



October 15, 2020

Kimberly D. Bose
Federal Energy Regulatory Commission
Office of the Secretary
888 1st Street NE
Washington, DC 20428

**Re: Delaware River Partners, LLC, FERC Docket No. CP20-522-000
Protest in Opposition to Petition for Declaratory Order**

Dear Ms. Bose,

The Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper (collectively, “DRN”) submit this protest in opposition to Delaware River Partners, LLC’s (“DRP’s”) Petition for Declaratory Order Disclaiming Jurisdiction and Motion for Expedited Action (“Petition” or “DRP Petition”) submitted to the Federal Energy Regulatory Commission (“FERC” or the “Commission”) on September, 11, 2020. In its Petition, DRP asks the Commission to ignore Congress’s command in the Natural Gas Act (“NGA”),¹ and look the other way while DRP and its affiliates transport natural gas in interstate commerce and export natural gas in foreign commerce without a certificate of public convenience and necessity, and contrary to the public interest. The Commission should deny DRP’s petition and hold that the Gibbstown Logistics Center (“Facility”) as proposed is subject to the Commission’s jurisdiction under the NGA.

Congress enacted the Natural Gas Act in 1938, declaring that “Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.”² The NGA applies to, among other things, “the transportation of natural gas in interstate commerce . . . and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation.”³ Section 3 of the NGA governs the exportation and importation of natural gas, and LNG terminals used to export and/or import natural gas.⁴ While the

¹ 15 U.S.C. §§ 717–717z.

² 15 U.S.C. § 717(a).

³ 15 U.S.C. § 717(b).

⁴ 15 U.S.C. § 717b.

United States Department of Energy (“DOE”) has jurisdiction over export and import authorizations,⁵ the Commission has “the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”⁶ Section 7 of the NGA grants the Commission jurisdiction over the transportation in interstate commerce of natural gas and the construction, acquisition, operation and abandonment of facilities used to transport gas in interstate commerce.⁷

In its Petition, DRP describes an untested strategy of producing and liquefying natural gas in Pennsylvania, then transporting the liquefied natural gas (“LNG”) by railcar and truck to an export facility in New Jersey, then transloading the LNG from the railcars and trucks to waterborne vessels bound for domestic consumers and foreign countries. DRP invites the Commission to disclaim jurisdiction over this project, despite that it involves both the transportation of natural gas in interstate commerce *and* the exportation of natural gas in foreign commerce. The Commission must act in the public interest, and in accordance with the plain language of the NGA, and decline DRP’s invitation. In fact, as we see from documents only secured by the Delaware Riverkeeper Network through litigation to enforce a Freedom of Information Act request that they didn’t just invite but in fact coaxed the Commission in closed door meetings.

I. FERC Docket Numbers CP20-522 and CP20-524 Should Be Consolidated So That the Commission Is Provided a Comprehensive Understanding of the Project’s Purpose and Scale.

DRP filed this Petition mere days before its affiliate, Bradford County Real Estate Partners, LLC (“BCREP”), filed a similar petition seeking the same relief—a declaratory order disclaiming jurisdiction.⁸ In that petition, BCREP describes a natural gas liquefaction plant in Wyalusing, Pennsylvania, which is yet another link in the chain through which these entities seek to transport natural gas in interstate commerce and export natural gas in foreign commerce. Because a comprehensive understanding of the entire operation is necessary for the Commission’s decision whether to exercise jurisdiction under Section 3 and/or Section 7 of the NGA, these dockets should be consolidated. In addition, a new Notice should be issued by the Commission, so that interested parties, particularly those who may be impacted by the truck and rail operations throughout Pennsylvania and New Jersey, have a chance to intervene and/or protest the consolidated petitions. In addition, given that the Wyalusing extraction operations and plant are a known and integral source of the gas to be transported, the environmental impacts of those operations are a clearly mandatory part of the Commission’s review of this project.

⁵ 15 U.S.C. § 717b(a).

⁶ 15 U.S.C. § 717b(e).

⁷ 15 U.S.C. § 717f.

⁸ See Petition for Declaratory Order Disclaiming Jurisdiction and Motion for Expedited Action, Accession No. 20200918-5180, Bradford County Real Estate Partners LLC, FERC Docket No. CP20-524-000 (Sept. 18, 2020) (hereinafter, “BCREP Petition”) (attached hereto as Exhibit B).

II. DRP’s Facility is a Novel and Creative Attempt to Evade FERC Jurisdiction that Must be Thwarted by the Commission.

The NGA entrusts the Commission with broad jurisdictional authority over LNG terminals, such as the one proposed by DRP. Specifically, the NGA broadly states that “[t]he Commission shall have the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”⁹ LNG terminals, in turn, are statutorily defined as “all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—(A) waterborne vessels used to deliver natural gas to or from any such facility; or (B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 7.”¹⁰

In an attempt to exploit the meaning and true purpose of the NGA, DRP is proposing a “loop-hole” to the Commission’s Section 3 jurisdictional authority that would limit and undermine the Commission’s ability to oversee the siting, construction, expansion, and operations over LNG terminals. The Commission should not allow operators, such as DRP, to use innovation in order to exploit a system that was made to protect consumers.

DRP describes its proposed operations in the petition as follows. LNG would be delivered to the Facility “by means of truck and railcar from LNG liquefaction facilities being developed by New Fortress [Energy Inc. (“New Fortress”)] such as the facility in Wyalusing Township, Bradford County, Pennsylvania, or from third-party liquefaction facilities.”¹¹

The Facility features “truck- and railcar-unloading facilities” currently capable of handling LNG and other liquefied gases, and a dock (“Dock 1”) that is currently capable of receiving an LNG marine vessel.¹² In addition, DRP has sought permits from authorities such as the United States Army Corps of Engineers (“Corps”), the New Jersey Department of Environmental Protection (“NJDEP”), and the Delaware River Basin Commission (“DRBC”) to construct a second dock (“Dock 2”) “capable of receiving two marine vessels,” and DRP also “plans to construct additional truck- and railcar-unloading facilities to handle LNG transloading operations at the Facility.”¹³ The Facility is also capable of loading ISO containers directly onto cargo vessels, or transloading LNG from ISO containers to an LNG marine vessel.¹⁴

⁹ 15 U.S.C. § 717b(e)(1).

¹⁰ 15 U.S.C. § 717a(11).

¹¹ DRP Petition at 5.

¹² *Id.* at 3.

¹³ *Id.* at 4.

¹⁴ *Id.* at 4, 5.

Boil-off gas, which is an inevitable result of the effort to contain LNG at the temperature required to maintain a liquid state, would be handled in three different ways at the Facility: (1) through a capture-and-return system operated by the marine vessel (essentially re-liquefying the gas); (2) by collecting the boil-off gas and routing it to on-site generation equipment used to power operations at the Facility; and (3) by flaring the boil-off gas.¹⁵ The Facility would also feature a floating LNG storage unit.¹⁶

Once the LNG is transloaded onto the waterborne vessel, that vessel would either: (1) transport the LNG directly from the Facility to foreign ports; (2) the floating storage unit or shuttle vessel would transport the LNG from the Facility to a larger ocean-going vessel for delivery to foreign ports; (3) the floating storage unit or shuttle vessel would transport the LNG directly to domestic end-users; or (4) the ISO containers or their contents (via transloading) would be transported by vessel directly to foreign ports or to domestic end-users.¹⁷

The Facility proposed by DRP is an example of a new type of facility that is not following the industry standard. Historically, natural gas has been predominantly exported through pipeline systems to facilities where they undergo several processes, including liquefaction, before being transported to their final destination. Here, DRP is proposing a large-scale operation where they outsource the liquefaction process and then transport the already liquified natural gas through rail and truck to another high scale facility where it will undergo several processes before being stored and/or exported via water vessel to Puerto Rico or an international location. To DRN's knowledge, the Commission has not yet examined a facility of this type to determine whether there is Section 3 jurisdiction.

DRP claims that the Facility is not subject to the Commission's jurisdiction because "it does not meet the definition of an 'LNG terminal' *as interpreted by the Commission.*"¹⁸ While DRP has stated that the Commission has a three-part test under Section 3 to determine whether a facility is jurisdictional, there is no record of the Commission officially instituting any jurisdictional test. Instead, the Commission has stated that "to date, the facilities which the Commission has viewed as "LNG terminals" for purposes of its jurisdiction have all been (1) connected to a pipeline that delivers gas to or sends gas from the facility and (2) located at the point of import or export such that LNG is directly transferred to or from an ocean-going, bulk-carrier LNG tanker."¹⁹ The Commission's jurisdiction is not limited just because these are the only types of facilities that have been previously viewed as LNG terminals.

As technology progresses, new and different types of facilities will appear and need to be evaluated for jurisdictional purposes. The Commission has previously stated that

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 4–5, n.5.

¹⁸ *Id.* at 6 (emphasis added).

¹⁹ *New Fortress Energy, LLC, Order to Show Cause*, 171 FERC ¶ 61,230 (2020).

“jurisdictional determinations concerning LNG projects are made on a case-by-case basis.”²⁰ As such, the Commission should individually evaluate whether it has Section 3 jurisdiction over the DRP facility.

III. The Commission Should Apply the Plain Language of the Natural Gas Act to the DRP Facility and Exercise its Jurisdiction Under Section 3.

The Natural Gas Act, broadly defines an LNG terminal to include “all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include--(A) waterborne vessels used to deliver natural gas to or from any such facility; or (B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 7.”²¹

A plain-language analysis of the NGA’s definition of “LNG terminal” reveals that DRP’s Facility fits squarely within it. First, the Facility is a natural gas facility. Although “natural gas facility” is not a defined phrase in the NGA, its meaning can be readily ascertained. A “facility” is defined in the Merriam-Webster Collegiate Dictionary as “something (such as a hospital) that is built, installed, or established to serve a particular purpose.” That purpose, in this context, is “natural gas.”

DRP seeks to narrow the term “natural gas facility” by highlighting all facilities over which the Commission has previously exercised jurisdiction and freezing time as of the date DRP filed its petition.²² While precedent is informative and relevant, it cannot be the end-all be-all in a rapidly shifting and spreading industry. According to DRP’s logic, the Commission can no longer evaluate facilities on a “case-by-case” basis,²³ and now must only look retrospectively at the facilities it exercised jurisdiction over in the past. Rather, the Commission should look to the plain meaning of the term, read harmoniously with the purposes of the NGA.

Furthermore, the definition of “LNG terminal” specifically excludes from “all natural gas facilities”: “(A) waterborne vessels used to deliver natural gas to or from any such facility; or (B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 7.”²⁴ Following the canons of construction, the expression of one thing implies the exclusion of others--thus, the expression of two limited exceptions to “all natural gas facilities” implies the exclusion of the unwritten exceptions that DRP urges the Commission to adopt.

²⁰ *Marathon Oil Company et al.*, 53 FPC 2164, 2173 (1975).

²¹ 15 U.S.C. § 717a(11).

²² DRP Petition at 11–14.

²³ *Marathon Oil Company et al.*, 53 FPC 2164, 2173 (1975).

²⁴ 15 U.S.C. § 717a(11).

Turning to the listed uses of a natural gas facility in the statutory definition of “LNG terminal,” DRP’s Facility would receive, unload, load, store, and transport natural gas that is exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel.²⁵ As described above, and as DRP outlined in its petition, the Facility would: “receive” LNG by truck and railcar;²⁶ “unload” and “load” LNG by the process of transloading, or by treating ISO containers as cargo;²⁷ “store” LNG in a floating storage container, in ISO containers, and inevitably store the LNG on truck and railcar due to the differing capacities of the modes of transportation (truck/railcar to large vessel);²⁸ and transport natural gas as a link in the chain from the Marcellus shale formation to domestic and foreign destinations.²⁹

In sum, because the Facility is a facility built, installed, or established to serve the purpose of receiving, unloading, loading, storing, and exporting natural gas, it is a natural gas facility.

IV. *Shell U.S. Gas & Power, LLC*, Was Based on Faulty Reasoning that the Commission Should Now Reject.

In *Shell U.S. Gas & Power, LLC*³⁰ (“*Shell*”), the Commission incorrectly decided that Section 3 jurisdiction was limited to facilities that have pipelines because only LNG import terminals connected to pipelines have come before the Commission for approval. In essence, the Commission declared that the industry standard, at that time, was the equivalent to its jurisdictional scope under Section 3 of the NGA. All facilities that fall outside of the scope of the industry standard have not been considered LNG terminals by the Commission. In reality, and as explored in former Commissioner Norman Bay’s dissent in *Shell*, the jurisdictional scope of Section 3 of the NGA, as plainly stated in the statute and intended by Congress, is much broader.

The Energy Policy Act of 2005 “explicitly provides the Commission with exclusive authority over LNG terminals subject to the [Commission’s] section 3 jurisdiction.”³¹ The majority in *Shell* acknowledged that in creating the Energy Policy Act of 2005, Congress employed “a very broad definition of ‘LNG Terminal.’”³² Specifically, Congress gave the Commission the power to regulate “all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process

²⁵ See 15 U.S.C. § 717a(11).

²⁶ DRP Petition at 5.

²⁷ *Id.* at 3–5.

²⁸ *Id.*

²⁹ *Id.* at 4–5, n.5.

³⁰ *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163 (2014).

³¹ *The Gas Company*, 142 FERC ¶ 61,036, P 17 (2013).

³² *Shell*, 148 FERC ¶ 61,163, p. 43 (2014).

natural gas" that is imported to, or exported from, the United States, or "transported in interstate commerce by waterborne vessel."³³

As established in the previous section of this protest, the DRP Facility is located at the point of import or export such that LNG is directly transferred to or from an ocean-going, bulk-carrier LNG tanker. The DRP facility will involve facilities that will "receive," "load," "unload," "store"³⁴, "transport", and "gasify"³⁵ natural gas that is exported from the United States [to other countries] and "transported in interstate commerce [to Puerto Rico] by waterborne vessels. As such, a plain reading of Section 2(11) of the NGA would find that the DRP facility clearly is an "LNG terminal" within the meaning of the Natural Gas Act.

In *Shell*, the Commission also based its Section 3 determination, in part, on the fact that the Commission has generally limited its jurisdiction under Section 3 or 7 of the Natural Gas Act to facilities that send or receive natural gas by pipeline.³⁶ Unlike Section 3, Section 7 of the NGA gives the Commission jurisdiction over "transportation facilities."³⁷ As compared, Section 2(11) defines "LNG terminals" to include "all natural gas facilities," which in turn includes, but is not limited to, "transportation facilities."³⁸ The former is broader than the latter, as evidenced by that definition's use of "transport" as one of many purposes for a "natural gas facility."³⁹ Had Congress intended a more limited approach it could have used the language of Section 7 to limit jurisdiction under Section 3.

The majority in *Shell* also decided that, although the projects will involve natural gas "transported in interstate commerce by waterborne vessel," the only waterborne transportation that counts for purposes of section 2(11) is interstate delivery to a facility that is connected to a pipeline (whether intrastate or interstate).⁴⁰ In support, the majority pointed to a jurisdictional dispute between California and FERC involving this fact pattern that preceded the enactment of the Energy Policy Act of 2005.⁴¹ If anything, that history suggests that Congress intended to pre-empt state action and used broad language to accomplish that result, providing "exclusive authority" to the Commission with respect to

³³ 15 U.S.C. § 717a(11).

³⁴ While DRP stated in the Petition that they do not have storing facilities, they also seemingly contradicted themselves by admitting that they will have a "floating storage unit". The trucks and railcars that will be on the site are also a form of storage, particularly considering that the perpetual loading of the shipping vessels from the tank trucks and rail tank cars will result in the continuing presence of these tanks on the site. See the Land Development Plan Approval from Greenwich Twp. to DRP for Dock 1 (stating that rail cars will be parked on site).

³⁵ DRP contradicted themselves in the petition by stating that "the LNG transloaded at or transported from the Facility will not be regasified.... except for the potential limited scenario in which LNG that is transloaded onto waterborne vessels at the Facility is ultimately regasified."

³⁶ *Shell*, 148 FERC ¶ 61,163, p. 43 (2014).

³⁷ See 15 U.S.C. § 717f(a).

³⁸ See 15 U.S.C. § 717a(11) ("LNG terminal' includes all natural gas facilities . . . that are used to receive, unload, load, store, [or] transport . . . natural gas").

³⁹ See 15 U.S.C. § 717a(11).

⁴⁰ See *Shell*, 148 FERC ¶ 61,163, P 43, 48 (2014).

⁴¹ *Id.*

LNG terminals⁴², including “all natural gas facilities” in which natural gas was “transported in interstate commerce by waterborne vessel”.⁴³

Continuing to apply the faulty reasoning in *Shell* would embolden operators, such as DRP, to find innovative ways, outside of the industry standard, to transport LNG and operate LNG facilities, in order to usurp the purpose of the Natural Gas Act. The Commission must follow congressional intent when interpreting the jurisdictional standard set out in Section 3 of the NGA. A plain reading of the statute, as Congress intended, makes clear that the Commission has broad and ample Section 3 jurisdiction over the DRP facility.

V. If the Commission Declines to Exercise Jurisdiction Based on Section 3 of the NGA, it Should Exercise Section 7 Jurisdiction Because the Facility is a Link in the Interstate Transportation Chain.

Section 7 of the NGA requires a natural-gas company⁴⁴ apply for a certificate of public convenience and necessity prior to “engag[ing] in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertak[ing] the construction or extension of any facilities therefor, or acquir[ing] or operat[ing] any such facilities or extensions thereof . . .”⁴⁵ The “jurisdiction of the Commission” is defined in Section 1(b) of the NGA as: “the transportation of natural gas in interstate commerce, . . . the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and . . . natural-gas companies engaged in such transportation or sale, and . . . the importation or exportation of natural gas in foreign commerce and . . . persons engaged in such importation and exportation . . .”⁴⁶ “Interstate commerce,” in turn, “means 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.”⁴⁷

Because the DRP Facility would be a link in the transportation of natural gas in interstate commerce, the Commission has the authority to exercise jurisdiction over the Facility. DRP describes in its Petition that once the LNG is transloaded into the floating storage unit or shuttle vessel, the floating storage unit or shuttle vessel would transport the LNG directly to domestic end-users, or, alternatively, ISO containers or their contents (via transloading) would be transported by vessel directly to domestic end-users.⁴⁸ Because the Facility would transport natural gas from New Jersey to another state, it is a “facility” for the “transportation of natural gas in interstate commerce.”⁴⁹ Thus, based on the plain language

⁴² 15 U.S.C. § 717b(e)(1).

⁴³ 15 U.S.C. § 717a(11).

⁴⁴ “Natural-gas company” is defined in 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.” 15 U.S.C. § 717a(7).

⁴⁵ 15 U.S.C. § 717f(c)(1)(A).

⁴⁶ 15 U.S.C. § 717(b).

⁴⁷ 15 U.S.C. § 717a(7).

⁴⁸ DRP Petition at 4–5, n.5.

⁴⁹ 15 U.S.C. § 717(b).

of the NGA, prior to the construction of the Facility, DRP is required to obtain a certificate of public convenience and necessity.⁵⁰

Even if the Commission finds the transportation of natural gas between New Jersey and the as-yet-unnamed states to be non-jurisdictional, the Commission should exercise its Section 7 jurisdiction over the “virtual pipeline” from Pennsylvania to New Jersey. DRP argues that, based on past decisions of the Commission, “Section 7 jurisdiction is limited to transportation of natural gas in its gaseous or liquefied state by pipeline only and that this ‘jurisdiction does not extend to deliveries of natural gas by truck, train, or barge.’”⁵¹

However, the Commission has made clear in past decisions that “[a]ny lack of jurisdiction on the Commission’s part in the . . . regulation of LNG, moreover, would seriously weaken the statutory scheme by which Congress intended the Commission to regulate the interstate movement of natural gas.”⁵² The Commission has also recognized that “the NGA is remedial in nature and Congress could not have intended to permit a transportation innovation essentially unknown in 1938 to defeat the statutory scheme devised. Thus, the Commission has explained that the interstate transportation of natural gas is a continuum that cannot be ‘broken’ by a party liquefying and transporting gas as LNG as a means of circumventing the NGA.”⁵³

Here, DRP and its affiliates do exactly that by liquefying the natural gas in Wyalusing, Pennsylvania and transporting it via a “virtual pipeline” of trucks and railcars to Gibbstown, New Jersey. The trucks and railcars transporting LNG from Wyalusing to Gibbstown constitute a “virtual pipeline” that is an obvious attempt to circumvent the Commission’s jurisdiction that it would otherwise clearly have exercised had DRP or any of its affiliated entities constructed a physical pipeline.

First, the transportation of the LNG would be between two defined and consistent points of location. In its Petition, DRP states that “New Fortress has entered into a multi-year agreement with DRP to have the exclusive right to transload LNG through the Facility” and that “New Fortress anticipates delivering LNG to the Facility by means of truck and railcar from LNG liquefaction facilities being developed by New Fortress, such as the facility in Wyalusing Township, Bradford County, Pennsylvania”⁵⁴ According to BCREP’s petition for a declaratory order, “New Fortress will be the sole offtaker of LNG produced by BCREP at the [Wyalusing] Facility pursuant to a multi-year agreement with BCREP” and “New Fortress will transport the LNG from the Facility by non-pipeline modes of transportation, i.e. truck and rail, for delivery to marine vessels at the LNG transloading facility in Gibbstown,

⁵⁰ *Id.*

⁵¹ DRP Petition at 14 (quoting *Gulf Oil Ltd. P’ship*, 148 FERC ¶ 61,029 at P 8 (2014)).

⁵² *Air Products and Chemicals, Inc.*, 58 FERC ¶ 61,199 (1992) (quoting *Distrigas Corporation*, 47 FPC 752, 759 (1972)).

⁵³ *Southern LNG Inc.*, 131 FERC ¶ 61,155 at P 17 (2010).

⁵⁴ DRP Petition at 5.

New Jersey . . .”⁵⁵ Thus, as proposed, LNG would be transported in interstate commerce between Pennsylvania and New Jersey for multiple years pursuant to New Fortress’s agreements with DRP and BCREP.

Second, the amount of LNG that would be transported from the Wyalusing liquefaction plant to the DRP Facility would be of a volume and frequency comparable to a natural gas pipeline. Based on filings by Energy Transport Solutions (“ETS”), a New Fortress subsidiary that sought and obtained a special permit to carry LNG by rail from Wyalusing to Gibbstown, ETS “anticipates operating two unit trains a day,”⁵⁶ and that each unit train will consist of “50-100 cars per day.”⁵⁷ Thus, if each approved DOT specification 113C120W tank car can hold 30,000 gallons of LNG,⁵⁸ and each gallon on LNG equals 26,993 therms, then each rail car has the capacity to transport 2,699 dekatherms of natural gas. If two unit trains each carrying 50 cars travel from Wyalusing to Gibbstown per day, that would amount to 269,900 dekatherms per day (Dth/d) of natural gas. If the unit trains each carried 100 cars, then 539,800 Dth/d would be carried from Wyalusing to Gibbstown. This range of 269,900-539,800 Dth/d is comparable to the capacity of a natural gas pipeline.⁵⁹ Of note, this figure does not include the additional transport of LNG from Wyalusing to Gibbstown via truck or ISO container, and does not include LNG received by the DRP facility from non-Wyalusing sources.

Thus, after consolidating both DRP’s and BCREP’s petitions for declaratory orders,⁶⁰ the Commission should exercise its Section 7 jurisdiction over the transportation of natural gas in interstate commerce between Pennsylvania and New Jersey, because “liquefaction of the gas [would be] interposed on what would otherwise have been a continuous flow of natural gas in an interstate pipeline system.”⁶¹

⁵⁵ BCREP Petition at 3.

⁵⁶ See Application for a Special Permit, to Transport Methane, Refrigerated Liquid in DOT 113 Tank Cars at 7, Energy Transport Solutions LLC (Aug. 21, 2017) (Attached as Exhibit C). ETS is a subsidiary of New Fortress Energy, LLC.

⁵⁷ *Id.* at 6.

⁵⁸ Preliminary Regulatory Impact Analysis, PHMSA-2018-0025 (HM-264) RIN 2137-AF40 (October 2019) at 23.

⁵⁹ For example, the Adelphia Gateway Pipeline Project is an 18-inch pipeline that transports 250,000 dekatherms per day. Oil & Gas Journal (2019). FERC certificate progresses Adelphia Gateway project. December 20, 2019. Retrieved from <https://www.ogi.com/pipelines-transportation/pipelines/article/14074005/ferc-certificate-progresses-adelphia-gateway-project>. The Millennium Eastern System Upgrade Project in New York consists of 30- and 36-inch pipelines with a capacity of approximately 223,000 dekatherms per day. NYSDEC (2017). Millennium Pipeline Company, LLC (Eastern System Upgrade Project). Retrieved from <https://www.dec.ny.gov/enb/110570.html>.

⁶⁰ See Section I, *supra*.

⁶¹ Air Products and Chemicals, Inc., 58 FERC ¶ 61,199 (1992).

VI. The Commission’s Jurisdiction Would Not Be Overly-Expansive and Would Fill a Regulatory Gap.

DRP complains that if the Commission were to exercise jurisdiction over the Facility, the “absurd consequence” of that decision would be to expand the Commission’s jurisdiction to all ports receiving or sending LNG in ISO containers.⁶² First, DRP does not explain why this consequence is absurd. Second, DRP neglects that the Commission exercises jurisdiction on a case-by-case basis,⁶³ and any decision the Commission makes about DRP’s Facility is not necessarily binding on another facility with different features.

Next, DRP argues that there is no “regulatory gap” that the Commission must fill with regard to the Facility.⁶⁴ In support of this argument, DRP claims that the Facility is “subject to comprehensive environmental and safety regulation and therefore cannot fall into any regulatory gap.”⁶⁵ While the Facility may be subject to *multiple* environmental and safety regulations imposed by *multiple* federal and state entities, this does not mean that it is subject to *comprehensive* regulation. In fact, the primary benefit to human health and the environment that would be provided by the Commission’s jurisdiction over the Facility would be a comprehensive analysis of the entire transportation and export operation, and the Commission’s determination whether, based on this comprehensive understanding, the overall project is “not inconsistent with the public interest”⁶⁶ and/or “required by the present or future public convenience and necessity.”⁶⁷ As with any application under Section 3 or Section 7, other federal and state entities play an important role in imposing regulatory requirements that protect human health and the environment. The presence of these requirements, therefore, does not justify the absence of the Commission’s jurisdiction.

VII. The Guidance Provided by FERC Staff to New Fortress Was Not Binding, and New Fortress Was Explicitly Informed that a Declaratory Order Would Be Necessary to Determine the Issue of Jurisdiction.

In its Petition, DRP describes a meeting and correspondence between New Fortress and certain FERC staff members, as well as correspondence from FERC staff to DRN in response to a FOIA request. These meetings and correspondences are not binding on the Commission. In fact, FERC Staff explained to New Fortress that the Commission’s policies are subject to change, and the only means of obtaining certainty as to the Commission’s jurisdiction is to seek a Declaratory Order.⁶⁸ Thus, to the extent DRP seeks to bind the Commission to prior statements made by staff where staff explicitly disclaimed the reliability of its statements, the Commission should reject that attempt.

⁶² DRP Petition at 19.

⁶³ *Marathon Oil Company et al.*, 53 FPC 2164, 2173 (1975).

⁶⁴ DRP Petition at 19.

⁶⁵ *Id.*

⁶⁶ 18 C.F.R. § 153.7(c)(1) (governing applications under Section 3).

⁶⁷ 18 C.F.R. § 157.6(b)(2) (governing applications under Section 7).

⁶⁸ See Petition for Declaratory Order, Attachment A.

VIII. Should the Commission Decline to Exercise its Jurisdiction, a Natural Gas Project Contrary to the Public Interest and Not Required by the Public Convenience and Necessity Will Be Constructed and Operated.

DRP's filings raise another issue for the Commission to consider: is the DRP Facility consistent with the public interest, and/or is it required by the present or future public convenience and necessity?⁶⁹ Under Section 3 of the NGA, the Commission cannot approve an LNG terminal unless it finds that the proposed exportation or importation will be consistent with the public interest.⁷⁰ Under Section 7, the Commission must determine whether interstate transportation and the facilities used therefor are required by the public convenience and necessity.⁷¹ There is no plausible way to determine whether the DRP facility is consistent with the public interest or required by the present or future public convenience and necessity because there has been no analysis of the planned operation under the National Environmental Policy Act ("NEPA"),⁷² and no Environmental Impact Statement issued. The Commission must exercise jurisdiction in order to participate in the NEPA analysis and ensure that the project is consistent with the public interest and required by the public convenience and necessity. In order to assist the Commission in its understanding of the scope of this project's impact, DRN hereby attaches and incorporates by reference comments submitted by DRN to NJDEP,⁷³ the Corps,⁷⁴ PHMSA,⁷⁵ DRBC,⁷⁶ and DOE.⁷⁷

As of now, many questions and concerns remain as to the safety of the project. These concerns are exacerbated by DRP's history of misconstruing project features and their constant contradictions. *See Exhibit A* (wherein DRN lists examples of features that DRP has misconstrued or contradicted). As it stands, it cannot be reasonably concluded that the project will be in the public's interest or that is required by the public convenience and necessity.

A. The Manner in Which DRP Proposes to Transport LNG is Dangerous

One of the threats imposed by this project is the heightened danger of transporting volatile LNG via railcars and trucks through highly populated areas. As DRN understands, the proposed route involves crossing densely populated areas in Pennsylvania including Wilkes Barre, Allentown, and Philadelphia. Scientists have constantly advised against the transport

⁶⁹ 18 C.F.R. §§ 153.7(c)(1), 157.6(b)(2).

⁷⁰ 15 U.S.C. § 717b(a)

⁷¹ 15 U.S.C. § 717f(c)(1)(A), (2).

⁷² 42 U.S.C. §§ 4321-4370h.

⁷³ Attached hereto as Exhibit D.

⁷⁴ Attached hereto as Exhibit E.

⁷⁵ Attached hereto as Exhibit F.

⁷⁶ Attached hereto as Exhibit G.

⁷⁷ Attached hereto as Exhibit H.

of LNG through highly populated areas due to the risk of human and technological error, as well as national security risks.

The Congressional Research Service has issued several publications detailing the unique dangers posed by the transport and storage of LNG. The CRS has found that “a major spill would likely result in a...serious fire.”⁷⁸ Their review of the literature notes that a safety zone could require more than 4,000 feet distance from an LNG spill.⁷⁹ CRS also notes that counterterrorism advisors have “asserted that terrorists have both the desire and capability to attack LNG shipping with the intention of harming the general population.”⁸⁰ In citing a 2014 study for the Maritime Administration, CRS warned that “prospective shippers of LNG by rail (to ports) perform a detailed study of potential routes for LNG transportation...that avoid densely populated areas and identify emergency response capabilities.”⁸¹

The amount of energy contained in LNG is quite alarming. One gallon of LNG has 0.89975 therms of energy.⁸² One DOT-113 tank car has a capacity of approximately 30,000 gallons,⁸³ meaning that there would be approximately 27,000 therms worth of energy per tank car. With this much LNG per tank car, it would only take 22 tank cars to hold the equivalent energy of the Hiroshima bomb.⁸⁴ According to Energy Transport Solutions, LLC’s (“ETS’s”) application for a special permit from the Pipeline and Hazardous Materials Safety Administration (“PHMSA”), the trains used to transport the LNG will contain 50-100 cars.⁸⁵ Despite these risks, there has been no NEPA review of the project, and DRP is insisting that the Commission should not be involved.

Additionally, there is also a significant risk associated with transporting LNG by truck. Truck risk factors include driver behavior, traffic congestion and truck speed, and the increasing volume of trucks on the road relative to other vehicles.⁸⁶ Alarmingly, a study showed that 2,925 LNG carriers were involved in crashes over a 12-month period.⁸⁷ These

⁷⁸ CONGRESSIONAL RESEARCH SERVICE, Liquefied Natural Gas (LNG) Import Terminals: Siting, Safety, and Regulation at 6, (Dec. 14, 2009),

https://www.everycrsreport.com/files/20091214_RL32205_e95cb50c88dbd56a2c8f706b2d521ef7ae81ee0.pdf

⁷⁹ Id at 7.

⁸⁰ Id at 23.

⁸¹ CONGRESSIONAL RESEARCH SERVICE, Liquefied Natural Gas by Rail: Policy Issues, at 1-2 (Nov. 18, 2019).

⁸² Report to the Congress, Liquefied Energy Gases Safety (July 31, 1978) at 2-2; see also U.S. DEPT. ENERGY, LIQUEFIED NATURAL GAS: UNDERSTANDING THE BASIC FACTS, at 9 (noting that one cubic foot of LNG contains 660,000 BTU)

⁸³ Preliminary Regulatory Impact Analysis, PHMSA-2018-0025 (HM-264) RIN 2137-AF40 (October 2019) at 15. (Attached as Exhibit I)

⁸⁴ The Hiroshima Bomb had the equivalent of 15 kilotons of TNT. John Malik, LOS ALAMOS NAT'L LAB. for U.S. DEPT. ENERGY, THE YIELDS OF THE HIROSHIMA AND NAGASAKI NUCLEAR EXPLOSIONS, at 25 (1985).

⁸⁵ See Application for a Special Permit, to Transport Methane, Refrigerated Liquid in DOT 113 Tank Cars at 6, Energy Transport Solutions LLC (Aug. 21, 2017) (Attached as Exhibit B).

⁸⁶ Risk Assessment of Surface Transport of Liquid Natural Gas (March 20, 2019) at 95. (Attached as Exhibit J)

⁸⁷ Id. at 98.

accidents could prove catastrophic as they could result in fires and explosions due to loss of containment.

The danger of LNG is also exacerbated when transloading LNG. The facility would transload throughout the day from trucks or rail cars into shipping vessels. This process would take around 2 weeks to complete, an extended period that greatly increases the opportunity for accidents and spills. Typically, LNG facilities complete transloading in one day in order to minimize risk. The facility is not taking appropriate safety measures in order to protect the human community from unavoidable risks that come from extending the time to transload, such as human error or technological failure. The facility is located in a densely populated area with communities such as Gibbstown, Tinicum Township, Chester and the Philadelphia Airport within ~2 miles of the site. The facility also places at least 75 neighbors that are within 200 feet of the property, at greater risk, including a child care center and the Gibbstown Public School.

Given the dangers of LNG, it is imperative that the Commission exercise its jurisdiction in order to carefully evaluate and minimize the risk of transporting LNG.

B. The Climate Change Effects of the DRP Facility have not been Assessed

The DRP facility is not within the public interest because it will have severe effects on our climate, and those effects have yet to be assessed or documented. Science has conclusively demonstrated that human release of greenhouse gas emissions (GHGs), including methane, are a direct cause of climate change. LNG facilities directly and indirectly exacerbate the climate crisis by releasing GHGs into the atmosphere. The DRP facility will contribute to climate change through its increase in truck traffic, operation of diesel equipment, and construction and operation of an LNG facility. In addition, the increased demand for natural gas created by the export facility will have upstream GHG impacts via fracking, extraction, production, processing, and transport of the natural gas and the liquefaction process. Fugitive emissions of methane occur during all these stages, including pipeline transport, liquefaction, overland truck and rail transport, and storage. DRP has acknowledged in its petition that, at least in some circumstances, "boil off gas could be flared at the Facility . . ."⁸⁸ Finally, the natural gas will be consumed downstream from the DRP Facility, and the ultimate consumption of the natural gas will also result in GHG emissions.

Climate change has serious and significant environmental, economic, and safety impacts and as a result of its harmful impacts on our communities and environment, climate change poses one of the most extreme existential threats facing humanity. Commissioner Glick has clearly outlined FERC's NGA mandate to consider climate change impacts resulting from its actions and decisions in recent statements:

"Climate change poses an existential threat to our security, economy, environment, and, ultimately, the health of individual

⁸⁸ DRP Petition at 5.

citizens. Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, which can be released in large quantities through the production and consumption of natural gas. Congress determined under the NGA that no entity may transport natural gas interstate, or construct or expand interstate natural gas facilities, without the Commission first determining the activity is in the public interest. This requires the Commission to find, on balance, that a project's benefits outweigh the harms, including the environmental impacts from climate change that result from authorizing additional transportation. Accordingly, it is critical that, as an agency of the federal government, the Commission comply with its statutory responsibility to document and consider how its authorization of a natural gas pipeline facility will lead to the emission of GHGs, contributing to the existential threat of climate change.”⁸⁹

As such, the effects concerning climate change must be carefully evaluated through an Environmental Impact Statement by the Commission when determining whether a facility is in the public's interest. Here, an Environmental Impact Statement has not been issued and DRP is attempting to shut the Commission out of the process. It is imperative that the Commission take jurisdiction over this project in order to carefully analyze the effects that it will have on our climate.

C. There Has Been No Analysis as to the Burden that Environmental Justice Communities will Bear due to the Construction and Operation of the DRP Facility

The DRP facility is located near an environmental justice community, and yet, no evaluation has taken place as to the impacts that these communities will bear as a result of the construction and operation of the DRP facility. The DRP facility is located 2.73 miles from Chester, Pennsylvania, a low-income and minority neighborhood.

The Public Interest Law Center describes Chester:

“Chester, Pennsylvania is a small city with a low-income African American population, located in the affluent, mostly white Delaware County – and it is the site of an unprecedented cluster of industrial polluting facilities. Chester has been home to a trash incinerator that handled waste from the entire county, a sewage treatment plant that still receives the entire county’s sewage, and numerous other waste processing plants, oil

⁸⁹ Texas Eastern Transmission, Item No.: C-2, FERC CP18-10-000 (2018).

refineries, and industrial polluters. Essentially, the low-income, black community of Chester has been forced to live amidst the waste of the more affluent, white towns and cities around it.”⁹⁰

Chester has been credited with starting the environmental justice movement in the United States with early opposition to the cluster of environmentally damaging projects that exposed residents to a disproportionate level of air and water pollution and industrial activity that adversely impacted the public’s health.

“Dr. Reverend Horace Strand from the [Chester Environmental Partnership \(CEP\)](#) is the driving force for environmental justice in Chester. Rev. Strand represents Chester on our Stakeholder Advisory Board. In the early 1990s, Rev. Strand of the Faith Temple Church founded Chester Residents Concerned for Quality of Living (CRCQL) to address the numerous environmental hazards that the people of Chester faced on a daily basis. He lead his group to block the permitting of new hazardous waste facilities in Chester and in doing so became a national figure in the suit *Chester v Seif, PA DEP* that went to the US Supreme Court, firmly establishing Chester as an **Environmental Justice** Community.”⁹¹

Due to the recognition by EPA, PADEP, and other permitting agencies of the environmental injustices ongoing in Chester, an environmental justice intermediary has been established by these agencies to discuss the permitting of new potential projects with the community in addition to the normal public participation process. Despite the numerous risks to the Chester community, DRP has not embarked on such a community engagement program with the Chester community.

Chester, which is already environmentally overburdened, will bear a large brunt of risk due to possible human error and technological failure. First, the transportation of LNG trucks are set to pass through the center of Chester to access the Commodore Barry Bridge. This would expose 34,000 people to the threat of an accident. Second, given the close proximity of Chester to the site, the Chester residents could be exposed to the catastrophic impacts of a release of LNG, including fires, explosions, or super-cold vapor clouds. Lastly, ships passing less than a mile from the Chester population center could become high-capacity bombs due to accidents or national security threats. According to a letter sent to Greenwich Township, “Dock 2 would provide navigational access, mooring, and loading

⁹⁰ The Public Interest Law Center, Environmental Racism in Chester, <https://www.pubintl.org/cases-and-projects/chester-2/> (last visited October 14, 2020).

⁹¹ Perelman School of Medicine, Chester, <http://ceet.upenn.edu/target-communities/chester/> (last visited October 14, 2020).

equipment for two vessels up to 173,400 cubic meters in capacity.⁹² This is the equivalent of 45,807,433 gallons.⁹³ One gallon of LNG has 0.89975 therms of energy,⁹⁴ meaning that one LNG ship has 41,215,237 therms of energy. After converting therms to tons of TNT, one LNG ship at Dock 2 equals 1,039,053 tons of TNT.⁹⁵ For comparison, the atomic bomb dropped on Hiroshima at the end of the second World War was the equivalent of 15,000 tons of TNT.⁹⁶ This means that one LNG ship is equal to approximately 69 Hiroshima atomic bombs.

The Commission cannot allow a project like this to proceed without taking jurisdiction and ensuring that these effects are carefully studied through an Environmental Impact Statement.

IX. Conclusion

For the reasons stated above, the Commission should deny the relief sought by DRP and exercise jurisdiction over the Facility and the overall project, including the Wyalusing liquefaction plant, under Sections 3 and 7 of the NGA.

Maya K. van Rossum



the Delaware Riverkeeper
Delaware Riverkeeper Network

Enclosures

⁹² Application submitted by Delaware River Partners, LLC, Regarding Property at 200 No. Repauno Avenue, Block 8, Lot 4, Greenwich Township, Gloucester County (February 26, 2019) (Attached as Exhibit K).

⁹³ Metric Conversions, Cubic Meters to US Gallons, <https://www.metric-conversions.org/volume/cubic-meters-to-us-liquid-gallons.htm> (last visited October 15, 2020).

⁹⁴ Report to the Congress, Liquefied Energy Gases Safety (July 31, 1978).

⁹⁵ Kyle's Converter, Therms (US) to Tons of TNT, [http://www.kylesconverter.com/energy,-work,-and-heat/therms-\(u.s.\)-to-tons-of-tnt](http://www.kylesconverter.com/energy,-work,-and-heat/therms-(u.s.)-to-tons-of-tnt) (last visited October 15, 2020).

⁹⁶ Simon Scarr, et al., In a Flash, a Changed World, Reuters Graphic (August 4, 2020), <https://graphics.reuters.com/WW2-ANNIVERSARY/HIROSHIMA/rlgpdnqljpo/>.