UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of:	)	
Rio Grande LNG, LLC	)	CP16-454-000
Rio Bravo Pipeline Company, LLC	)	CP16-455-000

Response to Request for Supplemental EIS

Pursuant to 18 C.F.R. § 385.213,[1] Rio Grande LNG, LLC ("RGLNG") and Rio Bravo Pipeline Company, LLC ("Rio Bravo") (together, "RG Developers") herein answer the "Request for Supplemental EIS to Address Full Scope of Planned Exports" ("Request") filed jointly by the Defenders of Wildlife, Save RGV from LNG, Shrimpers and Fisherman of the RGV, Sierra Club, and Vecinos para el Bienstar de la Comunidad Costera (collectively, "Commenters") on May 30, 2019, in the captioned dockets. RG Developers reject the Commenters' assertion that the Final Environmental Impact Statement ("FEIS") issued by the staff of the Federal Energy Regulatory Commission ("FERC" or "Commission") on April 26, 2019, is inadequate because it failed to consider the proper scope of the project and urge the Commission to reject Commenters' request for an Supplemental Environmental Impact Statement ("SEIS"). Commenters' assertions are factually inaccurate and legally unnecessary, since the Commission is not presented with any new circumstances that would warrant the preparation of an SEIS as a matter of law. As RG Developers have proposed to FERC in their original application filed on May 5, 2016, the companies intend to develop, own and operate a liquefied natural gas ("LNG") export facility to export 27 million tons per annum ("mtpa") of LNG. That fact has not changed and RG Developers

[1] 18 C.F.R. § 385.213 (2018). Commenters do not cite to any FERC regulation in support of their filing. RG Developers' response assumes that the Commenters intended to file their request as a motion pursuant to 18 C.F.R. § 385.212 (Rule 212), in which case RG Developers' response is expressly authorized by the regulations as an Answer pursuant to 18 C.F.R. § 385.213 (Rule 213).

categorically reject the Commenters' improper and misdirected allegations that RG Developers have "misled" or "misrepresented" anything to the Commission.[2]

Basis of Commenters' Request

The Commenters assert that FERC must perform an SEIS because the April 26 FEIS is "predicated on the mistaken assumption that the facility will only output and export 27 mtpa of LNG." The Commenters then suggest, without any factual basis whatsoever, that RG Developers are somehow misleading the Commission by planning to build a much larger facility with more environmental impacts than what FERC staff has analyzed to date. Commenters refer to a publicly available presentation, dated May 5, 2019, that NextDecade delivered to investors and posted on its website, in which NextDecade indicated that due to efficiencies in liquefaction technology, "[a]verage production, after debottlenecking, [is] expected to be at least 5.5 mtpa per liquefaction train." Commenters use this presentation as a means to argue that the project has changed from what was originally filed and therefore an SEIS must be performed. This is untrue and a bare attempt to delay in the eleventh hour the robust four-year regulatory review that FERC has conducted for the RG Developers' proposed LNG export project.

The technologies selected by RG Developers and filed with FERC in 2015 and 2016, in the pre-filing and application processes, have evolved over the last four years and now have the potential to produce more LNG. Despite this fact, RG Developers at this time do not intend to exceed the aggregate 27 mtpa that FERC has spent the last four years reviewing and analyzing and for which the U.S. Department of Energy already has issued authorization to export LNG to nations with which the U.S. has free trade agreements.[3] Based on this and the additional

[2] *See* Press Release, Sierra Club, New Disclosure Reveals Rio Grande LNG Misled Regulators About Capacity (May 30, 2019), https://www.sierraclub.org/press-releases/2019/05/new-disclosure-reveals-rio-grande-lng-misled-regulators-about-capacity.

[3] *Rio Grande LNG, LLC*, DOE-FE Order No. 3869, Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas By Vessel From The Proposed Rio Grande LNG Terminal

information provided herein, RG Developers urge FERC to reject the Commenters' request for an SEIS and issue the order authorizing the project pursuant to Sections 3 and 7 of the Natural Gas Act on a timely basis.

Case Law Makes Clear that an SEIS is not Required

It is clear that FERC is not obligated to prepare and publish an SEIS for the Rio Grande LNG and Rio Bravo pipeline facilities. The National Environmental Policy Act ("NEPA")[4] established procedural requirements for federal agencies to evaluate potential impacts on the human environment from proposed federal actions and if a federal action will significantly affect the quality of the human environment then the agency must prepare an EIS.[5] While NEPA does not address SEISs, the White House Council on Environmental Quality ("CEQ") regulations implementing NEPA do:

> 'Agencies [s]hall prepare supplements to either draft or final environmental impact statements if: (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.'[6]

On its face, this could appear to require federal agencies to complete SEISs with significant frequency. However, the U.S. Supreme Court and many federal appellate court decisions have provided clear guidance to agencies, narrowly interpreting this regulation and limiting its applicability as a matter of practice.[7]

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in Brownsville, Texas, to Free Trade Agreement Nations, (Aug. 17, 2016). The U.S. Department of Energy is actively considering RG Developers' application to export to non-FTA nations.

[4] 42 U.S.C. § 4321 *et seq*. (2019).

[5] *Department of Transp. v. Public Citizen et al.*, 541 U.S. 752, 756-57 (2004).

[6] 40 C.F.R. § 1502.9(c)(1)(i)-(ii) (2018).

[7] *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989); *see also City of Olmsted Falls, OH v. F.A.A.*, 292 F.3d 261, 274 (D.C. Cir. 2002) (finding that an SEIS is "only required where new information 'provides a seriously different picture of the environmental landscape'.").

In interpreting this CEQ regulation, an important principle that has repeatedly been affirmed in judicial decisions upholding agencies' refusal in the NEPA context to conduct an SEIS is that "agencies need not supplement an EIS every time new information comes to light after the EIS is finalized."[8] Courts have recognized that agencies must have the right to close the administrative record in order to bring finality to the administrative proceeding and not be stuck in a never-ending loop. In fact, the very nature of the NEPA regulatory process is lengthy, resulting in situations in which, by the time of the decision, relevant information, data, or facts may have changed since the original project was proposed to the agency.

For example, in one of its seminal cases interpreting NEPA and the CEQ regulations related to the consideration of whether an SEIS is required, the U.S. Supreme Court in *Marsh v. Oregon Natural Resource Council* noted that requiring an agency to issue an SEIS whenever there is new information after an issuance of an FEIS "would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made."[9] Addressing similar issues, the U.S. Supreme Court said in *Vermont Yankee Nuclear Power*:

> 'Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated. . . . If upon the coming down of the order litigants might demand rehearing as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.'[10]

[8] *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989); *see also Nat'l Comm. for the New River v. F.E.R.C.*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) ("the Supreme Court explained that under the 'rule of reason,' 'an agency need not supplement an [environmental impact statement ("EIS")] every time new information comes to light after the EIS is finalized'").

[9] *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989).

[10] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-55 (1978) (quoting *ICC v. Jersey City*, 322 U.S. 503, 514 (1944)).

This is perhaps the clearest application of the "rule of reason," which the U.S. Supreme Court articulated as the foundation of federal agencies' application of NEPA and the CEQ regulations. Failure to have a point in time at which the record is closed would lead to absurd results of agencies performing environmental reviews *ad infinitum* and an inability of agencies to ever reach a final decision on the merits of the original application. Reason dictates that agencies cannot issue an SEIS every time new information is presented and must be able to close a record in order to exercise their jurisdictional authority in authorizing a project.

Here, an SEIS is not required because there are no "new circumstances" and the information provided in the Commenters' Request "does not present 'significant…new information'"[11] with respect to the project. As stated previously, at this time RG Developers intend to develop an LNG export project to export 27 mtpa. FERC has spent more than four years[12] reviewing the proposed project, culminating in the issuance of an FEIS on April 26, 2019, that thoroughly addresses all relevant environmental and safety issues related to the proposed 27 mtpa LNG export project.

Proper Authorization Is Always Required to Modify LNG Project Capacity

As FERC is aware, technology evolution and refinement over the course of the final design of LNG export projects can impact the overall production of the LNG export facility. However, as stated clearly herein, RG Developers' intend to construct a 27 mtpa LNG export facility and recognize and accept that if, in the future, RG Developers want to exceed the FERC- and DOE-authorized 27 mtpa, it will be required to secure authorization from FERC, DOE and any other

[11] *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989).

[12] RG Developers filed their request to commence FERC's mandatory pre-filing process on March 20, 2015. *See Rio Grande LNG, LLC and Rio Bravo Pipeline Company, LLC*, "Request to Initiate NEPA Pre-Filing Process for Rio Grande LNG and Rio Bravo Pipeline Projects," Docket No. PF15-20 (filed Mar. 20, 2015).

federal or state agency with jurisdiction over the export project, as has occurred with several other LNG projects.

Cheniere's Sabine Pass LNG project is instructive in that it demonstrates FERC's ability to adjust to the practical realities and real-time needs of LNG development projects during the often lengthy periods between pre-filing and final order authorizing the project. Cheniere's initial Sabine Pass LNG application was filed on January 31, 2011, for four LNG trains each having a capacity of 4 mtpa (for a total of 16 mtpa across the facility).[13] On November 14, 2011, Cheniere announced it entered into an engineering, procurement and construction ("EPC") agreement for the first two trains at Sabine Pass LNG, each with a nominal capacity of 4.5 mtpa.[14] After FERC issued an order on April 16, 2012,[15] approving the proposal to construct and operate facilities to liquefy and export up to 16 mtpa of domestically produced natural gas, Cheniere signed another EPC contract for the construction of an additional two trains (3 and 4) at the Sabine Pass LNG project each also having a nominal capacity of 4.5 mtpa,[16] for a combined project total of 18 mtpa. On October 25, 2013, Cheniere applied to FERC for an amendment to the previously issued order to increase the overall project capacity to 20 mpta from 16 mtpa.[17] On February 20, 2014, FERC granted the amended order to increase Cheniere's Sabine Pass LNG project capacity to 20 mtpa from 16 mtpa.[18]

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[13] *Sabine Pass Liquefaction, LLC, and Sabine Pass LNG, L.P.*, "Application for Authorization Under Section 3 of the Natural Gas Act," Docket No. CP11-72-000 (filed Jan. 31, 2011).

[14] *See* Press Release, Cheniere Partners Enter into Lump Sum Turnkey Contract with Bechtel (November 14, 2011), https://www.prnewswire.com/news-releases/cheniere-partners-enters-into-lump-sum-turnkey-contract-with-bechtel-133799293.html.

[15] *Sabine Pass Liquefaction, LLC and Sabine Pass LNG, L.P.*, 139 FERC ¶ 61,039 (2012).

[16] *See* Press Release, Cheniere Partners Enter into Lump Sum Turnkey Contract with Bechtel for Trains 3 and 4 at Sabine Pass Liquefaction (December 21, 2012), https://www.prnewswire.com/news-releases/cheniere-partners-enters-into-lump-sum-turnkey-contract-with-bechtel-for-trains-3-and-4-at-sabine-pass-liquefaction-184414211.html.

[17] *Sabine Pass Liquefaction, LLC*, "Application to Amend Authorization Under Section 3 of the Natural Gas Act," Docket No. CP14-12 (filed Oct. 25, 2013).

[18] *Sabine Pass Liquefaction, LLC and Sabine Pass LNG, L.P.*, 146 FERC ¶ 61,117 (2014).

Similarly, Freeport LNG filed its application with FERC on August 31, 2012, proposing three trains, each with a production capacity of 4.4 mtpa for a total of 13.2 mtpa.[19] Freeport executed an EPC agreement with a joint venture of CB&I and Zachry on December 10, 2013, for the first two trains, which would "have a total capacity *in excess of* 8.8 million tons per year of LNG."[20] FERC issued an order authorizing the 13.2 mtpa project on July 30, 2014.[21] On June 15, 2015, Freeport filed an application with FERC seeking to amend its total LNG production capacity to 15.3 mtpa from 13.2 mtpa, as a result of "engineering refinements and progressions,"[22] which FERC authorized on July 7, 2016.[23]

RG Developers recognize and accept that if an LNG export project developer desires to expand a facility or produce more LNG than what FERC and other agencies have authorized, additional analysis must be undertaken and authorizations secured from all relevant agencies for the new increased export capacity. At this time, RG Developers do not intend to produce more than 27 mtpa of LNG for export. If the market in the future were to indicate an interest in more than 27 mtpa, RG Developers will abide by all legal and regulatory requirements in order to obtain authorizations and permits to produce and export additional volumes of LNG above 27 mtpa.

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[19] *Freeport LNG Development, L.P., et al*., "Application for Authorization Under Section 3 of the Natural Gas Act," Docket No. CP12-509 (filed Aug. 31, 2012).

[20] *See* Press Release, CBI Awarded Contract for LNG Liquefaction Terminal (December 10, 2013), http://www.mcdermott-investors.com/news/historical-cbi-news/historical-cb-i-news-details/2013/CBI-Awarded-Contract-for-LNG-Liquefaction-Terminal/default.aspx.

[21] *Freeport LNG Development, L.P., et al.,* 148 FERC ¶ 61,076 (2014).

[22] *Freeport LNG Development, L.P.*, et al., "Application for Limited Amendment to Authorization Granted Under Section 3 of the Natural Gas Act," Docket No. CP15-518 (filed Jun. 15, 2015).

[23] *Freeport LNG Development, L.P.*, et al., 156 FERC ¶ 61,019 (2016).

Conclusion

For the foregoing reasons, RG Developers respectfully request that FERC reject the Commenters' Request for an SEIS and promptly proceed with issuing the NGA Section 3 authorization and NGA Section 7 certificate for the RG Developers project.

Respectfully submitted,

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