Decision 04-10-039 October 28, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation Into The Proposal Of Sound Energy Solutions To Construct And Operate A Liquefied Natural Gas Terminal At The Port of Long Beach	I.04-04-024 (Filed April 22, 2004)

ORDER DENYING REHEARING OF ORDER INSTITUTING INVESTIGATION (I.) 04-04-024

I. INTRODUCTION

On April 27, 2004, the Commission issued I.04-04-024, "Order Instituting Investigation Into the Proposal of Sound Energy Solutions, Inc. ("SES") To Construct and Operate a Liquefied Natural Gas Terminal at the Port of Long Beach." ("OII"). The OII "institutes an investigation into the proposal of Sound Energy Solutions, Inc. (SES) to construct a liquefied natural gas (LNG) facility in Long Beach, California." (OII, p. 1). The OII ordered SES to file an application for a certificate of public convenience and necessity ("CPC&N") "if it intends to pursue construction of the project." The OII made four Findings of Fact, and concluded as a matter of law that "[i]f SES were to construct and operate the LNG terminal it describes in its pending application before FERC, it would become a public utility subject to the jurisdiction of this Commission." (OII, p. 10, Conclusion of Law 1). The OII further concluded that SES requires the authority of the Commission to site, construct or operate its proposed LNG terminal and must respond to Commission orders and information requests. (Id., Conclusions of Law 2 and 3). The Commission ordered SES to file an application for a CPC&N and that SES must receive

a CPC&N prior to commencing construction of its project. (Id. at 11, Ordering Paragraph 3.)

SES had initiated an informal "prefiling" process at the FERC in September 2003, Docket No. PF03-6. On October 30, 2003, the CPUC sent a letter to SES explaining that as the CPUC understood the project as SES was representing to the public, the project would require a CPC&N. On January 26, 2004, SES filed with the FERC an application, Docket No. CP04-58, pursuant to Section 3(a) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717b, requesting authorization to site, construct and operate an LNG terminal located in the Port of Long Beach, and describing its proposed project in detail ("FERC Application"). In the FERC Application, SES stated that it had "complied in all material respects with the applicable laws and regulations of the State of California."[1] On February 23, 2004, the Commission filed a protest at the FERC to SES's application and motion to intervene, arguing that the FERC failed to possess exclusive jurisdiction over the SES proposal due to the express language of Section 3 of the NGA and the absence of any interstate transportation of the imported LNG. On March 24, 2004, the FERC issued a Declaratory Order Asserting Exclusive Jurisdiction, 106 FERC ¶ 61,279 (2004), finding it had exclusive jurisdiction over the SES project despite the lack of interstate transportation and inviting the Commission to participate in FERC's proceeding, which it stated would address safety and security concerns. On April 23, 2004, the Commission filed a request for rehearing of FERC's Declaratory Order. On June 9, 2004, the FERC issued an Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, 107 FERC ¶ 61,263 (2004), reiterating its determination that the FERC possessed exclusive jurisdiction over the project, and further clarifying that no evidentiary hearings would be held to review the project, although technical workshops would be held in which parties such as the Commission could participate.

On May 27, 2004, SES filed an "Application of Sound Energy Solutions For Rehearing of Order Instituting Investigation and Request For Stay of the Proceeding," in

[1] Exhibit C, FERC Application.

I.04-04-024 (hereinafter, "Application"). On July 8, 2004, the Commission issued D.04-07-040, "Order Denying Request For Stay of Investigation 04-04-024." A prehearing conference was held in Long Beach on August 23, 2004.

The Application specifies twelve purported errors associated with issuance of the OII:

1. The OII violates SES's rights under the Constitution of the United States by commencing state proceedings based upon an assertion of authority that is preempted by federal law under the NGA as set forth in the FERC Declaratory Order.

2. The OII violates SES's right to due process under the Constitution of the United States and the California Constitution by denying SES an opportunity to respond to the OII prior to adoption of an order which requires SES to file an application for a CPC&N before beginning construction of an LNG import terminal and which further requires SES to respond to information requests by the CPUC and the CPUC staff.

3. The OII violates SES's rights to due process under the Constitution of the United States and the California Constitution by adopting an order asserting jurisdiction over SES in the complete absence of any factual record or any opportunity for SES to respond to the assertions of fact in the OII.

4. By instituting this investigation prior to the conclusion of administrative and appellate procedures required to contest FERC's outstanding Declaratory Order, the CPUC has not proceeded in the manner required by law under the NGA to seek relief from an order of the FERC related to LNG import facilities.

5. The OII is barred by *res judicata* and constitutes an impermissible collateral attach on FERC's declaratory order.

6. By opening this Investigation, making SES a respondent to this proceeding, ordering SES to file an application for a CPC&N prior to beginning construction on an LNG import terminal, and ordering SES to respond to information requests by the CPUC and its staff, the CPUC abused its discretion and acted prematurely and in excess of its jurisdiction because SES has not yet engaged in any activity which would qualify it as a public utility under California law.

7. By opening this Investigation, making SES a respondent to this proceeding, ordering SES to file an application for a CPC&N prior to beginning construction on an LNG import terminal, and ordering SES to respond to information requests by the CPUC and its staff, the CPUC abused its discretion and acted in excess of its jurisdiction because the proposed SES Import Terminal would not qualify as a public utility under California law.

8. The CPUC erred in finding that it has jurisdiction to regulate the siting, construction and operation of SES's Import Terminal pursuant to the U.S. Department of Transportation's ("DOT") Natural Gas Pipeline Safety Act ("NGPSA").

9. By opening this Investigation, making SES a respondent to this proceeding, ordering SES to file an application for a CPC&N prior to beginning construction on an LNG import terminal, and ordering SES to respond to information requests by the CPUC and its staff, the CPUC abused its discretion and acted in excess of its jurisdiction because the California Legislature has repealed CPUC jurisdiction over the siting of LNG terminals.

10. The CPUC erred in finding that because SES does not propose to conduct interstate transportation, the SES Import Terminal is not subject to FERC's jurisdiction.

11. By opening this Investigation, making SES a respondent to this proceeding, ordering SES to file an application for a CPC&N prior to beginning construction on an LNG import terminal, and ordering SES to respond to information requests by the CPUC and its staff, the CPUC abused its discretion and acted in excess of its jurisdiction because federal law grants exclusive jurisdiction to the FERC over LNG import terminal facilities – including those proposed by SES – and preempts the authority asserted by the CPUC.

12. The CPUC erred in finding that jurisdiction over SES can be established separately and apart from jurisdiction over SES's proposed LNG Import Terminal facilities.

Application, pp. 3-5.

SES further classifies the above errors into three categories: procedural errors in issuing the OII; misapplication of state law in concluding that SES is a "public

utility" under CPUC jurisdiction; and failure to recognize the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC") over the project.

With respect to procedural errors, the Application asserts that the OII violated SES's due process rights by denying it an opportunity to be heard and by failing to base its findings on any factual record. SES further claims the CPUC cannot judicially notice or rely upon SES's filings at the FERC. SES also asserts that the OII is an improper collateral attack on the FERC's Declaratory Order asserting jurisdiction over SES, and that the Commission is barred from issuing the OII due to *res judicata*.

SES further argues that under state law, it is not a "public utility" or a "natural gas company" and thus not subject to CPUC jurisdiction or required to field discovery requests. SES claims it has not yet engaged in activities which would qualify it as a public utility, and that its future activities only involve "foreign commerce." SES claims that the California Legislature, in repealing the previous LNG Terminal Act conferring exclusive state jurisdiction on the Commission over LNG facilities, repealed CPUC jurisdiction over LNG terminal siting. SES also posits that the OII errs in basing jurisdiction on review of safety and environmental issues or on market power concerns, which SES believes will be addressed by the FERC, or on CPUC "emergency powers."

Finally, SES generally asserts that FERC has jurisdiction over the LNG facilities, rather than the CPUC.

SES also expressly reserves its rights to seek relief in federal court for violations of federal law or the United States Constitution, pursuant to England v. Louisiana State Bd. of Medical Examiners (1984) 375 U.S. 411, 420-21. (Application, p. 1 fn. 1). This invocation of the "England reservation," as it is commonly known, means that the Commission is on notice that any Federal issues involved in the Commission's issuance of the OII and subsequent orders will be decided ultimately in Federal court.

We have carefully reviewed each and every argument raised by the application for rehearing and are of the opinion that good cause for rehearing has not been demonstrated. Accordingly, we deny the application for rehearing.

II. DISCUSSION

The Commission denies the application for rehearing, as the Commission acted within its proper delegated powers in issuing an OII to investigate SES's proposed LNG terminal, and did not commit legal error in concluding that SES would become a public utility upon completion of its proposal and thus requires a CPC&N under California law.

As a preliminary matter, because of SES's invocation of the "England reservation" and request that we not address federal issues, the Commission will not issue a ruling on Federal legal issues. The CPUC will comment a bit on the impact of State law issues on Federal issues, such as when State law explicitly references Federal law (*e.g.*, Public Utilities Code § 202, cited by SES), but is not ruling on Federal issues. The Commission is not the ultimate arbiter of whether or not Federal law pre-empts State law in asserting jurisdiction over SES and its LNG facilities, and we are not in this OII making such a determination.[2] The OII's comments as to the Commission's interpretation of the Natural Gas Act and other Federal law were all reflective of the Commission's previous stated positions expressed in the FERC proceeding, CP04-58-000. As a result of the England reservation, the CPUC will not be ruling upon the following errors specified by SES in its Application – Errors 1, 4, 8, & 11 – as the establishment of these errors depends upon whether or not Federal law pre-empts State law. The Commission notes that there are still numerous issues in the Application that are not affected by Federal law and are proper for the Commission to decide.

A. The Commission did not fail to proceed in the manner required by law.

1. The CPUC properly relied upon and referenced the SES application to the FERC as a basis for factual statements therein.

SES claims that the Commission had not established a record on which to base the OII, and furthermore that the OII is not "founded upon any facts of which the

[2] The CPUC has filed a Petition for Rehearing of FERC's Declaratory Order and Rehearing Order in the D.C. Circuit (No. 04-1264), which has been transferred to the Ninth Circuit (No. 04-75240). The U.S. Court of Appeals for the Ninth Circuit will be deciding the federal issues in this direct review of FERC's orders.

Commission could take judicial notice," arguing that any information that "appears to come solely from the SES FERC application" has "not been established conclusively" because its application to FERC could change. (Application, pp. 14-15). SES argues that "[m]atters subject to judicial notice include statutes, court decisions, and 'facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be subject of dispute.'" (Application, p. 14, *citing* Cal. Evidence Code § 450). SES also asserts that parties must be afforded notice and an opportunity to be heard regarding judicially noticed matters. (Id.) In essence, SES is stating that the CPUC cannot rely upon SES's own, sworn statements and evidence offered publicly in a FERC proceeding in finding that the SES project should be investigated, even though it is appropriate for FERC to rely upon such statements and evidence. SES apparently believes the Findings of Fact are inadequately supported by the record, although it fails to state what Findings are so tainted.

Although SES cites Cal. Evidence Code § 452[3], it apparently overlooked the explicit language of subsection (d)(2) of § 452 allowing for judicial notice to be taken of "[r]ecords of … (2) any court of record of the United States," and subsection (c) allowing notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States." SES's application and filings at the FERC are administrative records which can be judicially noticed. "[A] court may take judicial notice of 'records and reports of administrative bodies.'" Mack v. South Bay Distributors, Inc., 789 F.2d 1279, 1282 (9th Cir. 1986). Moreover, the CPUC has previously taken judicial notice of the contents of applications to FERC in prior proceedings. D.96-08-038, 67 CPUC2d 509, 519 & fn. 7, 1996 Cal. PUC LEXIS 857 at *26 fn. 7 (notice of applications of the Independent System Operator and Power Exchange to the FERC). Despite SES's concerns about the source of the information relied upon in the OII, the OII clearly referenced the SES "FERC filings" in describing SES's proposal. (OII, p. 3).

Moreover, SES's public statements are admissions made by SES itself and are thus admissible as evidence upon a basis other than judicial notice. SES asserts that

[3] Application, p. 15 fn. 23.

the proposal it has made could change and that therefore the facts of its proposal could be subject to dispute and thus are not judicially noticeable. While it is true that SES's application and proposal are subject to change, it is indisputable that SES has made such statements publicly and is relying upon its filings at the FERC as the basis for the granting of authority to construct its planned LNG terminal, while simultaneously arguing that the CPUC cannot rely on SES's statements. "Under the doctrine of 'conclusiveness of pleadings,' a pleader is bound by well pleaded material allegations." Witkin, California Procedure 4th Ed., § 413; *see* Brown v. Aguilar (1927) 202 Cal. 143, 149. The CPUC is not relying upon SES's statements to prove conclusively such statements as true, but the CPUC can use such statements as evidentiary admissions to show what SES has represented publicly, and that if such representations turn out to be correct, SES would be a "public utility" under California law. SES also was clearly aware of the statements it made to the FERC, and thus they cannot claim that they did not have "adequate notice" of the statements in their own application to the FERC.

It is important to note that the OII does not conclusively find that the SES proposal is static. Conclusion of Law 1 conditions the future status of SES as a "public utility" under California law on whether SES "were to construct and operate the LNG terminal it describes in its pending application before FERC." To the extent that SES intends to modify "the LNG terminal it describes in its pending application," the OII can evaluate the proposal as it evolves. The essence of an investigation is to take into account all the potential aspects of the proposal to construct and operate an LNG facility in the Port of Long Beach.

Finally, SES does not specifically challenge the Findings of Fact which they claim are unsupportable, nor explains why those Findings are unsupportable. The four Findings of Fact merely note that SES has applied to the FERC; that SES has challenged the Commission's authority to regulate the LNG facility; that the State of California has a compelling interest in the project; and that waiting for resolution of the jurisdictional dispute "might create undue delay." (OII, p. 10, Findings of Fact 1-4). None of these

findings are challenged nor seem particularly controversial.[4] SES has not challenged any specific Findings of Fact, which do not rely upon anything beyond the fact that SES applied to the FERC, and do not refer to the FERC application.

2. SES has not been denied due process

SES argues that because the Commission did not afford SES notice and an opportunity to be heard, it was denied due process and the OII is invalid.[5] SES posits that the Commission "typically issues an Order to Show Cause before instituting an action against an entity, thereby providing an entity with notice and a meaningful opportunity to respond." (SES Application, p. 12). SES argues that the Commission "did not follow that longstanding practice with respect to SES, but instead simply issued the OII, which included orders that would immediately and adversely effect SES, in violation of SES's due process rights." (Id.) SES believes that the order that SES immediately comply with discovery requests from Commission staff and intervenors is the "procedural equivalent of a certificate application." (Id.)

The Commission disagrees that it denied SES due process because the OII process itself provides a procedural vehicle for SES to air its argument that it is not a public utility under California law, based on the most up-to-date information about SES's project, as does the instant Application for Rehearing. What constitutes adequate notice and hearing varies with the circumstance, and due process "is flexible and calls for such procedural protections as the particular situation demands." Smith v. Organization of Foster Families for Equality & Reform (1977) 431 U.S. 816, 848; 9 Witkin California Procedure (4th Ed. 1997), Administrative Proceedings § 3; *see also* Petrillo v. Bay Area Rapid Transit Dist. (1988) 197 Cal.App.3d 798, 808. For example, there is no constitutional hearing requirement when the Commission adopts rules governing utility service or fixing rates. Wood v. CPUC (1971) 4 Cal.3d 288, 292. The OII was classified

[4] While SES would likely disagree with the characterization of the delay in resolution of the jurisdictional dispute as "undue," it has conceded in arguing to stay the OII that there would be delay if the CPUC has jurisdiction and their application is not filed until a reviewing court makes such a finding (Application, p. 7).

[5] SES Application, pp. 11-12 and fn 12, *citing* Morgan v. U.S. (1936) 298 U.S. 468; Morgan v. U.S. (1938) 304 U.S. 1; Petrillo v. Bay Area Rapid Transit Dist. (1988) 197 C.A.3d 798, 807, 808; 9 Witkin California Procedure (4th Ed. 1997), Administrative Proceedings § 3.

as a "ratesetting" proceeding pursuant to Rule 5(c) of the Commission's Rules of Practice and Procedure, and the Commission stated the OII "is neither quasi-legislative nor quasi-judicial in nature." OII, p. 7. Even if some hearing requirement is attached to the OII because it is construed to rule on the vested interests of SES and be "quasi-judicial," the OII provides for such hearings as part of the OII process: "We anticipate that hearings will be required to resolve disputed issues of fact." (OII, p. 7). The Commission did not intend to deprive SES of notice and an opportunity to be heard regarding either its assertion that the facts associated with SES's application are potentially in flux, or its argument that the Commission lacks jurisdiction under California law over SES as a "public utility" requiring a CPC&N to construct its proposal; indeed, the Commission does substantively respond in this decision to SES's arguments that it is not a public utility under state law.[6] The Commission disagrees that the issuance of an OII automatically requires notice and an opportunity to be heard. The Commission is responsible for the rules governing its own proceedings. Pub. Util. Code § 701. There is also no requirement that the Commission issue an Order to Show Cause rather than an OII, as implied by SES. As SES argues that the facts regarding its proposal are subject to change, an OII would be an appropriate procedural vehicle for assessing the proposal. The CPUC reserves the right to issue an Order to Show Cause if the circumstances warrant.

The Commission further notes that the mere time and expense of participating in an administrative hearing does not constitute irreparable harm. Renegotiation Board v. Bannercraft Clothing Co. (1974) 415 U.S. 1, 24; Board of Police Commissioners v. Superior Court (1985) 168 Cal.App.3d 420, 433. Moreover, the Commission has the authority under Pub. Util. Code § 701 to take action against entities that are not public utilities as long as such action is germane to the regulation of public utilities. *See* PG&E Corporation v. CPUC (2004) 118 Cal.App.4th 1174, 1198. SES's proposal includes a pipeline that interconnects with the intrastate pipeline system of the Southern California Gas Co., a natural gas corporation under Commission jurisdiction.

[6] See infra part II.C.

The general subject of interconnection of new gas supplies with California public utilities is the subject of an ongoing Commission rulemaking proceeding, R.04-01-025, and a recent Commission decision in that docket, D.04-09-022. SES's proposal is clearly germane to the Commission's regulation of natural gas in California, whether or not SES is a "public utility" under California law. Thus, the assertion of SES that the requirement that SES comply with discovery requests commences "the procedural equivalent of a certificate application" is patently incorrect, as the CPUC has an independent basis to order SES to comply with discovery requests even if SES is ruled not to be a public utility and is exempted from the requirement that all public utilities obtain a CPC&N.

B. The doctrine of *res judicata* does not bar the CPUC from initiating an investigation into SES's Proposal, which is not a collateral attack on the FERC Declaratory Order

SES asserts that the FERC Declaratory Order "constitutes final agency action subject to statutory rehearing and judicial review" and thus "it is entitled to *res judicata* effect as between the CPUC, SES and the FERC, until and unless it is overturned on rehearing or on petition for review in the D.C. Circuit." (SES Application, p. 16, citations omitted). SES further argues that "because the [Natural Gas Act] provides the exclusive remedy for judicial review of a FERC decision, any other proceedings challenging issues which were, or could have been, raised in the FERC proceeding or which otherwise conflict with the effective order, constitute an impermissible collateral attack." (Id., citations omitted).

SES is incorrect that *res judicata* is applicable in this circumstance, where: 1) the issues decided in the FERC Declaratory Order are different than the state issues that are the subject of the OII, and the OII is not ruling upon the issue of FERC jurisdiction or the legality of the FERC order; 2) the CPUC is not a litigant in the OII, but is a decisionmaking body against which *res judicata* is inapplicable; 3) the ruling of one administrative agency is being used against an administrative agency of a different jurisdiction on a strictly legal issue regarding "an undeveloped frontier of law and policy" and hence is an inappropriate decision to be accorded *res judicata* status.

1. The OII does not regard the same issues as the FERC proceeding

The requirements for the proper application of *res judicata* have been described as follows: "The doctrine of res judicata precludes parties or their privies from relitigating an issue that has been finally determined by a court of competent jurisdiction….The application of the doctrine in a given case depends upon an affirmative answer to these three questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party to or in privity with a party to the prior adjudication?" Levy v. Cohen, 19 Cal.3d 165, 171 (1977).

SES's assertion of *res judicata* fails as the issues in the prior adjudication are not identical to that presented in the OII, which regard the potential impacts of the project on public safety, the environment and California intrastate gas markets and operations, as well as state issues regarding the Commission's jurisdiction over the Project as a "public utility" under California law. *See* OII, parts IV-V. Even if the state is ruled ultimately to lack jurisdiction over the LNG terminal and the pipeline interconnecting with the SoCalGas intrastate transportation system, the impact of the project on state jurisdictional matters is unmistakable, and the state is entitled to investigate the impact of the Proposal on the public interest of California residents.

2. The OII is not a collateral attack against the FERC order

Furthermore, as the issues determined in the OII are not identical to those in the Declaratory Order, the OII is not a collateral attack against the FERC order, as the OII does not purport to rule upon the legality of the FERC order and is not a vehicle by which the FERC order could be reviewed. The CPUC is directly challenging the FERC Declaratory Order at the Federal District Court of Appeals, and will abide by the ultimate ruling as to underlying jurisdiction. However, just because the CPUC took the required

step of protesting the SES application at the FERC in order to protect the state's rights[7] does not mean that the CPUC is barred from opening an investigation into the proposed project for which SES applied for authorization from the FERC. SES notes that the CPUC's participation in the FERC proceeding was "voluntary," (SES application, p. 17), and argues that by making such a choice the CPUC was acceding to FERC's determination of jurisdiction as to the CPUC's state rights and waiving the right to issue the OII. On the contrary, the CPUC was required to challenge FERC's interpretation of the NGA in order to preserve the CPUC's assertion of jurisdiction over SES as a public utilty, or else the Commission would have been ruled to have waived their arguments. NGA § 19(b), 15 U.S.C.A. § 717r(b). In contrast to the procedural circumstance presented in Williams Natural Gas Co. v. Oklahoma City, (10th Cir. 1989) 890 F.2d, 255, 264, cited by the SES Application on p. 16 fn. 26, the CPUC and state courts have not been asked to rule upon the federal preemption issues at all, let alone prior to the appeal to the federal courts of the FERC ruling granting a certificate after a party had failed to raise the issue of jurisdiction prior to the granting of the certificate by FERC. The OII will not rule upon the issue of whether the FERC has exclusive jurisdiction over the SES proposal, and thus does not collaterally attack the FERC order.

3. The CPUC is not acting as a litigating party in the OII, but rather is acting as a decisionmaking body

One other basic requirement of *res judicata* is that it can only be asserted against a party to a proceeding. But the Commission is a decisionmaker, not a party, to the OII, and thus *res judicata* is not applicable against the Commission to prevent the Commission from hearing the issues in the OII. *See* New England Power Co., 72 FERC ¶ 61,148 at p. 61,761 n. 50 (FERC finding that FERC acting "as decisionmaker is not a litigating 'party'" for *res judicata* purposes). This again follows from the observation that the issues in the OII are different from those in the FERC proceeding, as the OII is

[7] SES notes that the CPUC's participation in the FERC proceeding was "voluntary," (SES application, p. 17), perhaps implying that by making such a choice the CPUC was acceding to FERC's determination of jurisdiction as to the CPUC's state rights and waiving the right to issue the OII. On the contrary, the CPUC was required to challenge FERC's interpretation of the NGA in order to preserve the CPUC's assertion of jurisdiction over SES as a public utility, or else the Commission would have been ruled to have waived their arguments.

not relitigating the issue of federal jurisdiction, but instead is examining state jurisdiction and the impact of the proposal on the state.

Indeed, in section II.C. below we will examine SES's claim that under California law, their operation of a proposed LNG terminal and pipeline does not render SES a "public utility." That issue was clearly not addressed by the FERC and could not preclude the CPUC's consideration of that legal issue. But that issue is properly before the CPUC in our quasi-judicial role as a decisionmaker in the OII, and the CPUC will rule upon these issues in this Order.

4. *Res Judicata* should not apply to a purely legal determination by one administrative agency against another administrative agency

Finally, we note that in this particular circumstance, where one administrative agency has issued a Declaratory Order on a purely legal issue of first impression, *res judicata* is not properly invoked against another administrative agency broadly investigating the same facts. SES cites "Davis on Administrative Law" and United States v. Utah Constr. & Mining Co. (1966) 384 U.S. 394, 422, for the proposition that "res judicata principles may apply to an administrative agency's adjudication." (SES Application, p. 16 fn. 25). A closer look at what the Supreme Court actually ruled, however, finds that, after first characterizing the rulings of prior courts that *res judicata* principles do not apply to administrative adjudication as "too broad," stated that "[w]hen an administrative agency is acting in a judicial capacity and resolves **disputed issues of fact** properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." 384 U.S. at 421, 422 (emphasis added). In contrast, courts do hesitate to apply *res judicata* to administrative determination of pure issues of law. In New England Petroleum Corp. v. Federal Energy Administration, 455 F.Supp. 1280, 1302 (S.D.N.Y. 1978), the court commented upon the limits of the ruling in Utah Construction on pure issues of law:

> While United States v. Utah Construction & Mining Co., 384 U.S. 394, 422, 86 S. Ct. 1545, 1560, 16 L. Ed. 2d 642 (1966), cited by the FEA on the Res judicata point, holds that Res

> judicata applies "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it" (emphasis added), Professor Davis (upon whose treatise the Court generally relied in Utah Construction, 422 n. 20, 86 S. Ct. 1545) observes that "the doctrine is weaker as applied to questions of law than as applied to questions of fact". n61
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> n61. 2 Davis, Administrative Law Treatise § 18.03 at p. 558 (1958). That author continues:
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> "The desire for repose on which res judicata rests relates primarily to findings of fact; repose on lively problems of law may even be affirmatively objectionable. A tribunal ought not to be barred from using trial-and-error methods of feeling its way into an undeveloped frontier of law and policy. Even when the principle of res judicata should be rigidly applied to findings of fact, some relaxation of its application to rulings of law may be indicated." Id. at 566.

Moreover, "[p]reclusion is much less likely to attach when a proceeding in one agency is followed by a proceeding in another agency …. When the agencies are creatures of different governments, all of the principles that generally prevent one government from precluding another are at work." Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction 2d § 4475 (1996 & 2004 Supp.). As there have been no court rulings on Section 3 of the Natural Gas Act as modified in 1992, *res judicata* should not be applied to bar the CPUC from investigating their own basis for jurisdiction under state law, as well as the impact of the project on issues clearly within state jurisdiction.

C. SES Would Qualify as a "Public Utility" Under California Law If It Commences Construction of its LNG Terminal as It Currently Proposes

SES claims that the OII errs in concluding under California law that the CPUC has jurisdiction over SES pursuant to Public Utility Code Sections 216, 221, 222, 227 and 228. (SES Application, p. 21). SES further asserts that Section 202 of the Public Utilities Code prohibits the CPUC from exercising jurisdiction over foreign

commerce. (SES Application, p. 27). SES also argues that the OII prematurely determines that SES is a public utility before SES has engaged in activity that would qualify it as a public utility under California law. (SES Application, p. 17).[8] Finally, SES argues that with the 1987 repeal of the Liquefied Natural Gas Terminal Act of 1977 ("LNG Terminal Act"), the Legislature deprived the CPUC of permitting jurisdiction over LNG terminals. (Application, pp. 30-31).

The CPUC reiterates its conclusion that the SES proposal, if constructed as it is presently conceived, and under an alternative suggested by SES in its rehearing, would qualify SES as a "public utility" under California law, a conclusion unaffected by the repeal of the LNG Terminal Act. In addition, regulation of the SES project, located wholly within the State of California, does not constitute the regulation of "foreign commerce," which would be prohibited by Public Utilities Code Section 202. Finally, while the CPUC agrees that SES is not currently providing public utility service in the sense that it has not completed construction of its LNG terminal, we do note that if it were to be a public utility upon completion of such construction it must apply to this Commission for a CPC&N and respond to Commission inquiries as if it were a public utility. Moreover, there are current indicia of public utility status in the form of property interests and present negotiations of future sales of natural gas over public utility property that arguably could confer public utility status onto SES now rather than at a future date when the service for which it is now preparing is actually provided.

1. SES is a "public utility" under California law as it is holding itself out to provide service to the public

SES asserts that its proposed LNG terminal would not make SES a "public utility" pursuant to Public Utility Code Sections 216, 221, 222, 227 and 228, on the basis of the judicial doctrine that corporations must also dedicate their property to public use. (Application, p. 22, *citing* Richfield v. CPUC, (1960) 54 Cal.2d 419, 425-434). We do find that SES will be dedicating its property to public use through the construction of its

[8] The CPUC will not address the arguments on pp. 27-42 arguing against the assertion of jurisdiction by the CPUC, as such arguments will be determined by the Court of Appeals.

LNG terminal, by holding itself out to provide natural gas for ultimate resale to numerous customers over the intrastate SoCalGas system. Richfield is distinguishable from the factual circumstances of SES's application, which will involve the selling of imported natural gas to non-core end users over the intrastate gas system, rather than the sale of California-produced natural gas to a regulated electric public utility over a private pipeline constructed for the sole purpose of transporting the gas to the utilty's on-site power production. Moreover, we note that this requirement has not been interpreted nearly as stringently as SES suggests in recent years, but rather has been interpreted liberally in favor of ruling that a corporation has dedicated its property to the public.

State statutes are fairly straightforward with respect to whether or not the proposed LNG facility in Long Beach is required to obtain a CPC&N under PU Code § 1001. "No . . . gas corporation . . . shall begin the construction of a . . . plant . . . or any extension thereof, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction."[9]

PU Code § 222 defines a "gas corporation" as follows:

> "Gas corporation" includes every corporation or person owning, controlling, operating, or managing any gas plant for compensation within this state, except where gas is made or produced on and distributed by the maker or producer through private property alone solely for his own use or the use of his tenants and not for sale to others.
>
> "Gas corporation" shall not include a corporation or person employing landfill gas technology for the production of gas for its own use or the use of its tenants or for sale to a gas corporation or state or local public agency, except that if the gas produced is of such insufficient quality or heating value that it is unacceptable for

[9] PU Code § 1002 requires the Commission when reviewing an application for a CPC&N to consider "community values," "[r]ecreational and park areas," "[h]istorical and aesthetic values," and "[i]nfluence on environment." PU Code § 1003 requires the submission of detailed information regarding a project's operating characteristics, costs, and feasible alternatives, and contracts with other parties, and § 1005 requires the Commission when issuing a certificate to specify such information. Section 1005.5 requires that a CPC&N for any facility costing over $50,000,000 include a maximum cost, but the cap can be increased upon further request of the corporation.

> introduction into the line, plant, or system of a gas corporation or state or local public agency, the person or corporation employing landfill gas technology may without becoming a gas corporation for purposes of this part sell the gas so produced to not more than four other corporations or persons.

Gas plant is defined in PU Code § 221:

> "Gas plant" includes all real estate, fixtures, and personal property, owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, underground storage, or furnishing of gas, natural or manufactured, except propane, for light, heat, or power.

The LNG facility will clearly be "gas plant" as it includes real estate, fixtures and personal property that is owned, controlled, operated or managed in connection with or to facilitate the transmission or furnishing of gas, natural or manufactured, for light, heat or power. Sound Energy Solutions is thus a "gas corporation," as it a corporation "owning, controlling, operating, or managing any gas plant for compensation within this state." The LNG facility does not fall under the exception "where gas is made or produced on and distributed by the maker or producer through private property alone solely for his own use or the use of his tenants and not for sale to others" as it intends the gas to be for sale to others to use, nor does it fall under the landfill gas exception.

Public Utilities Code § 227 defines "Pipe line":

> "Pipe line" includes all real estate, fixtures, and personal property, owned, controlled, operated, or managed in connection with or to facilitate the transmission, storage, distribution, or delivery of crude oil or other fluid substances except water through pipe lines.

Public Utilities Code § 228 defines "Pipeline corporation":

> "Pipeline corporation" includes every corporation or person owning, controlling, operating, or managing any pipeline for compensation within this state.
>
> "Pipeline corporation" shall not include a corporation or person employing landfill gas technology and owning, controlling, operating, or managing any pipeline solely for the transmission or distribution of landfill gas or other form of energy generated or produced therefrom."

Due to the presence of storage of natural gas as part of their proposal, SES is also a "pipeline corporation" as well as a "gas corporation" under California law. In addition, SES currently plans on owning and operating the pipeline connecting the LNG terminal to the SoCalGas intrastate pipeline transmission system. Operation of that pipeline also qualifies SES as a "pipeline corporation."

Public Utilities Code § 216 defines "public utility," and in relevant part states:

> (a) "Public utility" includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof.
>
> (b) Whenever any common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, or heat corporation performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, that common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, or heat corporation, is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.
>
> (c) When any person or corporation performs any service for, or delivers any commodity to, any person, private corporation, municipality, or other political subdivision of the

> state, that in turn either directly or indirectly, mediately or immediately, performs that service for, or delivers that commodity to, the public or any portion thereof, that person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.

SES appears to concede that its proposal meets the statutory language of Sections 216, 221 and 222. (Application, p. 22). As noted above, the presence of natural gas storage qualifies SES as a "pipeline corporation" under Sections 227 and 228, as does the more recent amended proposal under which SES would own and operate the take-away pipeline from the LNG terminal to the SoCalGas intrastate gas transmission system.

But SES maintains that pursuant to Richfield, a corporation "must also dedicate its property to public use." (Application, p. 22). SES avers that Richfield held that "where a new service was being sold 'to a selected customer and like service was denied to others' a company could not – as a matter of law – be held to have dedicated such service to the public." (Application, p. 22, *citing* Richfield, 54 Cal.2d at 439). SES later maintains "it is not clear that the services SES provides at the terminal (i.e., unloading, regassification, and storage) will be dedicated to the public." (Application, p. 24).

Before examining this question, we note that pursuant to SES's initial Application before the FERC, SES represented that the project "will provide a significant, new, and competitively-priced supply of natural gas, primarily to markets in the LA Basin and Southern California." (FERC Application, p. 4). The application noted that "SES intends to import LNG and negotiate a limited number of long-term natural gas sales agreements at competitive prices with a small number of non-core customers in California." (Id. at 4-5). SES elsewhere in its FERC Application notes that the project "is designed to import LNG from Asia and abroad to the U.S. for sale in California's noncore natural gas markets." (Id. at 6). The project is to have a firm send out capacity of 600 MMcfd, and a peak capacity of 1000 MMcfd. (Id. at 5). On its website, SES

notes that "[w]hen operational, the terminal will provide up to 20% of Southern California's gas supply."[10] In its Application for Rehearing, SES noted that the potential "commercial arrangements could be limited to a single LNG Import Terminal Operator providing service to a single entity" and argued that this was the situation that did not result in dedication in Richfield. (SES Application, p. 24). SES later notes that if it sold the entirety of the project's natural gas to a single marketer, the activity in turn of that marketer by making "the sale of the natural gas commodity to non-core end use customers" would not be subject to public utility regulation. (Id., p. 25). We also note that while initially SES intended that the pipeline from the terminal to the SoCalGas transmission system would be owned and operated by a municipal utility, (id.), it has now notified the FERC that SES currently intends to own and operate the pipeline if it cannot find a third-party to own and operate it. ("Amendment to Application for Authority to Site, Construct, and Operate LNG Import Terminal Facilities," September 9, 2004).

Courts have questioned and limited the applicability of the "dedication" doctrine, as long ago as 1968:

> The requirement of dedication as a condition precedent to regulation is not found in the statutes. This judicial doctrine, in its pristine form, was buttressed by constitutional principles which now have passed into history. [footnote omitted] Dedication continues to perform important functions in the interstices of the Public Utilities Code. But its *raison d'etre* is attenuated, and it would be inappropriate to extend its restraining power further than logic and precedent require. Greyhound Lines, Inc. v Public Utilities Commission (1968) 68 Cal. 2d 406, 413.

Citing this passage, the CPUC noted that "[t]hus, the dedication requirement has survived, but only narrowly." PG&E v. Dow Chemical Corp., D.94-07-063, 55 CPUC2d 430, 438, 1994 Cal. PUC LEXIS 974 at * 26.

[10] http://www.soundenergysolutions.com/4019-SES090904-F.html (October 28, 2004). The average daily gas consumption for all of California in 2003 was 5,965 MMcf/d. California Gas Report 2004.

In Richfield, the defendant corporation entered into a sale agreement with the Southern California Edison Company ("Edison"), a regulated electric utility, to deliver California-produced natural gas at Richfield's oil fields directly to Edison, and not to other customers, over a dedicated pipeline that Richfield would construct specifically for the purpose of transporting gas from Richfield to Edison. The Court stated that Richfield had not dedicated the entirety of their gas reserves to the public "by agreeing to sell gas to Edison, for that sale was made to a selected customer and like service was denied to others." 54 Cal.2d at 439.

Based on the above observations, we conclude that, based on the proposal it has submitted to FERC and its subsequent public statements, SES is holding itself out to deliver natural gas to the public and is a "public utility." We first note that dedication is a factual finding. PG&E v. Dow Chemical Corp.,D.94-07-063, 55 CPUC2d 430, 439, 1994 Cal. PUC LEXIS 974 at * 26, *citing* Haynes v MacFarlane (1929) 207 Cal. 529, 532; Slater v Shell Oil Co. (1940) 39 Cal.App. 2d 535, 545. Thus, SES's implication that Richfield held that as a matter of law a company could not be found to be a "public utility" based on SES's plan to sell to some companies and not to others is incorrect. SES concedes that dedication may be shown by implication and inferred by the Commission based on the acts of the corporation. Yucaipa Water Co. No. 1 v. CPUC, (1960) 54 Cal.2d 823, 828. But SES misrepresents the role of the intent of a corporation to become a public utility by suggesting that the intent to avoid CPUC regulation can be used as evidence that "contradicts an unequivocal intention to dedicate." (Application, p. 23, *citing* Matthews v. Lakeside Water Company (1991) 41 CPUC2d 477, 480). On the contrary, "disavowals of public utility status do not prevent the Commission from inferring dedication" based on the actions of a corporation rather than their express intent not to be a public utility. PG&E v. Dow Chemical Corp., D.94-07-063, 55 CPUC2d 430, 445, 1994 Cal. PUC LEXIS 974 at * 45. In Matthews, there was no evidence whatsoever of a dedication of public property, and the intent of the operators to avoid public utility regulation was not the determinative factor in the CPUC's decision. Instead, dedication is evidenced by a corporation holding itself out to provide utility

service to the general public or a class of customers. *See, e.g.*, Yucaipa Water Co., 54 Cal.2d at 827-828.

As stated above, SES has stated it intends to provide gas to the noncore markets in Southern California, either directly, as noted in their initial Application to the FERC for a certificate, or by selling all of their output to a single marketer which would in turn sell to noncore customers, as noted in their Application for Rehearing. SES does not seemingly attempt to argue that their initial proposal to sell gas to various noncore customers in California would not constitute dedication to the public, but with respect to its new plan to sell all of its output to a single marketer, SES argues as follows:

> The commercial arrangements could be limited to a single LNG Import Terminal operator providing service to a single entity. This situation was found not to result in dedication in the *Richfield* case. The parallels between the possible operation of the SES facility and the facilities owned by intrastate California gas producers are striking. LNG import terminals as well as the wellheads and gathering systems used by producers could fall within the definition of gas plant. The intrastate producer uses such production facilities merely to deliver the producer's own gas (from the ground) to an interconnection with utility transmission lines so that it can be delivered to a customer. This was found not to result in dedication in *Richfield*. SES could operate under a similar structure in which it uses its LNG import facility to make gas available to a customer at the interconnection with utility transmission lines. The argument as applied to SES here appears equally compelling as those made by the producer in *Richfield*. (Application, pp. 24-25).

First, SES is incorrect that the sale to a single entity was the determining factor in the decision in Richfield that the corporation was not a "public utility." Indeed, Richfield itself notes that "a utility that has dedicated its property to public use is a public utility even though it may serve only one or a few customers or a utility that in turn serves the public." 54 Cal.2d at 431. SES intends to serve the noncore markets of

Southern California, either directly or indirectly through marketers. Either way, the ultimate sale of gas is not merely to one end-use customer, but to the class of noncore customers in Southern California.

Moreover, in Richfield, the producer was not simply making gas available "to a customer at the interconnection with utility transmission lines," as there was no evidence that the then yet-to-be-constructed takeaway pipeline would interconnect with any gas transmission system. Edison was an electric utility that intended to directly burn such gas to generate electricity. The private pipeline would serve Edison directly, and would be constructed specifically to deliver the gas directly to Edison. In contrast, SES intends to deliver gas to the ultimate end-users over the regulated gas transmission system of SoCalGas, which supports the conclusion that the gas sales are intended to be made to the public generally, and are not just limited to one specific customer for whom the facilities would be constructed. As the Commission has noted, "dedication to public use can be found where service is offered to the members of a particular class, even if the number of customers is very small." PG&E v. Dow Chemical Corp., D.94-07-063, 55 CPUC2d 430, 440, 1994 Cal. PUC LEXIS 974 at * 28. In Dow Chemical Corp., the CPUC found that a seller of surplus natural gas over private pipelines to a very limited number of customers in PG&E's service territory was a "public utility" despite arguments that such sales were incidental to the defendant's chemical business and that the seller did not provide service to all customers. The fact that the defendant "solicit[ed] customers" to enter into long-term gas contracts was relied upon as evidence of dedication of property to the public. Id., 1994 Cal. PUC LEXIS 974 at * 39. As long as the gas that SES processes over any of its facilities is being held out to be sold, directly or indirectly, to various noncore customers in California, SES has dedicated the facilities used to process such merchant gas to public use. As SES has admitted it initially intended to "negotiate … natural gas sales agreements with a small number of non-core customers," (FERC Application, p. 8), and that if it sells gas to one marketer that marketer will sell to "non-core end use customers" (Application, p. 25), SES is clearly providing gas service to the class of non-core gas users. Its rigid reliance on Richfield is misplaced.

The Commission also rejects the notion that "a separate factual analysis must be conducted into whether each of the individual services to be provided at *each point of production or distribution* had been dedicated to public use," SES Application at pp. 23-24 (emphasis in original). The project at each point of "production" and distribution of natural gas is necessary to provide gas to the California public, and the project's activities regarding natural gas are subject to public utility regulation.

2. SES's proposed facilities are not in foreign commerce, but are intrastate facilities and thus not exempt from regulation pursuant to Public Utilities Code § 202

SES notes that Public Utilities Code § 202 prohibits application of the Public Utilities Code "to commerce with foreign nations or to interstate commerce, except insofar as such application is permitted under the Constitution and laws of the United States." SES argues that this provision means that the Commission may continue to assert regulatory authority where the federal government has not occupied the field of regulation to the exclusion of the states. Thus, according to SES, because the Declaratory Order of the FERC states that the FERC has exclusive jurisdiction over the project, and because the project is in foreign commerce, the CPUC is prohibited from regulating the project as a "public utility." (Application, pp. 26-27).

As with other arguments involving federal preemption, SES invoked the England reservation and requested that the CPUC not rule on federal issues. SES has not explicitly argued that even if the FERC does not have exclusive jurisdiction, the SES project would still be considered to fall under the exception of § 202. SES did argue it could not be denied that the importation of LNG "is foreign commerce." (Id., p. 27). However, we would not be asserting regulatory authority over whether or not LNG should be imported, but rather would be asserting authority over the safety and justness and reasonableness of these proposed facilities within the State of California. SES quotes a FERC administrative law judge in one of the Point Conception proceedings from the 1970's – ironically, in a ruling in which the FERC administrative law judge did not prohibit the CPUC from holding concurrent hearings on a proposed LNG terminal – as

stating "the importation of [gas from Indonesia] involves foreign commerce only," but the ruling specifically notes that "the importation of **the gas into California** involves foreign commerce only." (Application, p. 27 & fn. 51, *citing* Pacific Alaska LNG Company (1979) 8 FERC ¶ 63,032 at p. 65,296, *aff'd* 9 FERC ¶ 61,041 (original language and emphasis added).). The CPUC does not purport to regulate the actual importation of the gas into California, but rather the operations and activities of the facilities located wholly within California. We note that the language of § 202 prohibits public utility regulation of "commerce *with* foreign nations," not of products once they are imported. Moreover, by its explicit language § 202 does not prohibit Commission regulation if it is permitted under the Commerce Clause.

3. It is not premature for the Commission to investigate the proposal or to order SES to file for a CPC&N if it commences construction of its proposed LNG terminal

SES argues that the OII errs in prematurely determining that SES is subject to the CPUC's jurisdiction before SES has engaged in any activity which would qualify it as a public utility under California law. (Application, p. 17). We note the "chicken or egg" dilemma that occurs when a corporation constructs its initial public utility property which meets the minimum cost threshold of the CPC&N statutes, and has to file for a CPC&N prior to commencing construction even though strictly speaking it is not yet providing public utility services until the construction is completed. For purposes of assessing this argument, we will assume that the SES project will provide public utility service upon its completion. Common sense and Commission practice would suggest that if a corporation would become a public utility upon construction of facilities, it must apply to the Commission for a CPC&N prior to commencing construction.[11] As noted by SES, Ordering Paragraph 3 (OII, p. 11) states that SES shall file for and receive a CPC&N "prior to commencing construction of the project," consistent with the language

[11] *See, e.g.*, D.00-05-048, slip op. at p. 7, in which the Commission granted a CPC&N to Lodi Gas for its gas storage facility, and found that Lodi Gas became a gas corporation under California law "upon receipt of the CPC&N." Lodi applied for its CPC&N prior to becoming a "public utility."

of Public Utilities Code § 1001. SES notes some confusion based on language in the text of the OII ordering them to file an application for a CPC&N if SES "intends to pursue construction of the project." (Application, p. 18, *citing* OII, p. 7). We clarify that the language of the Ordering Paragraph controls, and that the text in the decision did not require a current application, but merely assumed that, if SES is required to receive a CPC&N prior to commencing construction, it would have to file for CPC&N at a time when SES intends to pursue construction before such construction commences. The CPUC did not order SES to file an immediate application for a CPC&N in the OII. SES is correct that "SES is not in violation of the Commission's order, assuming for purposes of argument that it is premised on legitimate jurisdiction." (Application, p. 19).

We do note, however, that SES has already filed its application for a certificate to the FERC. There is no indication that SES believes its application was premature, even though SES has amended its application subsequent to its filing. Although SES has not finalized commercial arrangements, it is currently pursuing customers for its project, and in a sense is currently holding itself out to the public to provide public utility service, albeit future service contingent on construction of the project. As part of its application to the FERC, SES presented its leasehold arrangement with the Port of Long Beach, which currently reserves for SES the exclusive right to pursue the development of an LNG terminal at the Port, and a specific location in the port solely to construct its LNG facility and for no other possible use. In return, the Port receives compensation, and agrees not to enter into any other agreements for use of the site or another LNG terminal elsewhere in the Port. FERC Application, Appendix 1-2, Correspondence & Exhibit A. The broad definition of "gas plant" in Public Utilities Code § 221 "includes all real estate**,** fixtures, and personal property, owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, underground storage, or furnishing of gas, natural or manufactured, except propane, for light, heat, or power" and would seem to apply to SES's current leasehold arrangement even prior to the actual furnishing of natural gas, as

long as the "real estate" is "owned, controlled, operated, or managed in connection with or to facilitate" the provision of such gas.

In any event, the OII did not rule that SES is currently a public utility, but only concluded that "[i]f SES were to construct the LNG terminal it describes in its pending application before FERC, it would become a public utility subject to the jurisdiction of this Commission." (OII, Conclusion of Law 1, p. 10). Based on that Conclusion of Law, the Commission opened an investigation into the proposed terminal, stated that SES requires Commission authority to construct its project, and that SES must respond to Commission orders and data requests. (OII, Conclusions of Law 2-4, p. 10). The Commission ordered the initiation of an investigation, and that SES is a respondent and shall respond to information requests by the Commission. (OII, Ordering Paragraphs 2, 4, p. 11). Such potential requests do not automatically assume that SES will become a public utility nor that the CPUC currently has "jurisdiction" over SES as a public utility. As noted earlier, the CPUC possesses broad powers germane to the regulation of public utilities, and such powers do not limit the right of the CPUC to issue discovery to public utilities only.

4. The Legislature did not explicitly repeal CPUC Jurisdiction over the siting of LNG Terminals by repealing the LNG Terminal Act, as the CPUC's Jurisdiction is derived from other sections of the Public Utilities Code

SES asserts that because the Legislature in 1987 repealed the Liquefied Natural Gas Terminal Act of 1977 ("LNG Terminal Act"), which granted the CPUC the right to be the sole state agency for permitting and siting an LNG terminal, the Legislature "explicitly repealed" CPUC jurisdiction over LNG terminals. (Application, p. 30). SES argues that the "LNG Terminal Act was the only portion of the Public Utilities Code to specifically grant statutory authority over the siting, construction and operation of LNG import terminals," and that the explicit repeal of the LNG Terminal Act "has the effect of relieving the CPUC of its source of statutory authority" over LNG terminals. (Application, p. 30).

SES ignores the applicability of the plain language of the Public Utilities Code Sections 216, 221, 222, 227 & 228, which predated the LNG Terminal Act, and survived the repeal of the LNG Terminal Act. Such language does grant the CPUC explicit authority over "gas plant," and SES did not dispute that the plain language of the statutes applies to the LNG Terminal. Unlike the circumstance in Estate of Taylor, 33 Cal.App.3d 44, 49, cited by SES at p. 31 fn. 69 of its Application, the CPUC does not purport to act to grant rights pursuant to a repealed law (the LNG Terminal Act), but rather grants rights under legal provisions unaffected by the repeal. The repeal of the LNG Terminal act did not repeal other provisions of the Public Utilities Code unmentioned in the legislation that repealed the LNG Terminal Act. *See* People v. Deibert (1953) 117 Cal. App. 2d 410, 417 ("when the legislature repeals certain acts and excludes mention of other acts even though they refer to the same subject, it is the intention of the legislature to leave standing those acts which are not mentioned.")

The CPUC has also previously stated its belief that an LNG terminal requires a CPC&N, although it later ruled that the more specific provisions of the LNG Terminal Act, then still in effect, should apply rather than the CPC&N provisions:

> In establishing the LNG Act, the Legislature found that "an initial liquefied natural gas terminal may currently be needed in order to permit the importation of sufficient natural gas to prevent shortages which have been predicted to occur in the early 1980's" (PU Code § 5551(c)). A Commission decision was required, and was issued, by July 31, 1978. The specific focus of the LNG Act was on actions reasonably required to meet a potential near-term crisis. No mention was made of ongoing permitting authority. In our view, the permitting authority conferred on the CPUC by virtue of the urgency legislation is no longer applicable or needed to retain the site. The conditional permit previously granted by this Commission is now moot. In the absence of new legislative action, any future permit requests must be made within the context of the Commission's authority to grant Certificates of Public Convenience and Necessity. D.84-09-089; 1984 Cal. PUC LEXIS 1013 at * 92 - *93; 16 CPUC2d 205.

Upon rehearing, the Commission subsequently concluded that any proposal should again be brought LNG Terminal Act, which was still in effect. D. 85-02-071, 1985 Cal. PUC LEXIS 68 at * 2 - * 3, 17 CPUC2d 182, 184. From these rulings, it is clear the CPUC has previously agreed that CPC&N requirements are applicable to LNG terminals if not superceded by more specific state siting laws regarding LNG terminals. Thus, with the repeal of the LNG Terminal Act, the state statutes requiring public utilities to apply for a CPC&N are to be followed to their full effect.

III. CONCLUSION

For the reasons discussed above, the application for rehearing of I.04-04-024 is denied.

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THEREFORE, IT IS ORDERED that:

1. Rehearing of I.04-04-024 is denied.

This order is effective today.

Dated October 28, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners