁶¹ Second, Congress may regulate the instrumentalities of interstate commerce.¹⁶² Finally, Congress may regulate "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."¹⁶³ Under this last category of activity, the Court in *Lopez* held that the Gun-Free School Zones Act of 1990 was invalid because it was beyond the power of Congress under the Commerce Clause. In its analysis, the Court reviewed commerce cases beginning in 1824

153. *United States v. Darby*, 312 U.S. 100 (1941).

154. In *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964), the Court reasoned that a restaurant that refused to serve minorities restricted the ability of minorities to travel interstate, and thus obstructed interstate commerce. See also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917))).

155. *United States v. Lopez*, 514 U.S. 549 (1995).

156. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down labor act applicable to miners).

157. 18 U.S.C. § 922(q)(2)(A) (1998 ed., Supp. V).

158. *Lopez*, 514 U.S. at 561.

159. *Id.*

160. *Lopez*, 514 U.S. at 556–557. The Court also noted that in *Maryland v. Wirtz*, "the Court reaffirmed that 'the power to regulate commerce, though broad indeed, has limits' that '[t]he Court has ample power' to enforce." *Id.* at 557 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968) (alteration in original)).

161. *Lopez*, 514 U.S. at 558 (citing *United States v. Darby*, 312 U.S. 100 (1941)).

162. *Id.* (citing *Shreveport Rate Cases*, 234 U.S. 342 (1914)).

163. *United States v. Lopez*, 514 U.S. 549, 559 (citations omitted).

with *Gibbons v. Ogden*. The Court underscored that in its previous cases it did not declare that Congress “may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.”¹⁶⁴ Rather, “[t]he Court has said only that where a *general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence.”¹⁶⁵ Thus, while it allowed a more stringent measure of power under the Commerce Clause, the Court’s holding in *Lopez* did not erode the federal commerce power to oversee commercial activities having a substantial relation to interstate commerce.¹⁶⁶

F. Treatment of Natural Gas Under the Commerce Clause

Congress enacted the Natural Gas Act of 1938 to fill the regulatory gap created by the negative Commerce Clause jurisprudence of the Supreme Court. Before the NGA was enacted, several states sought to assert regulatory oversight over interstate pipelines.¹⁶⁷ However, in a series of decisions, the Court held that the states’ regulation of interstate natural gas pipelines violated the Commerce Clause.¹⁶⁸ Thus, the purpose of the NGA was to occupy a field of regulation that the Supreme Court has held States were not authorized to regulate.¹⁶⁹

One notable case that preceded the enactment of the NGA was *Commonwealth of Pennsylvania v. State of West Virginia* where Pennsylvania and Ohio sought to enjoin the enforcement of a West Virginia statute that required its residents be given a preferred right to purchase all natural gas produced within West Virginia.¹⁷⁰ While West Virginia’s supply of natural gas far exceeded local demand, its producers turned to other states, including Pennsylvania and Ohio, to market its surplus. The State of West Virginia sanctioned this effort, adopting laws that facilitated the construction of pipelines from its gas fields into other states. The effort was a success, and West Virginia greatly benefited from the increased taxable wealth of its producers.¹⁷¹ However, after the natural gas supply was depleted, the State enacted the challenged law that was “intended to compel the retention within the State of whatever gas may be required to meet the local needs for all purposes. . . .”¹⁷² The Court observed that the statute would “operate to withdraw a large volume of the gas from an established inter-

164. *Id.* at 558 (1995).

165. *Lopez*, 514 U.S. at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183 (1968) (alteration in original)).

166. *Id.* at 559.

167. *See, e.g.*, *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

168. *See, e.g.*, *Missouri v. Kan. Gas Co.*, 265 U.S. 298 (1924) (While in the absence of congressional action a state may enact laws having only an indirect effect upon interstate commerce, however, the Commerce Clause restrains the states from imposing direct burdens upon interstate commerce); *Pub. Util. Comm’n v. Atleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (The Rhode Island Public Utilities Commission’s attempt to regulate the rates at which a Rhode Island utility sold electricity to a Massachusetts distributor was struck down because, having involved a transaction at wholesale, it imposed a “direct” rather than “indirect” burden in interstate commerce).

169. *Ill. Natural Gas Co. v. Cent. Ill. Pub. Serv. Co.*, 314 U.S. 498, 508 (1942).

170. *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923).

171. *Id.* at 587.

172. *Pennsylvania*, 262 U.S. at 594.

state current,"¹⁷³ to the detriment of the complaining states which relied upon the natural gas to supply the needs of its public.¹⁷⁴

The Court declared the statute invalid under the Commerce Clause and enjoined its enforcement. It held that "[n]atural gas is a lawful article of [interstate] commerce, and its transmission from one state to another for sale and consumption in the latter is interstate commerce."¹⁷⁵ The purpose of the Commerce Clause was to "protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation."¹⁷⁶ The Court held that the challenged law, which would serve to prevent, obstruct, or burden the transmission of natural gas in interstate commerce, was "a prohibited interference."¹⁷⁷

The Court dismissed the argument that the statute served as a legitimate measure of conservation in the interest of the people of the state. It cited to its ruling in *West v. Kansas Natural Gas Co.*, in which the Court had invalidated an Oklahoma statute that sought in the interest of conservation to prohibit natural gas from being sold interstate, although its trade in intrastate commerce was permitted.¹⁷⁸ In that case, the Court underscored that in matters of foreign and interstate commerce, "there are no state lines." Under the Court's reasoning, the welfare of the national economy "transcends that of any state."¹⁷⁹ This was the purpose of the Interstate Commerce Clause, and the court noted, "[i]f there is to be a turning backward, it must be done by the authority of another instrumentality than a court."¹⁸⁰

In 1982, the Supreme Court was presented with another negative Commerce Clause challenge to state action similar to the natural gas legislation that was at issue in 1923. The case was *New England Power Co. v. New Hampshire*.¹⁸¹

G. *New Hampshire Hydropower Case*

In *New England Power Co. v. New Hampshire*, the Supreme Court, in 1982, held that it was unconstitutional for a state to prohibit the exportation of hydroelectric energy produced within its borders or otherwise reserve for its own citizens the economic benefit of such hydropower.¹⁸² In that case, New England Power owned and operated six hydroelectric¹⁸³ generating stations consisting of twenty-seven generating units.¹⁸⁴ About ten percent of its total generating capacity was located within the State of New Hampshire. New England Power was a

173. *Id.* at 595.

174. *Pennsylvania*, 262 U.S. at 588.

175. *Id.* at 596.

176. *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923).

177. *Id.* at 597.

178. *West v. Kan. Natural Gas Co.*, 221 U.S. 229 (1911).

179. *Pennsylvania*, 262 U.S. at 599 (citing *West v. Kan. Natural Gas Co.*, 221 U.S. 299, 255 (1911)).

180. *Id.* at 600.

181. *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

182. *Id.*

183. Hydroelectric units produce electricity at substantially lower cost than most other generating sources because the facilities operate without significant fuel consumption. *New Eng. Power Co.*, 455 U.S. at 333.

184. 41 Stat. 1063, as amended, 16 U.S.C. § 791a-823 (1976 ed. & Supp. IV).

public utility that generated and transmitted electricity at wholesale throughout the region. New England Power's wholesale customers served less than six percent of New Hampshire's population.¹⁸⁵

New England Power was a member of the New England Power Pool (NEPOOL), whose members owned over ninety-eight percent of the total generation capacity and nearly all of the transmission facilities in a six-state region. Under the NEPOOL's Central Dispatch system, based on the cost of generation for each generating unit, each unit is assigned an operating schedule that will minimize the cost of the region's total power supply.¹⁸⁶ Power is flowed through the pool's regional grid and dispatched to the members' customers as their power needs arise, without regard to generating source. Because each member is billed the amount it would have cost the utility to meet its load using only its own generating resources minus that member's share of the savings resulting from the centralized system, the savings accrued have been substantial.¹⁸⁷

Under a New Hampshire statute enacted in 1913, the New Hampshire Public Utilities Commission was authorized to prohibit the exportation of electrical hydropower if it deemed such energy "[was] reasonably required for use within this state and that the public good requires that it be delivered for such use."¹⁸⁸ Under this law, New England Power, since 1926, obtained approval from the State Commission to export its hydroelectric energy out of New Hampshire. However, in 1980 the State Commission withdrew the authorization formerly granted to New England Power, ordering the company to sell the previously exported hydroelectric energy exclusively within the state of New Hampshire.¹⁸⁹ The Commission stated that the company's hydroelectric power was needed within New Hampshire because the state's population and energy needs were increasing rapidly, and the state's largest electric utility, Public Service Company of New Hampshire, had generating costs approximately 25% higher than New England Power. If valid, the order would potentially save New Hampshire customers approximately \$25 million per year.¹⁹⁰

The Supreme Court of New Hampshire upheld the order, stating that a "saving clause" in § 201(b) of the FPA expressly permits a state to prohibit the exportation of hydroelectric power produced within its borders. The U.S. Supreme Court, in a unanimous decision, reversed the judgment, holding that the State Commission's order was preempted by Parts I and II of the FPA,¹⁹¹ and constituted an impermissible burden on interstate commerce. It stated that the Commerce Clause precludes a state from mandating that its residents receive rights to

185. *New Eng. Power Co.*, 455 U.S. at 333.

186. *Id.* at 334.

187. *New Eng. Power Co.*, 455 U.S. at 334.

188. *Id.* at 335.

189. *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 335 (1982).

190. New England Power was not ordered to withdraw from the Power Pool. Rather, the company was required to sell electricity to New Hampshire utilities in an amount equal to the output of its in-state hydroelectric plants, at special rates adjusted to reflect the savings attributable to the low-cost hydroelectric generation. *Id.* at 336.

191. 16 U.S.C. §§ 791a-824k (1976 ed. and Supp. IV).

natural resources within its borders that are superior to out-of-state consumers.¹⁹² The Court underscored the proposition that a state cannot prevent private goods from being shipped and sold in interstate commerce on the basis that they are required to satisfy local demands of its residents.¹⁹³ Such practices, designed to secure an economic advantage for state residents at the expense of consumers in neighboring states, constitute the sort of discrimination the Commerce Clause was intended to end.

Although it determined that the New Hampshire Commission's order placed impermissible burdens on interstate commerce, the Supreme Court acknowledged that Congress could use its powers under the Commerce Clause, "to '[confer] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.'"¹⁹⁴ Under Part II of the FPA, the Federal Power Commission had been delegated the exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, regardless of the source of production.¹⁹⁵ Section 201(b) of the Act provided that Part II shall not deprive a state "of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line."¹⁹⁶ However, said the court, section 201(b) did not grant authority to states to restrict the transmission of electricity in interstate commerce "in a manner [that] would otherwise not be permissible."¹⁹⁷ Rather, section 201(b) saved from preemption only existing laws that were otherwise lawful and consistent with the Commerce Clause.¹⁹⁸ The Supreme Court concluded that § 201(b) of the FPA did not allow New Hampshire to prohibit New England Power's exportation of hydroelectric power produced within its borders.

In the same year that *New Hampshire Hydropower* was decided, the Supreme Court considered a Commerce Clause dispute challenging Congress' affirmative exercise of commerce power. Congress had enacted the Public Utility Regulatory Policies Act of 1978¹⁹⁹ (PURPA) in response to a national energy crisis. The PURPA's constitutionality was quickly challenged in *FERC v. Mississippi*, on the ground that it exceeded the federal commerce power. This case

192. *New Eng. Power Co.*, 455 U.S. at 338. The court was not persuaded by New Hampshire's argument that its order was valid because it "owns" the Connecticut River, the source of the hydroelectricity at issue, because the authority to regulate the flow of navigable waters rests with the federal government. See *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). The state's reliance on *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (holding that the state may confine to its residents the sale of products that it produces) was misplaced, because its "ownership" of the Connecticut River is inconsequential to the production of electricity by New England Power, a private corporation, using privately owned facilities.

193. *Id.* (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978)).

194. *New Eng. Power Co.*, 455 U.S. at 340 (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 44 (1980)).

195. *United States v. Pub. Util. Comm'n of Cal.*, 345 U.S. 295 (1953). See also *Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (states lack power to regulate rates governing interstate sale of electricity for resale).

196. *New England Power Co.*, 455 U.S. at 341.

197. *Id.* at 341 (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)).

198. *United States v. Pub. Util. Comm'n of Cal.*, 345 U.S. 295, 304 (1953).

199. Pub. L. No. 95-617, 92 Stat. 3134 (1978) (codified as amended in scattered sections of 15, 16, 42, 43 U.S.C. (2000)).

was important because it applied a new standard to the commerce power within the context of a regulatory program. Under the standard enunciated one-year earlier in *Hodel v. Indiana*, the Court held that legislative acts enjoyed a presumption of constitutionality unless the Court could discern no rational basis for finding that the regulated activity affects interstate commerce or no reasonable connection between regulatory means selected and the asserted ends.²⁰⁰ Also in *FERC v. Mississippi*, the Court was faced with an issue of first impression to the extent that the federal government, using the PURPA, attempted to “use state regulatory machinery to advance federal goals.”²⁰¹

H. FERC v. Mississippi

In *FERC v. Mississippi*, the Supreme Court reversed a district court judgment holding that titles I and III, and section 210 of title II of the PURPA were unconstitutional.²⁰² The PURPA had been enacted in 1978 as part of a package of statutes aimed at addressing the national energy crisis. At that time, approximately one-third of the electricity generated in the United States depended on the use of oil and natural gas. There appeared to be a shortage of both fuels. This resulted in increased costs and decreased efficiency, which had an adverse effect on consumers and the economy as a whole.²⁰³ The PURPA was enacted to reduce this country’s dependence on foreign oil and domestic gas, encouraging energy conservation and more efficient use of scarce resources.

To attain these goals, the PURPA titles I and III were designed to encourage certain retail regulatory policies for electric and natural gas utilities. State utility regulatory commissions and non-regulated utilities were required to “consider” the adoption of a specific rate design and other regulatory standards.²⁰⁴ Each state was directed to decide whether to adopt the standards no later than two years following the PURPA’s enactment, although no penalty was provided for failure to meet the deadline. Titles I and III prescribed certain procedures that states would follow when considering the proposed standards, including provisions for a public hearing after notice and, if applicable, a public, written statement of reasons why the standards were not adopted.²⁰⁵ However, no state authority or non-regulated utility was required to adopt the specified regulatory standards, and the statute did not prohibit “any State regulatory authority or non-regulated . . . utility from making any determination that it is not appropriate to implement [or adopt] any such standard, pursuant to its authority under otherwise applicable State law.”²⁰⁶

Section 210 of the PURPA title II sought to encourage the development of cogeneration and small power production facilities in order to reduce the demand

200. *FERC v. Mississippi*, 456 U.S. 742, 754 (1982).

201. *Id.* at 758.

202. *FERC*, 456 U.S. at 745.

203. *Id.* at 745–746.

204. *FERC*, 456 U.S. at 746.

205. *Id.* at 748.

206. *FERC v. Mississippi*, 456 U.S. 742, 749–750 (1982) (alteration in original).

for traditional fossil fuels. To overcome the reluctance of traditional electricity utilities to purchase power from, or sell power to, these non-traditional facilities, section 210 directed the FERC (in consultation with state authorities) to promulgate rules to encourage cogeneration and small power production.²⁰⁷ Section 210 required each state regulatory authority and non-regulated utility to implement the FERC's rules, and the FERC was authorized to enforce this requirement by suit in federal court. In order to address another problem hindering the development of these facilities, section 210 directed the FERC to prescribe rules exempting cogeneration and small power facilities from certain state and federal laws governing electricity utilities.

The state of Mississippi and the Mississippi Public Service Commission (MPSC) filed suit in the United States District Court for the Southern District of Mississippi against the FERC and the Secretary of Energy, alleging that the PURPA was beyond the scope of congressional power under the Commerce Clause and that it was an invasion of state sovereignty in violation of the Tenth Amendment.²⁰⁸ The district court held that in enacting the PURPA, Congress exceeded its powers under the Commerce Clause. Citing *Carter v. Carter Coal Co.*,²⁰⁹ it reasoned that the MPSC held the "power and authority to regulate and control intrastate activities" and nothing in the Commerce Clause authorized the federal government to take over the regulation and control of public utilities.²¹⁰ Furthermore, the district court concluded that the PURPA trespassed on state sovereignty and constituted "a direct intrusion on integral and traditional functions of the [State]."²¹¹

The Supreme Court held that the district court's Commerce Clause reasoning was unsound in light of the traditional standard for testing the validity of legislation under Congress' plenary powers:

It is established . . . that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality. . . .' *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). . . . A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.²¹²

Furthermore, in another recent case the Court had noted the spirit of Chief Justice Marshall's expansive view of Congress' plenary commerce power. Citing to *Gibbons v. Ogden*, the Court underscored that this plenary power, which "acknowledges no limitations, other than are prescribed in the constitution," extends to activities affecting commerce.²¹³

207. *Id.* at 751.

208. *FERC*, 456 U.S. at 752. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST., amend. X.

209. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

210. *FERC*, 456 U.S. at 752.

211. *Id.* at 753.

212. *FERC*, 456 U.S. at 754 (quoting *Hodel v. Indiana*, 452 U.S. 314, 323-324 (1981)).

213. *Id.* at 754 n.18 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-277 (1981) (observing even purely intrastate activity may be regulated if the activity, combined with like conduct of

The Court noted that “[d]espite these expansive observations by this Court, appellees assert that the PURPA is facially unconstitutional because . . . the Act directs the nonconsenting State[s] to regulate in accordance with federal procedures.”²¹⁴ However, the appellees’ arguments ignored Congress’ finding in section 2 of the Act that the regulated activities must have an immediate effect on interstate commerce.²¹⁵ Thus, the relevant inquiry was whether these congressional findings had a rational basis.

The Court found that there was ample support for Congress’ conclusions, as was evident in the legislative history of the PURPA. Based on evidence of severe shortages of natural gas supplies, the nation’s dependence on foreign sources of oil, and other factors, “Congress naturally concluded that the energy problem was nationwide in scope, and that these developments demonstrated the need to establish federal standards regarding retail sales of electricity, as well as federal attempts to encourage conservation and more efficient use of scarce energy resources.”²¹⁶ Furthermore, it said that “it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility.”²¹⁷ The Court concluded that the means chosen by Congress were reasonably adapted to achieve the end permitted by the Constitution and held that the challenged portions of the statute constituted a valid exercise of Congress’ commerce power.

The Supreme Court found that Mississippi’s Tenth Amendment arguments, while “somewhat novel,” also lacked merit. Although the facts of the case were similar to other Supreme Court precedent concerning the extent to which state sovereignty protects the states from generally applicable federal regulations, the case was distinguished on the basis that in the PURPA Congress attempted to use the states’ regulatory system to advance its own federal goals.²¹⁸ The court broke down the challenged PURPA provisions into three parts: (1) Section 210 requires states to enforce standards promulgated by the FERC, including rules exempting cogeneration and small power facilities from certain state laws; (2) Titles I and III direct the states to consider specific ratemaking standards; and (3) Titles I and III impose certain procedures on state commissions.

The Court found that the first category, although the most intrusive of the PURPA’s provisions, simply pre-empted conflicting state enactments in the traditional way.²¹⁹ In general, so long as there is a valid exercise of commerce power, “the Federal Government may displace state regulation even though this serves to ‘curtail or prohibit the States’ prerogatives to make legislative choices

others similarly situated, affects interstate or foreign commerce)).

214. FERC v. Mississippi, 456 U.S. 742, 754 (1982).

215. 16 U.S.C. § 2601 (2000). Congress found that the protection of public health, safety, welfare, and national security and “the proper exercise of congressional authority under the Constitution to regulate interstate commerce” require a program for increased electric energy conservation, energy efficiency, equitable retail electric rates, and improved wholesale distribution. *Id.*

216. FERC, 456 U.S. at 756–757 (footnote omitted).

217. *Id.* at 757.

218. FERC, 456 U.S. 742, 758.

219. *Id.* at 759.

respecting subjects the States may consider important.”²²⁰

With respect to the mandates of titles I and III directing the states to consider specific ratemaking standards, the Court held that, while the power to make decisions is a “quintessential attribute of sovereignty,” in certain circumstances the federal government may structure the state’s exercise of its sovereign power.²²¹ The Court noted this analysis had been adopted in *Hodel v. Virginia Surface Mining & Reclamation Ass’n*:

[F]ederal regulations are subject to Tenth Amendment attack only if they ‘regulat[e] the ‘States as States,’ ‘address matters that are indisputably ‘attributes of state sovereignty,’ and impair the States’ ‘ability ‘to structure integral operations in areas of traditional functions.’ And even when these requirements are met, ‘[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission.’²²²

In this case, titles I and III of the PURPA required only “consideration” of federal standards.²²³ The Court had previously settled the proposition that the commerce power permits Congress to preempt the states entirely in the regulation of private utilities.²²⁴ The Court reasoned that the “PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards.”²²⁵ Thus, the Court validated the challenged provisions of title I and title III under the principles of *Hodel v. Virginia Surface Mining & Reclamation Ass’n*.²²⁶

I. Supremacy Clause

The commerce power in some instances, such as taxation, is shared with the states. The Supreme Court established in *Cooley v. Board of Wardens* that “the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects. . . some imperatively demanding a single uniform rule. . . and some . . . as imperatively demanding . . . diversity, which alone can meet the local necessities of [the subject matter].”²²⁷ In some instances, “the nature of the subject when examined, is such as to leave no doubt of the superior

220. *FERC*, 456 U.S. at 759 (citing *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 290 (1981)). Insofar as section 210 requires the state regulatory authority to implement the rules aiding cogeneration and small power facilities, the Court held that it simply requires Mississippi authorities to adjudicate disputes arising under the statute in a manner customarily engaged in by the MPSC. *Id.* at 760.

221. *FERC v. Mississippi*, 456 U.S. 742, 761 (1982).

222. *Id.* at 763 (citing *Hodel*, 452 U.S. at 288, n.29 (alterations in original) (citations omitted)).

223. The Court upheld the procedural requirements under the same analysis employed in the “consideration” provisions. *FERC*, 456 U.S. at 771.

224. *See S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945).

225. *FERC*, 456 U.S. at 765.

226. The court stated that its ruling does not undervalue *National League of Cities*, because its holding here states only that Congress may impose conditions on the State’s regulation of private conduct in a preemptible area. Its holding did not foreclose a Tenth Amendment challenge to federal interference with the state’s traditional authority to structure employer-employee relationships, as was the case in *National League of Cities*. *Id.* at 770, n.32. *See Nat’l League of Cities v. Usery*, 426 U.S. 833, 851 (1976).

227. *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1852) (holding that the mere grant to Congress of the power to regulate commerce did not deprive the States of the power to regulate pilots).

fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants."²²⁸ In the *Sound Energy Solutions* case the CPUC argued that the siting and safety of LNG import facilities is a subject matter best suited for regulation at the state level. For example, the CPUC argued that California has geographical characteristics posing seismic problems peculiar to the state, making certain areas vulnerable to earthquakes and liquefaction. The CPUC argued that decisions concerning the siting and safety of an LNG facility in the State of California are best addressed at the state level.

The *Cooley* opinion, in which the Court deferred the regulation of pilots to the states, was confined to the facts in that case. The Court underscored that it did not:

extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the States in the absence of all congressional legislation; nor to the general question how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the states upon the same subject.²²⁹

However, in that case, the Court was mindful that the states had already legislated on the subject-matter for over sixty years, and it was reluctant to find that the penalties and fees at issue were "illegally exacted" under existing state laws adopted in violation of the Constitution.²³⁰ Likewise, the jurisdiction over siting and safety of some energy projects, including natural gas distribution facilities and oil pipelines and electric generators, has traditionally been exercised by the states. Thus, central to the *Sound Energy Solutions* debate is whether Congress has given the FERC authority to occupy this field of regulation, or whether the California law at issue constitutes a valid exercise of traditional police power over safety. This highly contentious debate includes numerous thoughtful arguments for each position, which are too complex to resolve here.

V. THE COMMERCE CLAUSE: *SOUND ENERGY SOLUTIONS*

In the *Sound Energy Solutions* case, the State of California sought to exercise jurisdiction over an LNG import terminal project in the Port of Long Beach, California. SES's application stated that the proposed project was designed to address natural gas supply problems in California by providing a new source of up to 1,000 MMcfd (or 1 billion cubic feet per day) of natural gas to the Los Angeles Basin and Southern California.²³¹ After processing, the LNG would be vaporized for transport via a new natural gas pipeline. The pipeline, which would be constructed, owned, and operated by a third party, would originate at the LNG site and extend 2.3 miles to a tie-in with the Southern California Gas Company's (SoCalGas) existing pipeline system. Some of the LNG would be further proc-

228. *Id.* at 320.

229. *Cooley*, 53 U.S. at 320.

230. *Id.* at 321.

231. See also Notice of Intervention and Protest of the Public Utilities Commission of the State of California, *Sound Energy Solutions* at 6 (2004) (No. CP04-58-000).

essed and recondensed for vehicle-grade fuel that would be stored on site at the LNG trailer-truck loading station for transport off-site by motor vehicle. SES intended to sell the natural gas in California's non-core natural gas markets.²³²

The CPUC argued that SES is a "public utility" under California law that is required to obtain a certificate of public convenience and necessity (CPCN) before it may begin construction. Although it expressed no intention to regulate the price or importation of LNG, the CPUC maintained that it had jurisdiction over the siting and safety of the proposed facility. It was also concerned with the need for natural gas to be transported to core residential customers or electric generation units and the exercise of market power by SES through a transfer of ownership of LNG facilities or merger between SES and another entity. The CPUC added that it already regulated those subject areas with regard to other natural gas utilities in California.

The construction of LNG import terminals such as the project proposed by SES affects interstate commerce, requiring uniform federal regulation in this area. A new LNG import terminal in California would have an effect on interstate commerce because the LNG would supply California's need for natural gas that would otherwise be met in the market, in the same way that home-grown wheat competed with wheat in commerce in *Wickard*. The United States Court of Appeals for the Eleventh Circuit held in *Habersham Mills v. FERC (Habersham)* that a hydroelectric project is subject to Congressional regulation if it meets its generation demand in part by supplying its own power, because its power production affects interstate commerce.²³³ Habersham Mills operated a textile company in Habersham, Georgia, that owned two small dams and power houses that supplied about thirty percent of the factory's electricity.²³⁴ Habersham Mills sold small amounts of excess electricity to Georgia Power. The Commission ordered Habersham Mills to apply for federal licenses. However, Habersham Mills had subsequently stopped selling electricity to Georgia Power in 1991. In a request for rehearing of the Commission's order, it argued that the electricity generated by its project no longer connected to an interstate grid, thereby eliminating the Commission's basis for requiring licensing of the project.²³⁵ The Commission disagreed, stating that the Habersham Mills projects affected interstate commerce by altering the supply of, or the demand for, electricity across state lines. According to the Commission, "[a] project that generates electricity as partial substitution for purchase of electricity from an interstate grid also affects the interests of interstate commerce."²³⁶ The project's generation was found to affect the size of Habersham Mills' demand for electricity from other sources, and thereby the supply of electricity to the entire grid. The court affirmed the Commission's order. It concluded that the production of electricity

232. According to a company profile on the SoCalGas website, the "[n]on-core' customers are very large consumers of gas, such as electric power plants and industrial and manufacturing facilities, who use 250,000 therms1 [(one therm equals 100,000 BTUs)] of natural gas or more annually," at <http://www.socalgas.com/about/profile/customers/> (last visited Jan. 18, 2005).

233. *Habersham Mills v. FERC*, 976 F.2d 1381, 1384 (1992).

234. *Id.* at 1382-1383.

235. *Habersham Mills*, 57 F.E.R.C. ¶ 61,351, 62,148-62,149 (1991).

236. *Id.* at ¶ 62,149.

at issue displaced electricity that would otherwise have been transported through the national power grid. It found that because the electricity produced by two small hydroelectric projects affected interstate commerce, the licensing of the proposed project was subject to federal regulation.²³⁷

For the same reasons, LNG import terminals also have an affect on interstate commerce. An LNG import terminal constructed in California will affect the size of demand for natural gas from across state lines. Moreover, the fact that only one LNG import terminal is proposed for construction in the *Sound Energy Solutions* case does not alter the conclusion. Citing to *Wickard*, the *Habersham* court held that a small hydroelectric project that affects commerce only slightly would still be subject to Congressional regulation if it is part of a class with a significant cumulative effect.²³⁸ Because LNG is projected to supply a considerable share of total U.S. natural gas consumption, e.g., twenty-one percent in the year 2010, the cumulative impact of LNG import terminals on interstate commerce will be substantial. And, given the small number of operational LNG import terminals in the United States, the effect of only one terminal is significant.

The construction of a new LNG import terminal could also have an effect on interstate commerce if the LNG is used to supply natural gas-fired generation plants. In the year 2000, sixteen percent of electricity generation in North America was powered with natural gas.²³⁹ “[N]atural gas is expected to dominate fuel choices for new power plants in the foreseeable future.”²⁴⁰ According to the Department of Fossil Energy, natural gas-powered turbines could be installed in nearly ninety percent of the electric power plants to be built in the United States between the years 2000 and 2020.²⁴¹ Thus, the construction of LNG import terminals will have an effect on the flow of natural gas in interstate commerce that is supplied to meet the requirements of natural gas-fired power plants. In California, it was projected in 2003 that natural gas demand for electricity generation in California will increase 1.5 percent per year.²⁴² In California, because electricity is sold in interstate commerce through the California Independent System Operator, the supply of natural gas to serve electric power plants also has an effect on interstate commerce. SES intended to sell a portion of the natural gas in California’s non-core natural gas markets.²⁴³ The “non-core” customers that So-

237. *Habersham Mills*, 976 F.2d at 1384 (1992).

238. *Id.* at 1384 (citing *Wickard v. Filburn*, 317 U.S. at 111 (1942)).

239. N. AM. ENERGY WORKING GROUP, ENERGY INFO. ADMIN., NORTH AMERICA: THE ENERGY PICTURE (2002), available at <http://www.eia.doe.gov/emeu/northamerica/engsupp.htm>.

240. See OFFICE OF FOSSIL ENERGY, DEP’T OF ENERGY, COAL & NATURAL GAS ELECTRIC POWER SYSTEMS, available at <http://fossil.energy.gov/programs/powersystems/> (last updated Oct. 15, 2004).

241. OFFICE OF FOSSIL ENERGY, DEP’T OF ENERGY, THE TURBINES OF TOMORROW, available at <http://fossil.energy.gov/programs/powersystems/turbines/> (last updated Oct. 21, 2004).

242. RICH FERGUSON, CTR. FOR ENERGY EFFICIENCY & RENEWABLE TECHS., REDUCING DEMAND FOR NATURAL GAS IN CALIFORNIA, NATURAL GAS MARKET OUTLOOK (2003), available at http://www.energy.ca.gov/naturalgas/documents/2003-12-9+10_workshop/presentations/IIA_demand_red/CEERT_2003-12-09.PDF.

243. SES’s Application for Authority to Site, Construct, and Operate LNG Import Terminal Facilities at pp. 4–6.

CalGas served were very large consumers of gas, including electric power plants.²⁴⁴ Thus, SES's proposed LNG facilities would have an effect on interstate commerce.

The dissenting comments of FERC commissioners in the *Distrigas* decision (Opinion No. 613) offer further support for federal regulation of intrastate LNG import projects. In Opinion No. 613, the FERC majority asserted that the importation and exportation of natural gas is within its jurisdiction under section 3 of the NGA. However, it also found that *Distrigas*' siting and marketing activities were solely intrastate and outside of its jurisdiction. At that point the majority chose not to apply its certification requirements under section 7 of the NGA to *Distrigas*. The dissenters claimed that the majority had failed to follow the mandate of the NGA requiring the Commission to assert comprehensive jurisdiction over LNG imports, and that the majority decision created a regulatory gap contrary to that mandate.²⁴⁵ Chairman Nassikas opined that it would be repugnant to the national interest to approve an LNG project, yet relinquish all responsibility and control over the delivered gas, because the Commission has a responsibility to "foster the dedication of new gas reserves to the jurisdictional markets."²⁴⁶ Thus, the Chairman argued, "[w]hen the price and volume of imported LNG have such a direct impact on the price, volume, and exploration activity for domestic gas, this Commission, as a resource-allocating agency must exercise its authority over alternative gas supplies."²⁴⁷

The dissent argued that Opinion No. 613 created a regulatory gap insofar as the Commission preempted state rate surveillance without taking upon itself the responsibility to provide effective regulation in that area. The Chairman also argued that the *Distrigas* decision provided an incentive for the proliferation of other unregulated intrastate distributors of LNG along the Atlantic Seaboard, which also "would be contrary to the public interest in securing a commitment of gas supplies to the jurisdictional markets."²⁴⁸ Commissioner Moody was concerned that the LNG could be processed and transported in any fashion and sold to the consumer at any price until it enters the stream of interstate commerce or is sold for resale.²⁴⁹ The dissent urged that *Distrigas* must be treated as a natural gas company under the NGA, such that its imports, rates, facilities, services, sales, and transportation would be subject to Commission jurisdiction.²⁵⁰

In their applications for rehearing of Opinion No. 613, the Public Service Commission of the State of New York (NYPSC) and The Superior Oil Company (Superior) also expressed concern over the regulatory gap created in the *Distri-*

244. See <http://www.socalgas.com/about/profile/customers/> (last visited Jan. 18, 2005).

245. *Distrigas*, 47 F.P.C. 752, 778 (1972).

246. *Id.* at 779. Chairman Nassikas asserted that to allow LNG prices to be determined on a "what the traffic will bear" approach, as the Chairman claimed the majority in *Distrigas* has done, is analogous to a producer's attempt to withhold gas unless its price is met. 47 F.P.C. 752, at n.7; see *Atl. Ref. Co. v. P.S.C.*, 360 U.S. 378 (1959).

247. *Id.* at 779.

248. 47 F.P.C. at 780.

249. *Id.* at 784.

250. *Distrigas*, 47 F.P.C. 752, 784 (1972).

gas case.²⁵¹ The NYPSC and Superior maintained that under sections 3 and 7 of the NGA, the Commission is required to exercise comprehensive jurisdiction over all of *Distrigas*' facilities and sales, regardless of whether the LNG remained within the state of entry or was transported and sold interstate. They argued that without comprehensive regulation, the extent of regulation in each state will vary, with those "less regulatory minded" states enjoying an advantage in attracting LNG projects.²⁵² Moreover, the NYPSC argued that the Commission's decision not to exercise comprehensive regulation over LNG might be used to preempt state regulations, leaving the sales and facilities at issue free from any regulation.²⁵³ If the NGA gives the Commission jurisdiction and it elects not to exercise it, it suggested the states may be preempted from filling the regulatory gap.

In the *Sound Energy Solutions* case the Commission's failure to assert jurisdiction over certification of the LNG import project (whether under section 3 or section 7) would not result in the regulatory gap described by the dissent in Opinion No. 613, because the State of California has in place a process for certification of LNG import projects. However, to the extent that states do not have in place an adequate certification process for intrastate LNG projects, a regulatory gap would be created because the siting, construction, and operation of intrastate LNG import projects would not be regulated at the federal or state level. Alternatively, some states may implement a certification process but elect to apply lax standards for approval while other states apply stringent certification standards, resulting in different policies across state jurisdictions. Thus, as was argued by the dissent in *Distrigas*, less "regulatory minded" states would attract LNG projects away from states that implement a strict certification process.

Other arguments made in the *Distrigas* dissent also apply in the *Sound Energy Solutions* case. For example, if the Commission declined to exercise jurisdiction over the siting, construction, and operation of exclusively intrastate LNG import projects, e.g., by imposing the equivalent of section 7 certification requirements, then individual states will be empowered to deny applications for certification of those projects. States succumbing to the "Not-In-My-Backyard" mentality would hinder the development of a sophisticated network of LNG storage and transportation facilities, thus limiting the tools available to manage natural gas demand.

A. Affirmative Exercise of Commerce Power: the Natural Gas Act

In the *Sound Energy Solutions* case, the CPUC pointed out that SES filed with the FERC an application to construct the LNG import facilities under section 3 of the NGA, while the issuance of a CPCN is addressed in the NGA under section 7. It argued that section 3 of the NGA does not confer on the FERC exclusive jurisdiction over siting and construction of purely intrastate facilities. In its Declaratory Order, the FERC acknowledged that the cases affirming the ex-

251. *Distrigas*, 47 F.P.C. 1465 (1972).

252. *Id.* at 1466.

253. *Distrigas*, 47 F.P.C. 752, 1466.

clusive character of its jurisdiction lie principally in the area of interstate commerce, “whereas here the proposal concerns foreign commerce.”²⁵⁴ Nonetheless, the Commission found “no difference in the principle of preemption in foreign commerce cases.”²⁵⁵ The Commission argued that its power under section 3 is elastic. It noted that the courts have already settled the question whether the FERC may use its conditioning authority under section 3 to impose the equivalent of section 7 certification requirements on imports of natural gas, as to the facilities and as to both interstate and intrastate sales.²⁵⁶ It added that under *Distrigas*, section 3 “supplies the Commission not only with the power necessary to prevent gaps in regulation, but also with flexibility in exercising that power”²⁵⁷ The Commission, the CPUC, and SES agreed that the SES proposal would not involve interstate commerce.²⁵⁸

As noted above, at press time this issue was still pending review. However, the Supreme Court’s *Chevron* doctrine holds that courts should defer to a reasonable agency interpretation of a statute when the statute itself is silent or ambiguous.²⁵⁹ Although it did not expressly address CPCNs in section 3 of the NGA, for discussion purposes here it is assumed that under section 3 the Commission’s action constitutes a legitimate exercise of its conditioning authority to regulate, through its certification requirements, the siting, construction, and operation of intrastate LNG import facilities. The following section explores Congress’ current treatment of the “affecting interstate commerce” standard, and considers whether Congress, if it included such standard in the Natural Gas Act, would exceed its plenary commerce power.

B. The “affects interstate commerce” Standard

Congress’ treatment of the “affecting interstate commerce” standard has varied. For example, section 201(b) of the Federal Power Act (FPA) provides for Commission jurisdiction over “the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce, but . . . not [over] any other sale of electric energy. . . .”²⁶⁰ In *FPC v. Florida Power & Light Co. (FP&L)*, the Supreme Court held that a showing that a sale affects interstate commerce is insufficient for jurisdiction to attach under section 201 of the FPA.²⁶¹ Section 201(c) defines energy transmitted “in interstate commerce” as energy “transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the

254. *Sound Energy Solutions*, 106 F.E.R.C. ¶ 61,279 (2004).

255. *Id.*

256. 106 F.E.R.C. ¶ 61,279.

257. *Distrigas Corp.*, 495 F.2d at 1064.

258. The Commission stated “[p]rovided the 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), there will be no interstate activity, and SES will not require NGA Section 7 certificate authorization for its facilities or services.” *Sound Energy Solutions*, 106 F.E.R.C. ¶ 61,279 at n.5.

259. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

260. 16 U.S.C. § 824(b) (2000).

261. *FPC v. Fla. Power & Light Co.*, 404 U.S. 453 (1972). *See also* *Jersey Power & Light Co. v. FPC*, 319 U.S. 61 (1943).

United States.”²⁶² Thus, there must be proof of interstate movement of energy for federal jurisdiction to apply.

Section 23(b) of the FPA contains a broader test for determining Commission jurisdiction. Section 23(b) provides for federal jurisdiction over the proposed construction of dam projects if “the interests of interstate or foreign commerce would be affected by such proposed construction.”²⁶³ Thus, rather than requiring the transactions to be “in interstate commerce,” as required by section 201(b), section 23(b) only requires that activities under the hydroelectric project “affect” interstate commerce.²⁶⁴

FP&L argued that Congress could have chosen to grant the Commission jurisdiction over activities affecting commerce, but “it clearly did not do so.”²⁶⁵ The Court acknowledged Congress’ disparate use of the “affecting interstate commerce” standard, noting that FP&L’s argument was developed by the dissent in *Jersey Central Power & Light Co. (Jersey Central)*. Having concluded that the language of the FPA and the legislative history show that Congress did not intend to regulate matters affecting commerce, the dissenters observed, “[i]t is interesting to compare, in this connection, other statutes enacted by the same Congress. Three adopted in July and August 1935²⁶⁶ covered activities ‘affecting’ commerce; three, including the Federal Power Act in question, adopted in August 1935²⁶⁷ did not cover activities ‘affecting’ commerce.”²⁶⁸ The FP&L Court stated, “[t]hus it was inferred that we are dealing with a particularly ‘discriminating use of language.’”²⁶⁹

Under the NGA, as currently drafted, there is little support for application of the “affecting interstate commerce” standard to activities regulated under section 7. “Interstate commerce” is defined in the NGA under section 2(7) as “commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.”²⁷⁰ Under FP&L, purely intrastate LNG import terminal projects would not be subject to federal jurisdiction on the basis that the proposed activities would have an effect on interstate commerce.

Congress could amend the NGA to provide for jurisdiction over intrastate

262. 16 U.S.C. § 824(c) (2000).

263. 16 U.S.C. § 817(1) (2000).

264. *City of Centralia v. FERC*, 661 F.2d 787, 789–790 (9th Cir. 1981) (“The Commission has licensing jurisdiction over hydroelectric projects on nonnavigable streams within Congress’s jurisdiction whenever the interests of interstate commerce would be affected by such projects.”).

265. *Fla. Power & Light Co.*, 404 U.S. at 462.

266. *Jersey Power & Light Co.*, 319 U.S. at 88 (citing National Labor Relations Act § 2(7), 29 U.S.C. § 152(7) (2000); Public Utility Holding Company Act § 1(c), 15 U.S.C. § 79(c) (2000); Bituminous Coal Conservation Act § 1, U.S.C. (2000)).

267. *Id.* at 88 (citing Federal Power Act § 201 (b), 49 Stat. 838, 847, 16 U.S.C. § 824(b); Motor Carrier Act § 202(b), 49 Stat. 543, 49 U.S.C. § 302(b); Federal Alcohol Administration Act § 3, 49 Stat. 977, 978, 27 U.S.C. § 203).

268. *Jersey Power & Light Co.*, 319 U.S. at 87–88.

269. *Fla. Power & Light Co.*, 404 U.S. at 462.

270. 15 U.S.C. § 717a(7) (2000).

activities of LNG import terminals, without exceeding the scope of its plenary power under the Commerce Clause. Unlike earlier acts of Congress that regulated civil rights and labor relations under the commerce power, the inclusion of an “affects interstate commerce” standard in the NGA would call for regulation of aspects of commercial life. Under the standard applied in *FERC v. Mississippi*, “legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality”²⁷¹ Echoing the sentiment of Justice Marshall, the Court underscored that the commerce power “is ‘complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.’”²⁷² Under these broad standards, it is evident that the commerce power, extending to activities affecting interstate commerce, likewise extends to regulation of the siting, construction, and operation of all LNG import facilities.²⁷³

Under the *FERC v. Mississippi* test, a court may invalidate legislation enacted under the Commerce Clause “only if it is clear that there is no rational basis for. . . finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.”²⁷⁴ It is difficult to overcome this strict standard in this case, as it is not tenable that there is “no rational basis” for finding that the regulated activity under section 3 of the Natural Gas Act affects interstate commerce. Moreover, it would be difficult to argue that there is “no reasonable connection” between the means selected (i.e. imposing the equivalent of section 7 certification requirements through section 3 conditioning authority) and the asserted ends (regulation of the siting, construction, and operation of intrastate LNG import facilities). However, under the *FERC v. Mississippi* test, the same reasoning applies to regulation of the siting, construction, and operation of intrastate LNG import facilities that have an effect on interstate commerce. Although the SES project would not involve interstate commerce,²⁷⁵ there is a rational basis for finding that its proposed project would have an effect on interstate commerce, and that there is a reasonable connection between the regulatory means selected and the asserted ends.

Because the CPUC claims that the SES’s proposed project falls under its jurisdiction, a complete Commerce Clause analysis requires examination of the state law asserted. In this case, the CPUC claims that because the proposed facilities will be in California serving California markets, SES will be a California public utility subject to regulation by the CPUC under the California Public

271. *FERC v. Mississippi*, 456 U.S. 742, 754 (1982) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

272. *Id.* at 754 (quoting *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824)).

273. Also in *FERC v. Mississippi*, the Court repeated “that the commerce power extends not only to ‘the use of channels of interstate or foreign commerce’ and to ‘protection of the instrumentalities of interstate commerce’” 456 U.S. at 754 n.18 (quoting *Perez v. United States*, 402 U.S. 146, 150 (1971)). In *FERC v. Mississippi*, the LNG would be transported via separate intrastate pipelines located only in California. The FERC and CPUC agreed that these were “Hinshaw” pipelines that were exempt from the FERC’s regulations under sections 1(b) and 1(c) of the Natural Gas Act, 15 U.S.C. § 717(b),(c) (2000).

274. *FERC*, 456 U.S. at 754.

275. Further discussion on how the certification process of LNG import terminals affects interstate commerce is included below.

Utilities Code. The following discussion examines that law in the context of dormant Commerce Clause jurisprudence.

C. Dormant Commerce Clause: California Public Utilities Code

In testing the constitutionality of a law under the dormant Commerce Clause, a court will first determine whether a state law discriminates against out-of-state businesses or individuals. If the language of a statute is facially discriminatory, then the statute is presumed to be unconstitutional.²⁷⁶ If the law is facially neutral, then courts will ask whether the law has a discriminatory purpose or effect.²⁷⁷

The CPUC argued that SES's proposed operations would make it a public utility under California Public Utilities Code (California Code) sections 216, 221, 222, 227, and 228.²⁷⁸ Under section 1001 of that code, a public utility is required to apply for and receive a certificate of public convenience and necessity from the CPUC prior to commencing construction of its facilities.²⁷⁹ The CPUC protested SES's application to the FERC on the ground that SES had not fully complied with this aspect of California law.²⁸⁰

Section 1005 of the California Public Utilities Code provides:

The [CPUC] may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the construction of a portion only . . . and may attach to the exercise of the rights granted by the certificate such terms and conditions . . . as in its judgment the public convenience and necessity require; provided, however, upon timely application for a hearing . . . the commission, before issuing or refusing to issue the certificate, shall hold a hearing thereon.

The California Code further provides that when a public utility "is engaged or is about to engage in construction work without having secured from the [CPUC] a certificate of public convenience and necessity as required by this article, the [CPUC] may . . . order . . . the public utility complained of to cease and desist from such construction"²⁸¹ A plain reading of the statutory language

276. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

277. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977).

278. Section 216(a) states that a "public utility" includes a gas corporation "where the service is performed for, or the commodity is delivered to, the public or any portion thereof." CAL. PUB. UTIL. CODE § 216 (2004 & Supp. 2005). Whenever a gas corporation performs such service, under § 216(b) it "is a public utility subject to the jurisdiction, control, and regulation of the [CPUC] and the provisions of this part [of the California Public Utilities Code]."

279. Section 1001 states that "no . . . gas corporation . . . shall begin the construction of a . . . plant, or system, or of any extension thereof, without having first obtained from the [CPUC] a certificate that the present or future public convenience and necessity require or will require such construction." CAL. PUB. UTIL. CODE § 1001 (1994 & Supp. 2005).

280. In its protest, the CPUC clarified that its assertion of jurisdiction does not constitute a determination on the merits of the proposed LNG facility at the Port of Long Beach, California. It expressed that it intended to consider all arguments on the merits at a public hearing on SES's application for a CPCN, but argued that SES must apply for and receive a CPCN before it begins construction. *See also* Notice of Intervention and Protest of the Public Utilities Commission of the State of California, *Sound Energy Solutions* at 6 (2004) (No. CP04-58-000).

281. CAL. PUB. UTIL. CODE § 1006 (1994).

reveals that the law is facially neutral. The remaining issue is whether the law is discriminatory in purpose or effect.

The California Code allows the CPUC to grant a CPCN after considering: “1) Community values; 2) Recreational and park areas; 3) Historical and aesthetic values; and 4) Influence on environment . . . [with certain exceptions].”²⁸² An applicant for a CPCN must submit extensive information pertaining to the proposed facility’s engineering, design, construction, and project implementation.²⁸³ Under section 1005(a) the CPUC may issue the certificate subject to such terms and conditions “as in its judgment the public convenience and necessity require.” Thus, it is conceivable that, following its own review of this information, the CPUC may impose upon a project such terms and conditions pertaining to safety that would greatly increase the projected cost of a facility’s design or implementation.

Under traditional cost-of-service ratemaking, these costs would be allocated to customers on a rolled-in or incremental basis.²⁸⁴ Under incremental pricing, a separate cost of service is developed for expansion facilities, recapturing construction costs solely from the particular customers who utilize them. Under rolled-in pricing, the costs of expansion facilities are added to the total pipeline costs, recovering expenditures by increasing the general rate that all customers pay.²⁸⁵ In *Commonwealth of Pennsylvania v. West Virginia*²⁸⁶ and *New England Power Co. v. New Hampshire*,²⁸⁷ the Supreme Court struck down as unconstitutional state laws that took protectionist measures to hoard natural gas and electric hydropower. In the case of LNG imports, the California Public Utilities Code may be unconstitutional if its purpose or effect is to retain cheaper energy resources exclusively for the benefit of California’s citizens. However, California would be unable to keep cheaper domestic natural gas (or LNG, depending which is cheaper) in the state by simply proscribing incremental pricing for expensive LNG. If the customers subject to incremental pricing are outside California, the LNG (or domestic natural gas) at issue would enter the flow of interstate commerce, bringing the LNG and facilities under FERC jurisdiction. The FERC would have the authority to decide whether to approve incremental pricing, and thus address any discriminatory practices. Furthermore, if the LNG imports were intended for sale for resale or transportation in interstate commerce, the siting, construction, and operation of the LNG import terminal would be subject to FERC jurisdiction under section 7 of the NGA. Finally, in December 2002, the Commission stated that, in certain circumstances, it would no longer apply cost-of-service regulations and open-access obligations to new LNG terminals. In that instance, it approved an application for market-based ratemaking for a new LNG import terminal in Hackberry, Louisiana. However, a facility would be unlikely to succeed in recovering the costs of an expensive LNG facil-

282. CAL. PUB. UTIL. CODE § 1002(a) (1994).

283. CAL. PUB. UTIL. CODE § 1003 (1994).

284. See *S. LNG Inc.*, 101 F.E.R.C. ¶ 61,187 (2002) (addressing whether costs associated with expansion of LNG import facilities should be given rolled-in or incremental rate treatment).

285. See “Complex” Consol. Edison Co. v. FERC, 165 F.3d 992, 996 n.2 (1999).

286. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

287. *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331 (1981).

ity though market-based rates because it would be uncompetitive relative to the alternatives in the marketplace. Thus, it is unlikely that a court would find that the California Public Utilities Code is discriminatory in purpose or effect.

Once it determines that the purpose or effect of a statute is not discriminatory, a court will apply the balancing test in *Pike v. Bruce Church, Inc.* In that case, the test for determining the validity of a state statute affecting interstate commerce was as follows: “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”²⁸⁸

In the *Sound Energy Solutions* case, if the California Code was given effect, then the CPUC would be empowered to deny certificates of public convenience and necessity, thereby potentially preventing the construction of proposed LNG projects in California. The California Public Utilities Code provides that in issuing a CPCN for additional natural gas pipeline capacity proposed for construction within California,

the [CPUC] shall consider the state’s need to provide sufficient and competitively priced natural gas supplies for both present and anticipated future residential, industrial, commercial, and utility demand. *When it finds it is in the state’s best interests to do so,*²⁸⁹ the [CPUC] shall expeditiously issue [CPCNs] for those additional . . . projects.

Because the California Code allows the CPUC to consider the state’s need, and to issue CPCNs when “it is in the state’s best interests to do so,” circumstances may arise where the construction of an LNG import terminal, while beneficial for the United States as a whole, may be deemed a detriment to the interests of California. The state may be faced with strong local opposition from citizens concerned with LNG import terminal safety, the effect on property values, and other issues. But, enforcement of the Code in California may have an effect on the availability of LNG or other interchangeable resources elsewhere in the United States.

LNG is an alternative source available to supplement American baseload supplies.²⁹⁰ One state’s choice of whether to allow LNG imports, e.g., as reflected in its treatment of applications for certificates of public convenience and necessity to construct LNG import facilities, will have an impact on the rest of the country’s ability to obtain LNG for its supply stream. This is contrary to Commission policy.²⁹¹ If a state commission were to exercise its authority to deny such applications, thereby blocking LNG imports to its borders, the effect on supplies of natural gas and other resources would be national in scope. LNG that is imported into one state, and is consumed there, competes with LNG or

288. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

289. CAL. PUB. UTIL. CODE § 1002.5 (1994) (emphasis added).

290. *See id.*

291. *See Northeast Hub Partners v. CNG Transmission Corp.*, 239 F.3d 333, 339 (3rd Cir. 2001) (“The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction of facilities approved by this Commission.”).

another interchangeable resource, such as natural gas, in the same way that the milk and wheat in *Wrightwood Dairy* and *Wickard* were found to compete with those commodities in interstate commerce. The decision to construct a LNG import terminal affects alternative gas supplies to the extent that those supplies are displaced to fill the demand that could have been satisfied with LNG.

According to the CPUC, “California is a natural gas consuming state with more than 85 percent of its natural gas coming from out-of-state sources.”²⁹² If it denies certification of LNG import terminals, the burden on fulfilling California’s natural gas demand will be placed on other sources, including natural gas pipelines outside the state of California. Thus, it is conceivable that section 1003 of the California Code may have an incidental effect on interstate commerce. However, it is unlikely that such concerns would materialize, given that the State of California has expressed an interest in attracting LNG. The CPUC has not suggested that it would deny altogether applications for certification of LNG import projects; rather, it wishes to assert control over siting and safety issues.

The remaining inquiry is whether this incidental burden on interstate commerce is outweighed by the putative benefits of local regulation. It is certain that there are numerous benefits to deferring the regulation of the siting, construction, and operation of intrastate LNG import projects to the individual states. In this case, the CPUC pointed out that “the FERC does not understand the different local conditions in the 50 states anywhere near the level of knowledge which each state has about its unique conditions.”²⁹³ Justice Brandeis cautioned against stamping out individual policy agendas that foster social and economic experimentation. Warning of serious consequences that would result, he observed “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²⁹⁴

However, as guardians of its own citizens, the states are in danger of promulgating policies that serve to protect and benefit their own citizens above all others. But, “in matters of foreign and interstate commerce there are no state lines.”²⁹⁵ Rather, a new welfare appears which “transcends that of any State” and constitutes the welfare of all states.²⁹⁶ Furthermore, the benefits of uniformity in regulation ought not to be overlooked, particularly when the area of regulation rises to the high level of national interest as does the allocation of resources. LNG import terminals are capital-intensive projects that require long-term commitments from various parties.²⁹⁷ Such investments require predictability and

292. CPUC’s Request for Rehearing at 1, *Sound Energy Solutions* (2004) (No. CP04-58-000) (Apr. 23, 2004). “In 1999, California produced 16 percent of its own natural gas, 46 percent was from the southwest U.S., 28 percent from Canada, and 10 percent came from the Rocky Mountain states.” CAL. ENERGY COMM’N, CALIFORNIA NATURAL GAS FACTS AND FIGURES, available at http://www.energy.ca.gov/naturalgas/natural_gas_facts.html (last visited Jan. 18, 2005).

293. *Id.* at 10.

294. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).

295. *Pennsylvania v. West Virginia*, 262 U.S. 553, 599 (1923) (citing *West v. Kan. Nat. Gas Co.*, 221 U.S. 229, 255 (1911)).

296. *Id.*

297. *Sound Energy Solutions*, 107 F.E.R.C. ¶ 61,263, 62,168 (2004).

uniformity in regulatory treatment. The Commission has acknowledged that “federal oversight can serve as a check on states’ erecting unreasonable hurdles to LNG imports.”²⁹⁸ In its order denying rehearing of the March 24 order, the FERC warned that “state actions could skew rational development of the nation’s LNG import capacity, since as a matter of geography and the existing infrastructure, there are a finite number of potential sites where LNG imports can be off-loaded, stored, regasified, and gain access to underserved markets.”²⁹⁹ Thus, policies concerning LNG import terminals ought to be promulgated at the federal level, with regulation carried out in concert with state and local authorities and other federal agencies that also play a critical role at every stage of project development.

VI. CONCLUSION

It is well settled that the choice of national policy in areas affecting interstate commerce is within the exclusive power of Congress. In some cases, Congress has concluded that it would be more effective to regulate certain matters at the local level. Many strong arguments have been proffered on both sides of the debate regarding whether LNG import terminals should be regulated at the state or federal level. Ultimately, “whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question”³⁰⁰ Thus, whether the siting, construction, and operation of LNG import facilities affects interstate commerce is an issue that currently “can be settled finally only by [the] Court.”³⁰¹

The author concludes that the regulation of LNG import terminals does have an effect on interstate commerce. The Natural Gas Act should be amended to clearly provide for federal jurisdiction of all LNG import projects, including intrastate projects that do not involve the sale for resale or transportation of LNG in interstate commerce. As noted in *Gibbons*, the federal commerce power, “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”³⁰² Projections for the long-term natural gas market (through 2025) show that domestic natural gas production is expected to increase more slowly than consumption, placing the United States at risk for a future natural gas shortage. Under the *Cooley* standard, the siting, construction, and operation of LNG import terminals is an area of regulation that demands a single, uniform rule. Thus, it is incumbent upon Congress to draft clear, uniform legislation regulating the siting, construction, and operation of all LNG import terminals.

298. *Id.*

299. 107 F.E.R.C. ¶ 61,263, at ¶62,169.

300. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964).

301. *Id.*

302. *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824).