UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY

In the Matter of:

Sabine Pass Liquefaction, LLC	**)**	**FE Docket No. 15-63-LNG**

MOTION FOR LEAVE TO ANSWER AND ANSWER OF SABINE PASS LIQUEFACTION, LLC TO SIERRA CLUB'S REQUEST FOR REHEARING

Pursuant to Rules 302 and 505 of the Department of Energy's ("DOE") Rules of Practice and Procedure,[1] Sabine Pass Liquefaction, LLC ("SPL") hereby submits this Motion for Leave to Answer and Answer to Sierra Club's April 11, 2016, Request for Rehearing[2] of DOE, Office of Fossil Energy's ("DOE/FE") March 11, 2016 Final Opinion and Order issued in the above-captioned docket authorizing SPL to export additional volumes ("Additional Capacity") of liquefied natural gas ("LNG") from the Sabine Pass LNG Terminal ("Terminal") to non-Free Trade Agreement ("FTA") nations.[3] Sierra Club's Rehearing Request fails to overcome the Natural Gas Act's ("NGA") well-established presumption that such exports are in the public interest and improperly argues that National Environmental Policy Act ("NEPA") analyses for the Terminal were deficient because they failed to consider impacts that are in actuality not cognizable under NEPA. The Rehearing Request should be denied in its entirety.

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1 10 C.F.R. §§ 590.302, 590.505 (2016).

2 Request for Rehearing, *Sierra Club*, FE Docket No. 15-63-LNG (Apr. 11, 2016) [hereinafter *Rehearing Request*].

3 *Sabine Pass Liquefaction, LLC, Final Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas from the Sabine Pass LNG Terminal Located in Cameron Parish, Louisiana to Non-Free Trade Agreement Nations*, DOE/FE Order No. 3792, FE Docket No. 15-63-LNG (Mar. 11, 2016) [hereinafter *Additional Capacity Order*].

I. Introduction

On April 20, 2015, SPL submitted an application ("Application") to DOE/FE seeking authorization under NGA Section 3 to export LNG from the Terminal to non-FTA nations in an amount of up to the equivalent of 203 billion cubic feet per year.[4] Sierra Club sought to intervene in the proceeding. Previously, on October 25, 2013, SPL and its affiliate Sabine Pass LNG, L.P. submitted an application to the Federal Energy Regulatory Commission ("FERC") seeking authorization under NGA Section 3 to amend their existing authorization to allow for production of the Additional Capacity at the Terminal (up to the maximum peak day LNG production capacity).[5] After conducting a review under NEPA, FERC issued an Environmental Assessment ("EA") for the Additional Capacity in January of 2014, and authorized the amendment application on February 20, 2014.[6]

Before the Application's pendency, DOE/FE released several studies related to its NGA Section 3 "public interest" review. In 2012, it commissioned and issued a two-part "LNG Export Study" in furtherance of its "continuing duty to monitor supply and demand conditions in the United States in order to ensure that authorizations to export LNG do not subsequently lead to a reduction in the supply of natural gas needed to meet essential domestic needs."[7] The first part, conducted by the U.S. Energy Information Administration ("EIA"), was designed "to understand the implications of additional natural gas demand (as exports) on domestic energy markets under various scenarios," which DOE/FE cautioned "were not forecasts of either the ultimate level, or rates of increase, of exports."[8] The EIA found that, "[u]nder the scenarios specified, increased

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4 *See* Application of Sabine Pass Liquefaction, LLC for Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations, *Sabine Pass Liquefaction, LLC*, FE Docket No. 15-63-LNG (Apr. 20, 2015).

5 Application For Limited Amendment to Authorization Granted Under Section 3 of the Natural Gas Act, *Sabine Pass Liquefaction, LLC, & Sabine Pass LNG, L.P.*, FERC Docket No. CP14-12-000 (Oct. 25, 2013).

6 FERC, *Environmental Assessment Report, Sabine Pass Liquefaction, LLC & Sabine Pass LNG, L.P.*, FERC Docket No. CP14-12-000 (Jan. 24, 2014) [hereinafter *FERC EA*]; *Sabine Pass Liquefaction, LLC & Sabine Pass LNG, L.P.*, 146 FERC ¶ 61,117 (2014) [hereinafter *FERC Order*].

7 77 Fed. Reg. 73,627, 73,628 (Dec. 11, 2012).

8 *Id.*

natural gas exports lead to higher domestic natural gas prices, which lead to reduced domestic consumption, and increased domestic production and pipeline imports from Canada," but cautioned that "[t]he projections in this report are not statements of what *will* happen but of what *might* happen, given the assumptions and methodologies used."[9] The EIA Study generally projected the sources of additional domestic natural gas production (with geographically non-specific references to "shale gas, tight gas, coalbed, and other sources"), as well as the sectors in which domestic natural gas consumption would decrease, but cautioned that "projections of energy markets over a 25-year period are highly uncertain and subject to many events that cannot be foreseen."[10] The second part of the LNG Export Study, performed by NERA Economic Consulting, analyzed the "macroeconomic impact of LNG exports on the U.S. economy" under a range of scenarios.[11] It was designed to complement the EIA Study, which had been "limited to the relationship between export levels and domestic prices without considering whether or not those quantities of exports could be sold at high enough world prices to support the calculated domestic prices."[12] The NERA Report concluded that, "[a]cross all … scenarios, the U.S. was projected to gain net economic benefits from allowing LNG exports," and that the highest export-level scenarios—and corresponding prices—considered by the EIA Study were "not likely."[13] It noted that "U.S. LNG exports provide an opportunity for natural gas producers to realize additional profits by selling incremental volumes of natural gas," but—like the EIA Study—recognized "great uncertainties about how the U.S. natural gas market will evolve," one of the "major uncertainties" being "the availability of shale gas in the United States."[14] The

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9 EIA, *Effect of Increased Natural Gas Exports on Domestic Energy Markets* ii (Jan. 2012) *available at* http://energy.gov/sites/prod/files/2013/04/f0/fe_eia_lng.pdf [hereinafter *EIA Study*].

10 *Id.* at 11, 3.

11 77 Fed. Reg. at 73,627; *see* NERA Economic Consulting, *Macroeconomic Impacts of LNG Exports from the United States* (Dec. 3, 2012), *available at* http://energy.gov/sites/prod/files/2013/04/f0/nera_lng_report.pdf [hereinafter *NERA Report*].

12 *NERA Report*, *supra* note 11, at 1.

13 *Id.* at 1, 9.

14 *Id.* at 13, 21.

NERA Report explicitly did not consider "the location of additional natural gas production."[15] SPL also included in its Application a discussion regarding an update to the NERA Report that found, *inter alia*, that: greater LNG exports and domestic demand can be supported in the U.S. natural gas market at lower prices compared to those presented in the NERA Report; and greater economic benefits would result to the United States at a given level of LNG exports than those estimated in the NERA Report.[16]

More recently, DOE issued two studies in the summer of 2014 that were designed "to provide additional information to the public regarding the potential environmental impacts of unconventional natural gas exploration and production activities,"[17] and to "estimate[] the life cycle [greenhouse gas ("GHG")] emissions of U.S. LNG exports to Europe and Asia, compared with alternative supplies, to produce electric power."[18] The Environmental Addendum, which DOE/FE explained was "not required by … NEPA,"[19] briefly summarized unconventional natural gas production activities, then discussed the potential environmental impacts of such activities based on a review of existing literature, regulations, and best management practices. DOE/FE cautioned that "[f]undamental uncertainties constrain the ability to predict what, if any, domestic natural gas production would be induced by granting any specific authorization … to export LNG …."[20]

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15 *Id.* at 210.

16 NERA Econ. Consulting, *Updated Macroeconomic Impacts of LNG Exports from the United States* (Mar. 24, 2014), *available at* http://www.nera.com/content/dam/nera/publications/archive2/PUB_LNG_Update_0214_FINAL.pdf .

17 79 Fed. Reg. 48,132, 48,132 (Aug. 15, 2014); *see* DOE, *Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States* (Aug. 2014), *available at* http://energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf [hereinafter *Environmental Addendum*]; DOE/FE & National Energy Technology Laboratory, *Life Cycle Greenhouse Gas Perspective on Exporting Liquefied Natural Gas from the United States*, DOE/NETL-2014/1649 (May 29, 2014), *available at* http://www.energy.gov/sites/prod/files/2014/05/f16/Life%20Cycle%20GHG%20Perspective%20Report.pdf [hereinafter *LCA GHG Report*]; *see also* 79 Fed. Reg. 32,258 (June 4, 2014); 79 Fed. Reg. 32,260 (June 4, 2014).

18 79 Fed. Reg. at 32,261.

19 79 Fed. Reg. at 48,132.

20 79 Fed. Reg. at 32,259.

DOE/FE issued the Additional Capacity Order on March 11, 2016, granting the authorization requested by SPL, addressing Sierra Club's arguments, and incorporating discussions of the LNG Export Study, the Environmental Addendum, and the LCA Greenhouse Gas ("GHG") Report. Sierra Club's Rehearing Request followed thereafter.

II. Sierra Club's Rehearing Request Fails to Overcome the NGA's Presumption that LNG Exports Are Consistent with the Public Interest

A. LNG Exports Are Presumptively Consistent with the Public Interest

As DOE/FE properly found, Section 3 of the NGA creates a rebuttable presumption that a proposed LNG export is in the public interest, stating that DOE "*shall* issue such order upon application, *unless*, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest."[21] Sierra Club fruitlessly argues that no presumption applies here.[22] Even if the plain statutory text were somehow insufficient to show that Sierra Club is mistaken, judicial precedent would confirm as much: the United States Court of Appeals for the District of Columbia Circuit has explained that "section 3 sets out a general presumption favoring such authorization, by language which requires approval of an application unless there is an express finding that the proposed activity would not be consistent with the public interest," adding that Section 3 "therefore differs significantly from other sections under the NGA which condition agency approval upon a positive finding that the proposed activity will be in the public interest."[23] Likewise, the case that Sierra Club attempts to distinguish, *Panhandle Producers & Royalty Owners Association v. Energy Regulatory Administration* explicitly states that "§ 3 requires an affirmative showing of inconsistency with the public interest to deny an application."[24]

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[21] 15 U.S.C. § 717b(a) (2012) (emphases added); *see Additional Capacity Order*, *supra* note 3, at 13-14.

[22] *See Reh'g Req.*, *supra* note 2, at 2-3.

[23] *W. Va. Pub. Servs. Comm'n v. U.S. Dept' of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982).

[24] 822 F.2d 1105, 1111 (D.C. Cir. 1987).

Sierra Club also argues that NEPA somehow nullifies the NGA Section 3 presumption.[25] However, this is not so. "NEPA's mandate 'is essentially procedural.'"[26] The statute requires federal agencies to take a "hard look" at the environmental consequences of proposed actions, but does not mandate substantive results such as conditioning the NGA Section 3 public interest inquiry on any particular environmental finding. Indeed, courts have emphasized that "NEPA is 'not a suitable vehicle' for airing grievances about the substantive policies adopted by an agency, as 'NEPA was not intended to resolve fundamental policy disputes.'"[27]

B. NEPA Analyses for the Additional Capacity Were Valid and Sufficient

1. DOE Properly Fulfilled Its Role Under NEPA

Sierra Club argues that DOE/FE should have issued its own NEPA document, and conducted additional review beyond what was completed for the Additional Capacity.[28] In the instant proceeding, DOE/FE reviewed the entire record compiled during the review of the Additional Capacity at FERC, as well as the record at DOE/FE. DOE/FE concluded that the proposed exports would not constitute a "major federal action significantly affecting the quality of the human environment" and that supplementing the record or preparing an Environmental Impact Statement ("EIS") was not necessary.[29] Based on these findings, DOE/FE properly adopted the FERC EA, and issued a Finding of No Significant Impact.[30]

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[25] *See Reh'g Req.*, *supra* note 2, at 2-3.

[26] *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978)).

[27] *Id.* (quoting *Found. on Econ. Trends v. Lyng*, 817 F.2d 882, 886 (D.C. Cir. 1987)).

[28] *See Reh'g Req.*, *supra* note 2, at 2-5.

[29] *Additional Capacity Order*, *supra* note 3, at 171.

[30] *See* DOE/FE, *Finding of No Significant Impact for Sabine Pass Liquefaction Project Regarding Application to Department of Energy to Increase Authorized Volumes of Liquefied Natural Gas for Export from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations, Sabine Pass Liquefaction, LLC*, FE Docket No. 15-63-LNG (Mar. 11, 2016).

2. The Putative Impacts of Emissions from Increased Domestic Natural Gas Production and Fossil Fuel Consumption Allegedly Induced by the Additional Capacity Are Not Cognizable Under NEPA

The Rehearing Request's NEPA discussion consists mostly of repeating an argument that both DOE/FE and FERC have consistently—and extensively—rejected in proceedings for both the Additional Capacity and others like it,[31] namely that the NEPA analysis for any LNG export project must consider the putative impacts of emissions from increased domestic natural production and fossil fuel consumption allegedly induced by the LNG export project in question.[32] FERC has reasonably explained that putative impacts of the sort alleged by Sierra Club are not cognizable under NEPA, regardless of whether they are viewed as "indirect effects" or "cumulative impacts."[33]

a. The Putative Impacts that Sierra Club Alleges Are Not Cognizable Under NEPA as "Indirect Effects"

NEPA requires environmental analyses to consider a proposed Federal action's "indirect effects," which are defined as effects that "are caused by the action and are later in time or farther removed but are still reasonably foreseeable."[34] Here, neither the foreseeability nor the

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[31] *See Additional Capacity Order*, *supra* note 3; *FERC* Order, *supra* note 6; *Sabine Pass Liquefaction, LLC, Final Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas from the Sabine Pass LNG Terminal Located in Cameron Parish, Louisiana to Non-Free Trade Agreement Nations* at 12–13, 65, 77–78, 88, 197–209, DOE/FE Order No. 3669, FE Docket Nos. 13-30-LNG, 13-42-LNG &13-121-LNG (June 26, 2015); *Sabine Pass Liquefaction Expansion, LLC, Sabine Pass Liquefaction, LLC, Sabine Pass LNG, L.P. & Cheniere Creole Trail Pipeline, L.P.*, 151 FERC ¶ 61,012, at PP 88–97 (2015); *Sabine Pass Liquefaction Expansion, LLC, Sabine Pass Liquefaction, LLC, Sabine Pass LNG, L.P. & Cheniere Creole Trail Pipeline, L.P.*, 151 FERC ¶ 61,253, at PP 6–44 (2015) [hereinafter *Expansion FERC Rehearing Order*]; *see also Dominion Cove Point LNG, LP, Final Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Cove Point LNG Terminal in Calvert County, Maryland, to Non-Free Trade Agreement Nations* 5–6, 25–27, 82–95, DOE/FE Order No. 3331-A, FE Docket No. 11-128-LNG (May 7, 2015); *Freeport LNG Expansion, L.P. et al., Final Opinion and Order Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Freeport LNG Terminal on Quintana Island, Texas, to Non-Free Trade Agreement Nations* 5, 83–94, DOE/FE Order No. 3357-B, FE Docket No. 11-161-LNG (Nov. 14, 2014); *Cameron LNG, LLC, Final Opinion and Order Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Cameron LNG Terminal in Cameron Parish, Louisiana, to Non-Free Trade Agreement Nations* 4, 22–23, 72–83, DOE/FE Order No. 3391-A, FE Docket No. 11-162-LNG (Sept. 10, 2014).

[32] *See Reh'g Req.*, *supra* note 2, at 5–21.

[33] *See Expansion FERC Reh'g Order*, *supra* note 31, at PP 6–44.

[34] 40 C.F.R. §§ 1502.16, 1508.8(b) (2015).

causation requirement is met: the putative impacts of emissions from increased domestic natural gas production and coal consumption allegedly induced by authorizing the Additional Capacity are too speculative to be cognizable as indirect effects under NEPA, and are also insufficiently causally related to any specific authorization under NGA Section 3 to be cognizable as indirect effects under NEPA.

i. The Putative Impacts Sierra Club Alleges Are Overly Speculative

As FERC has previously explained, "[a]n effect is 'reasonably foreseeable' if it is 'sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.'"[35] But NEPA's requirement to consider indirect effects does not require agencies to engage in overly "speculative" analyses of potential impacts.[36] (Sierra Club cites cases in support of an apparently contrary interpretation of the regulatory definition, but they are distinguishable as either (1) not actually involving "indirect effects" or (2) involving internally inconsistent reasoning by an agency.)[37] "[B]road statistical data discussing general national trends" is insufficient to create "reasonable foreseeability under NEPA."[38] Rather, in order for an effect to be reasonably foreseeable instead of overly speculative, an agency must have at its

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35 *Expansion FERC Reh'g Order*, *supra* note 31, at P 8 (quoting *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005)).

36 *E.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989); *see, e.g.*, *City of Dallas v. Hall*, 562 F.3d 712, 719 (5th Cir. 2009) (NEPA analysis for wildlife refuge at site previously considered for reservoir was not required to consider indirect effects on water supply and urban planning, because such effects were "highly speculative" due to insufficient specificity in city's reservoir plans and "uncertainty over whether the reservoir will be constructed and its impact on water supplies").

37 *See New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 482 (D.C. Cir. 2012) (holding that, in determining whether environmental impact statement is required, an agency "generally must examine" whether "harm in question is so 'remote and speculative' as to reduce the effective probability of its occurrence to zero," but not addressing indirect effects or reasonable foreseeability in setting this non-zero threshold); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1031 (9th Cir. 2006) ("We find it difficult to reconcile the Commission's conclusion that, as a matter of law, the possibility of a terrorist attack on a nuclear facility is 'remote and speculative,' with its stated efforts to undertake a 'top to bottom' security review against this same threat.").

38 *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 238 (5th Cir. 2006).

disposal, specific, quantifiable information regarding likely future impacts.[39] As FERC has pointed out in previous proceedings, Sierra Club's argument that the LNG export projects will lead to impacts from emissions attributable to increased domestic natural gas consumption and coal consumption requires at least three levels of speculation: first, as to the "location and extent of potential subsequent production activity," which are "unknown"; second, as to the "environmental impacts of such production"; and third, as to the "potential impacts of changes in electricity generation."[40]

FERC has explained that it is not feasible to "reasonably estimat[e] how much of [an LNG] project's export volumes will come from current versus future natural gas production, or where and when the assumed future production may specifically be located and take place, much less [to] identify[] any associated environmental impacts of such production."[41] Specifically, in the Commission's order denying rehearing of the FERC Order, the Commission noted that "no specific shale gas play had been identified" and that "additional shale gas production…may

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[39] *See, e.g., N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079–82 (9th Cir. 2011) (holding that Surface Transportation Board's NEPA analysis for coal railroad was required to consider the impacts of coal mines and coal bed methane wells in the areas to be served by the railroad, because the agency had sufficiently specific information—the number of wells and associated infrastructure in each of the three counties to be served by the railroad, as well a map of future mine sites—for such impacts to be reasonably foreseeable rather than speculative); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1195–98 (D. Colo. 2014) (holding environmental impact statement for document addressing road construction to facilitate coal mining was required to consider impacts of increased emissions from mining and combustion of coal, because agency knew exactly which three mines would be expanded, already had emissions data for them, and had projected how much additional coal would be produced by them); *Border Plant Working Grp. v. DOE*, 260 F. Supp. 2d 997, 1027-28 (S.D. Cal. 2003) (holding that agencies' NEPA analyses for cross-border electric transmission lines were not required to consider putative indirect effect in form of subsequent increase in power plant emissions, because power plant expansion was "a speculative possibility, dependant on the market for electricity and other factors," and because the record yielded "nothing to show that the specific operating details of [power] plants are reasonably foreseeable"); *see also WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enforcement*, 104 F. Supp. 3d 1208, (D. Colo. 2015) (agency knew both how much coal would be mined, and—due to commercial arrangements—where and how it would be combusted); *Diné Citizens Against Ruining the Env't v. U.S. Office of Surface Mining, Reclamation & Enforcement*, 82 F. Supp. 3d 1201, (D. Colo. 2015), *appeal dismissed* (Aug. 18, 2015), *order vacated in part, appeal dismissed in part sub. nom. Diné Citizens Against Ruining the Env't v. U.S. Office of Surface Mining, Reclamation & Enforcement* No. 15-1126, 2016 WL 1237955 (10th Cir. Mar. 30, 2016) (agency knew how much coal would be combusted, and there was "no uncertainty as to the location, the method, or the timing of this combustion").

[40] *Expansion FERC Reh'g Order*, *supra* note 31, at PP 12, 21, 33.

[41] *Id.* at P 23.

occur for reasons unrelated to the project and over which the Commission has no control."[42] The situation here is thus very different from that in the cases Sierra Club relies on for the proposition that induced production *is* reasonably foreseeable, as the courts in those cases had been presented with far more certain information regarding indirect effects than is available here. *Mid States Coalition for Progress v. Surface Transportation Board* held that the Surface Transportation Board's NEPA analysis for a coal railroad was arbitrary and capricious for failure to consider the railroad's indirect effects in the form of emissions from coal-fired power plants.[43] But there the agency itself had said during the NEPA scoping process that it would "'[e]valuate the potential air quality impacts associated with the increased availability and utilization of Powder River Basin Coal,'" and then inexplicably failed to do so in its NEPA analysis,[44] whereas here both FERC and DOE/FE have consistently maintained that indirect emissions are not reasonably foreseeable. Furthermore, in *Mid States Coalition*, the amount of coal being mined (and then burned) was known, and the demand for it had been acknowledged by the agency.[45]

Here, there has been no specific prediction of how much natural gas production or fuel-switching to coal, if any, will be caused by approving LNG exports, and the prospect of coal-switching has been made less—not more—likely by U.S. Environmental Protection Agency ("EPA") regulation under the Clean Air Act.[46] The U.S. Court of Appeals for the Seventh Circuit has distinguished *Mid States Coalition* because "[t]he court in *Mid States* concluded that adverse effects from the readily foreseeable increase in coal sales were certain to occur," whereas in its case cumulative impacts were insufficiently foreseeable to be "capable of meaningful discussion."[47] Here, both increased natural gas consumption and consequent

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42 *Sabine Pass Liquefaction, LLC & Sabine Pass LNG, L.P.*, 148 FERC ¶ 61,200, at P 13 (2014).

43 345 F.3d 520 (8th Cir. 2008).

44 *Id.* at 550.

45 *Id.* at 549.

46 *See Expansion FERC Reh'g Order*, *supra* note 31, P 36; *Additional Capacity Order*, *supra* note 3, at 181–182.

47 *Habitat Educ. Ctr. v. U.S. Forest Serv.*, 609 F.3d 897, 902 (7th Cir. 2010).

increased emissions are far too speculative for *Mid States Coalition* to be on point, nor have there been inconsistent agency pronouncements on the subject. Similarly, in *High Country Conservation Advocates v. U.S. Forest Service*, the court held that it was arbitrary and capricious for a NEPA analysis accompanying an agency rulemaking that was designed to "facilitate coal mining" both to "provide detailed estimates of the amount of coal to be mined … and simultaneously claim that it would be too speculative to estimate emissions from 'coal that may or may not be produced' from 'mines that may or may not be developed.'"[48] Again, there is no such specificity or inconsistency on a federal agency's part here.[49]

Unable to point to specific, quantifiable natural gas production induced by the Additional Capacity, Sierra Club instead relies on "broad statistical data discussing general national trends" that are insufficient to create "reasonable foreseeability under NEPA."[50] Sierra Club claims that available resources allow DOE to predict "where any additional production would occur and in what quantity."[51] But DOE has already explained that, "[a]lthough the [EIA Study] made broad projections about the types of resources from which additional production may come, the [Environmental] Addendum stated that DOE cannot meaningfully estimate where, when, or by what particular method additional natural gas would be produced in response to non-FTA export demand."[52] FERC has agreed that, while the model underlying the EIA Study "can be used to project the response of the U.S. energy markets to a wide variety of alternative assumptions and policies or policy initiatives, or to examine the impact of new energy programs and policies . . . it is not designed to predict or analyze the environmental impacts of specific infrastructure projects."[53] The EIA Study itself cautioned that its projections were "not statements of what *will*

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48 52 F. Supp. 3d at 1184, 1196–97.

49 *See also supra*, note 39 (discussing *High Country Conservation Advocates* and similar coal-mining cases).

50 *Coliseum Square Ass'n*, 465 F.3d at 238.

51 *Reh'g Req.*, *supra* note 2, at 7.

52 *Additional Capacity Order*, *supra* note 3, at 122.

53 *Expansion FERC Reh'g Order*, *supra* note 31, at P 19.

happen but of what *might* happen, given the assumptions and methodologies used," and "recognize[d] that projections of energy markets over a 25-year period are highly uncertain and subject to many events that cannot be foreseen …."[54] Notably, the EIA Study indicated that domestic natural gas production from shale would increase or decrease based on supply and economic growth factors, even if no additional exports were to occur.[55] It is thus an oversimplification for Sierra Club to argue that a "belief that production will rise in response to exports is central to DOE's" public interest findings.[56] Indeed, the determinative effect of broader market conditions has been reflected in situations of actual commercial uncertainty for specific LNG terminals. DOE has cautioned that granting an authorization under NGA Section 3 "does not guarantee that a particular facility would be financed and built," much less "that, even if built, market conditions would continue to favor export once the facility is operational"; indeed, "[n]umerous LNG import facilities were previously authorized by DOE, received financing, and were built, only to see declining use over the past decade."[57] Sierra Club argues that this acknowledgment of market forces violates NEPA because it is an attempt to "exclude[] the direct effects of the action."[58] However, DOE/FE made this statement about the Environmental Addendum, not the Additional Capacity.[59] And in any event, DOE/FE pointed to such market forces as adding to the uncertainties that "constrain [DOE/FE's] ability to foresee and analyze with any particularity the incremental natural gas production that may be induced by permitting exports of LNG to non-FTA countries."[60] There was no attempt on the agency's part

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54 *EIA Study*, *supra* note 9, at 3.

55 *See id.*, App. B at Tables B1, B3, B5 (discussing four scenarios, and estimating the "baseline" amount of natural gas produced under each).

56 *Reh'g Req.*, *supra* note 2, at 6.

57 79 Fed. Reg. at 32,259; *see, e.g.*, *Oregon v. FERC*, 636 F.3d 1203 (9th Cir. 2011) (involving bankruptcy of LNG import terminal).

58 *Reh'g Req.*, *supra* note 2, at 7.

59 *See Additional Capacity Order*, *supra* note 3, at 174.

60 *Id.* at 173.

to avoid consideration of the Additional Capacity's direct impacts, which are discussed in the FERC EA.

DOE/FE and FERC are also in agreement that the impacts of emissions from increased domestic natural gas production and coal consumption are not reasonably foreseeable indirect effects of NGA Section 3 authorizations for the Additional Capacity.[61] As DOE/FE explained, it "cannot meaningfully analyze the specific environmental impacts of such production,"[62] and even the Environmental Addendum did "not attempt to identify or characterize the incremental environmental impacts that would result from LNG exports to non-FTA nations. Such impacts are not reasonably foreseeable and cannot be analyzed with any particularity."[63] Sierra Club says that, even without specific information, the impacts of GHG emissions can be assessed because such impacts "generally do not depend on the geographic location of the emissions."[64] This assertion actually reflects the inherently speculative nature of the inquiry that Sierra Club demands; it would require assessing the climate-change impacts of net GHG emissions changes worldwide attributable to the Additional Capacity. This demand is further complicated by the fact that American natural gas exports could displace less environmentally-friendly fuels abroad.[65] FERC has explained that there is no methodology by which incremental effects can be assessed either locally or globally.[66] Furthermore, the decisions and manner of reporting of

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61 *See id.* at 173-175; *FERC Order*, *supra* note 6, P 15-16.

62 79 Fed. Reg. at 32,259.

63 *Additional Capacity Order*, *supra* note 3, at 174.

64 *Reh'g Req.*, *supra* note 2, at 12.

65 *See LCA GHG Report*, *supra* note 17, at 9 (stating that, "for most scenarios in both the European and Asian regions, the generation of power from imported natural gas has lower life cycle GHG emissions than power generation from regional coal"); *see also* Executive Office of the President, *The President's Climate Action Plan* 4, 19 (June 2013), *available at* https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf (noting that United States has "become the world's leading producer of natural gas," explaining that "[b]urning natural gas is about one-half as carbon-intensive as coal, which can make it a critical 'bridge fuel' for many countries as the world transitions to even cleaner sources of energy," and stating Administration's intentions to "promote fuel-switching from coal to gas for electricity production and encourage the development of a global market for gas").

66 FERC, *Environmental Assessment for the Sabine Pass Liquefaction Expansion Project and Cheniere Creole Trail Pipeline Expansion Project, Sabine Pass Liquefaction Expansion, LLC, Sabine Pass Liquefaction, LLC, Sabine Pass LNG, L.P. & Cheniere Creole Trail Pipeline, L.P.* 171, FERC Docket Nos. CP13-552-000 & CP13-553-000 (Dec, 12, 2014).

foreign sovereigns would have a determinative effect, a factor that Sierra Club admits to be highly speculative.[67] DOE/FE reasonably explained that "[t]he uncertainty associated with estimating" the various factors on which net global GHG emissions would depend would make the analysis "too speculative to inform the public interest in this or other non-FTA LNG export proceedings."[68]

ii. The Putative Impacts Sierra Club Alleges Are Insufficiently Causally Related to the Additional Capacity

In addition to not being reasonably foreseeable, the putative impacts alleged by Sierra Club are also not cognizable as indirect effects under NEPA because there is not a sufficiently close relationship between the impacts of future natural gas production and the Additional Capacity. As DOE/FE noted in the Additional Capacity Order "[t]he current rapid development of natural gas resources in the United States likely will continue, with or without the export of natural gas to non-FTA nations." [69]

"NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause" in order "to make an agency responsible for a particular effect under NEPA."[70] The Supreme Court has analogized to "the familiar doctrine of proximate cause from tort law," explaining that "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within [42 U.S.C. § 4332] because the causal chain is too attenuated."[71] Thus, "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA …."[72] To

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67 *Reh'g Req.*, *supra* note 2, at 23.

68 *Additional Capacity Order*, *supra* note 3, at 184.

69 *Id*. at 176.

70 *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

71 *Metro. Edison*, 460 U.S. at 774.

72 *Pub. Citizen*, 541 U.S. at 767.

determine whether an agency must consider a particular effect, courts must "look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not."[73] Thus, in *Public Citizen* the Court held that the Federal Motor Carrier Safety Administration's EA for safety regulations applicable to Mexican trucks—which would newly be permitted to operate in the United States following the President's lifting of a moratorium—was only required to evaluate the effects of the regulations themselves (e.g., emissions during roadside inspections), and not the broader effects of the Mexican trucks' newfound U.S. presence, which the agency had no discretion to prevent.[74] Applying NEPA's "rule of reason," the Court found that requiring the agency to consider broader effects would not provide "useful" information that served the purpose of informed decision-making.[75]

Notwithstanding this binding authority, Sierra Club relies exclusively on a lengthy chain of but-for causation in arguing that the DOE/FE violated NEPA, arguing that a DOE/FE order under NGA Section 3 will lead to increased domestic natural gas production, which will lead to increased domestic emissions and increased domestic coal consumption, which will lead to yet more domestic emissions, which will lead to a net increase in global emissions. This lengthy and speculative chain of causation between an order under NGA Section 3 and a potential net increase in worldwide emissions depends on an activity—domestic natural gas production—which cannot be "foresee[n] and analyze[d]," is "too speculative," and over which the NGA gives DOE/FE and FERC no jurisdiction by congressional design.[76] Instead, natural gas exploration, production, and gathering, and the facilities used for these activities, are subject to

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[73] *Metro. Edison*, 460 U.S. at 774 n.7.

[74] *See* 541 U.S. at 768–69 (holding that requiring agency to consider the environmental effects of the entry of Mexican trucks would not fulfill NEPA's purposes of informed decision-making and disclosure).

[75] *Id.* at 767, 768.

[76] *Additional Capacity Order*, *supra* note 3, at 173, 184; *see* 15 U.S.C. § 717(b) (2012) (stating NGA "shall not apply to … the production or gathering of natural gas"); *see also Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1596 (2015) ("The Act leaves regulation of other portions of the industry—such as production, local distribution facilities, and direct sales—to the States.").

extensive regulation by state and local agencies (as well as increasingly by EPA).[77] In light of this legislative intent, and just as in *Public Citizen*, DOE/FE should not be deemed to have "caused"—and therefore to be responsible under NEPA for considering—effects that may occur regardless of their actions, and over which Congress did not intend them to have any control.[78]

Sierra Club cites *Save our Sonoran v. Flowers* for the proposition that the Additional Capacity's NEPA analysis was nevertheless required to treat emissions from increased domestic natural gas production and coal consumption as a cognizable indirect effect, regardless of the tenuous chain of causation between the Additional Capacity and those activities (over which DOE/FE has no control).[79] *Save our Sonoran* held that the U.S. Army Corps of Engineers' EA for a permit to fill in 7.5 acres of natural waterways as part of a 608-acre residential development project should have considered the permit's effects on the entirety of the parcel to be developed,

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[77] *See Additional Capacity Order*, *supra* note 3, at 176–178, 181-182.

[78] *See Pub. Citizen*, 541 U.S. at 752; *Town of Barnstable, Mass. v. FAA*, 740 F.3d 681, 691 (D.C. Cir. 2014) (holding that agency was not required to prepare NEPA analysis for hazard analysis concerning wind farm, because it had "no authority to countermand Interior's approval of the project or to require changes to the project in response to environmental concerns"); *see also Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, 746 F.3d 698, 709-10 (6th Cir. 2014) (holding that U.S. Army Corps of Engineers' NEPA analysis for a Clean Water Act permit related to coal mining operation was not required to consider effects of entire mining operation in light of "Congress's intent to place primary responsibility for surface mining with state regulators," and stating that "agencies may reasonably limit their NEPA review to only those effects proximately caused by the actions over which they have regulatory responsibility"); *Hall*, 562 F.3d at 719 ("[T]he effects of establishing the refuge, and thus precluding the reservoir, are highly speculative and cannot be shown to be the proximate cause of future water shortages …."); *N.J. Dep't of Envtl. Prot. v. U.S. Nuclear Regulatory Comm'n*, 561 F.3d 132, 139-40 (3d Cir. 2009) (holding that Nuclear Regulatory Commission's NEPA analysis for nuclear power facility re-licensing application was not required to consider effects of terrorist airplane attacks, because Congress empowered Nuclear Regulatory Commission to determine "whether equipment within a facility is suitable for continued operation or could withstand an accident, but … no authority over the airspace above its facilities," meaning that the prospect of "a terrorist attack lengthens the causal chain beyond the 'reasonably close causal relationship' required" under NEPA); *City of Shoreacres*, 420 F.3d at 452 (holding that U.S. Army Corps of Engineers' NEPA analysis for a permit associated with construction of a ship terminal was not required to consider the effects of hypothetical future deepening of the ship channel, and stating that, "if the rationale of *Public Citizen* is applicable, the deepening of the Houston Ship Channel, if it ever occurs, would not be treated as [an] 'indirect effect' 'caused' by the Corps' decision to grant a … permit to the Port," because the ship channel could "only be deepened by an Act of Congress, not any decision by the Corps."); *cf. Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 104 (D.D.C. 2006) (holding that National Park Service's NEPA analyses for directional oil and gas drilling activities occurring—on the surface—outside of a preserve were nevertheless required to consider impacts outside the preserve under *Public Citizen*, because agency had "the ability … to prevent the activities causing the environmental impact by denying access to the Preserve").

[79] *Reh'g Req.*, *supra* note 2, at 13 (citing 408 F.3d 1113 (9th Cir. 2005)).

and not just the 31.3 acres of natural waterways running through it.[80] Crucial to this holding was the fact that "the project could not go forward" without the permit; instead, "denial of a permit would prevent the site from developing in a manner consistent with the developer's purpose."[81] Furthermore, "[b]ecause the jurisdictional waters run throughout the property like capillaries through tissue, any development the Corps permit[ted] would have an effect on the whole property."[82] The court accordingly concluded that "*Public Citizen*'s causal nexus requirement is satisfied," and that "[t]he NEPA analysis should have included the entire property."[83] Section 3 of the NGA provides neither FERC nor DOE such power over natural gas production.

While exhaustively attacking putative impacts of emissions from increased domestic natural gas production and coal consumption allegedly induced by the Additional Capacity, Sierra Club does not discuss the fact that emissions from existing and new coal-fired electric power generation, rather than only being susceptible to basic market principles, are increasingly subject to EPA regulation under the Clean Air Act.[84] DOE/FE explained that EPA rulemaking would have a significant impact on potential coal-switching: DOE noted that "these rules have the potential to mitigate significantly any increased emissions from the U.S. electric power sector that would otherwise result from increased use of coal, and perhaps to negate those increased emissions entirely."[85] EPA has also promulgated new source performance standards for

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80 *See* 408 F.3d at 1118, 1121–22.

81 *Id.* at 1119, 1122.

82 *Id.* at 1122.

83 *Id.*

84 *See Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) (upholding EPA's decision to require Best Available Control Technology for GHG emissions from existing stationary sources otherwise subject to Prevention of Significant Deterioration permitting under Clean Air Act); *see also* 79 Fed. Reg. 1430 (Jan. 8, 2014) (proposing performance standards for new fossil fuel-direct electric utility generating units); 79 Fed. Reg. 34,830 (June 18, 2014) (proposing emission guidelines for states to follow in developing plans to address GHG emissions from existing fossil fuel-fired electric generating units); 79 Fed. Reg. 34,960 (June 18, 2014) (proposing standards of performance for emissions of GHGs from modified and reconstructed fossil fuel-fired electric utility generation units); 79 Fed. Reg. 65,482 (Nov. 4, 2014) (proposing supplemental emission guidelines for U.S. territories and Indian country regarding GHG emissions from existing fossil fuel-fired electric generating units).

85 *See Additional Capacity Order*, *supra* note 3, at 182.

emissions from natural-gas processing plants.[86] While Sierra Club faults DOE/FE for not speculating as to the specific impact that recent rulemakings would have,[87] their mere proposals further confirm that authorizations for the Additional Capacity under NGA Section 3 are insufficiently causally connected to the putative impacts alleged by Sierra Club for those impacts to be cognizable as "indirect effects" of the Additional Capacity under NEPA.

b. The Putative Impacts that Sierra Club Alleges Are Not Cognizable Under NEPA as "Cumulative Impacts"

Sierra Club's Rehearing Request appears to argue that the putative impacts of emissions from increased domestic natural gas production and coal consumption allegedly induced by the Additional Capacity are separately cognizable under NEPA as "cumulative impacts."[88] This is incorrect. Cumulative impact is "the *impact* on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[89] Thus, an agency's "obligation under NEPA to consider cumulative impacts is confined to impacts that are 'reasonably foreseeable.'"[90] As discussed above, the impacts of emissions from increased natural gas production and coal consumption theoretically induced by LNG exports are not reasonably foreseeable under NEPA. Therefore, the FERC EA's cumulative impact analysis was not required to consider them.[91]

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86 *See* 76 Fed. Reg. 52,738 (Aug. 23, 2011) (proposing rule); 77 Fed. Reg. 49,490 (Aug. 16, 2012) (publishing final rule).

87 *See Reh'g Req.*, *supra* note 2, at 19-20.

88 *See, e.g.*, *id.* at 8-9 ("Similarly, authorities interpreting the obligation to discuss 'cumulative effects' explain that uncertainty is only a ground for excluding an effect from NEPA review when the effect is so uncertain that it is not susceptible to 'meaningful discussion' at the time of the analysis.").

89 40 C.F.R. § 1508.7 (2015) (emphasis added); *see Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1319 (D.C. Cir. 2014) (cumulative impacts analysis should consider "'expected impacts from these other actions'" (quoting *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002))).

90 *City of Shoreacres*, 420 F.3d at 453; *see also Expansion FERC Reh'g Order*, *supra* note 31, at P 44.

91 *See, e.g.*, *Town of Cave Creek, Ariz. v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003) (holding cumulative impact analysis was not required to include "difficult … as well as increasingly inaccurate … projections").

3. DOE's Environmental Addendum and LCA GHG Report Were Not Required by NEPA

Sierra Club also argues that the Environmental Addendum and LCA GHG Report "are not a substitute for NEPA review."[92] SPL agrees, but only because—as DOE/FE explained—the reports were neither required by NEPA nor intended to be elements of the NEPA review process for the Additional Capacity.[93] These reports provide useful generalized analyses, but do not attempt to provide specific, quantifiable information for a particular LNG export project. As to the Environmental Addendum, DOE/FE explained that "[f]undamental uncertainties constrain the ability to predict what, if any, domestic natural gas production would be induced by granting any specific [export] authorization," that the Environmental Addendum could not "meaningfully" analyze either the specific existence or impacts of induced natural gas production, and therefore that "environmental impacts resulting from production activity induced by LNG exports … are not 'reasonably foreseeable.'"[94] As to the LCA GHG Report, DOE/FE explained that it "does not fulfill any NEPA requirements in this proceeding, nor has DOE/FE made any suggestion to that effect," and that it "addresses foreign GHG emissions and thus goes beyond the scope of what must be reviewed under NEPA."[95] Ultimately, as FERC has previously noted, the mere fact that DOE/FE commissions a projection of LNG exports' hypothetical effects does not imbue those effects with reasonable foreseeability such that they are cognizable under NEPA; rather, such generalized projections do not provide the requisite specificity for "reasonably estimating how much of [an LNG] project's export volumes will come from current versus future natural gas production, or where and when the future production may specifically be located and take place, much less in identifying any associated environmental impacts of such production."[96]

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92 *Reh'g Req.*, *supra* note 2, at 4.

93 *Additional Capacity Order*, *supra* note 3, at 7-8.

94 79 Fed. Reg. at 32,259.

95 *Additional Capacity Order*, *supra* note 3, at 162.

96 *Expansion FERC Reh'g Order*, *supra* note 31, at P 23.

4. NEPA Does Not Require DOE to Rely on a Full Environmental Impact Statement Rather Than an Environmental Assessment

Sierra Club contends that DOE/FE violated NEPA by relying on the FERC EA, rather than a full EIS, and "by failing to support the conclusion that exports will not have significant environmental impacts."[97] This is incorrect. The Additional Capacity, as noted in the Application, involves no new construction or modifications to existing facilities and merely represents the production capacity of previously authorized facilities, based on the latest and most up to date engineering and design information. The Additional Capacity is not, as Sierra Club contends, a "major increase in the quantity of [LNG] exported," nor does such a de minnimus change pose a "substantial question" whether a proposed project will have significant impacts.[98] As FERC has noted, an EA is sufficient and an EIS is not required for a modification project where, as in the instant case, "there were only a relatively small and well-defined number of other environmental issues raised" beyond the environmental review that had been previously conducted.[99] Furthermore, DOE held that the Additional Capacity would not have a significant impact on the human environment.

5. Sierra Club's Remaining Arguments Are Likewise Unavailing

The rest of Sierra Club's Rehearing Request is devoted largely to non-NEPA arguments that (like Sierra Club's NEPA arguments) lack much specificity to the Additional Capacity.[100] DOE/FE has addressed such arguments before, including in the Additional Capacity Order.

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97 *Reh'g Req.*, *supra* note 2, at 21.

98 *Id*.

99 *Additional Capacity Order*, *supra* note 3, at 9.

100 *See Reh'g Req.*, *supra* note 2, at 22–23.

IV. Conclusion

For the foregoing reasons, Sierra Club's Rehearing Request should be denied in its entirety.

Respectfully submitted,

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Dated: April 26, 2016

VERIFICATION

State of Texas)

County of Harris)

BEFORE ME, the undersigned authority, on this day personally appeared Patricia Outtrim, who, having been by me first duly sworn, on oath says: that she is Vice President, Government and Regulatory Affairs for Cheniere Energy, Inc., and is duly authorized to make this Verification; that she has read the foregoing instrument; and that the facts therein stated are true and correct to the best of her knowledge, information and belief.

Pat Outtrim

Patricia Outtrim

SWORN TO AND SUBSCRIBED before me on the 26th day of April, 2016.

Name: Ruthann Frausto

Title: Notary Public

My Commission expires:

6/17/2017

NOTARY PUBLIC STATE OF TEXAS

RUTHANN FRAUSTO
My Commission Expires
June 17, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings.

Dated at New York, N.Y., this 26th day of April, 2016.

/s/ Dionne McCallum-George
Dionne McCallum-George
Legal Secretary on behalf of
Sabine Pass Liquefaction, LLC