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

In the matter of:

SABINE PASS LIQUEFACTION, LLC	)	**DOCKET NO. 10-111-LNG**

ANSWER OF SABINE PASS LIQUEFACTION, LLC IN OPPOSITION TO MOTION OF SIERRA CLUB FOR STAY

Pursuant to 10 C.F.R. § 590.302(b) (2012), Sabine Pass Liquefaction, LLC ("Sabine") submits this answer opposing Sierra Club's motion for stay of the August 7, 2012 Finding of No Significant Impact ("FONSI") and Final Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations ("Order No. 2961-A"). *See* Motion for Rehearing and For Stay Pendente Lite filed September 6, 2012 ("Mot.") at 24-25. Sierra Club is not entitled to a stay of the FONSI or Order No. 2961-A for the simple reason that it is not a party to this proceeding.[1] Accordingly, Sierra Club lacks standing to seek review or stay of the Department of Energy, Office of Fossil Energy's ("DOE/FE") merits determinations in this proceeding. In any event, even if Sierra Club had standing to seek a stay—and it does not—it has not come close to satisfying the stringent standards necessary for such extraordinary relief. For the foregoing reasons, Sabine respectfully requests that DOE/FE deny Sierra Club's motion for stay.

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[1] The bulk of Sierra Club's filing consists of its improper attempt, as a non-party, to seek rehearing of the Department of Energy, Office of Fossil Energy's substantive order granting export authorization. Because answers to requests for rehearing are not permitted, 10 C.F.R. § 590.505, Sabine answers only the motion for stay. However, a principal ground for denying the motion for stay—that Sierra Club is not a party to this proceeding—also provides grounds to deny rehearing on all issues, except, perhaps the denial of its late intervention.

I. AS A NON-PARTY, SIERRA CLUB LACKS STANDING TO SEEK A STAY

Sierra Club asks DOE/FE to "stay Order 2961-A pending resolution of this motion for rehearing and any judicial appeal of DOE/FE's decision thereon." Mot. at 25. However, Sierra Club has no standing to seek such relief because it is not a party to this proceeding. Sierra Club's tardy motion for intervention was denied by DOE/FE for lack of good cause. *See* Order No. 2961-A at 24-26. As DOE/FE explained, "[t]he Sierra Club, like other members of the public, had a responsibility to comply with the filing deadlines established in the Notice of Application if it wanted to raise issues regarding the environmental impacts of granting the instant application" *(id.* at 25) and "granting the Motion to Intervene would unnecessarily delay the issuance of final agency action herein and unfairly prejudice the parties to this proceeding." *Id.* at 26. The current request for a stay pending rehearing and judicial review is merely another unjustified and untimely attempt to delay this proceeding and prejudice the actual parties.

Under DOE's regulations, "an application for rehearing of a final opinion and order, conditional order or emergency interim order may be filed by any ***party*** aggrieved by the issuance of such opinion and order within thirty (30) days after issuance." 10 C.F.R. § 590.501 (emphasis added). The regulations define a "party" as "an applicant, any person who has filed a motion for and been granted intervenor status or whose motion to intervene is pending, and any state commission which has intervened by notice pursuant to 10 C.F.R. 590.303(a)." 10 C.F.R. §590.102(l). Moreover, if "an answer in opposition to a motion to intervene is timely filed or if the motion to intervene is not timely filed, then the movant becomes a party only after the motion to intervene is expressly granted." 10 C.F.R. § 590.303(f). Here, because DOE/FE denied Sierra Club's late motion for intervention, Sierra Club is not a party to this proceeding.

The DOE regulations are consistent with Section 19(a) of the Natural Gas Act ("NGA"), which pertains to applications for rehearing, and which only permits such applications by parties to the underlying proceedings. *See* 15 USC § 717r(a) (2006) ("Any person . . . aggrieved by an order issued by the Commission in a proceeding under this Act to which such person . . . is a ***party*** may apply for a rehearing within thirty days after the issuance of such order") (emphasis added). As agencies and courts have held, putative intervenors are not "parties" within the definition of Section 19(a) of the NGA. The Federal Energy Regulatory Commission ("FERC"), which is also governed by Section 19 of the NGA, has noted that "[i]t is well settled that neither a person who is not a party nor a person who has been denied intervention may file an application for rehearing after a final order." *Natural Gas Pipeline Co. of America*, 21 FERC ¶ 61,223 at 61,501 (1982) (citing *Pub. Serv. Comm'n of N.Y. v. FPC*, 284 F.2d 200 (D.C. Cir. 1960) and *Episcopal Theological Seminary of the Southwest v. FPC*, 269 F.2d 228 (D.C. Cir. 1959)).

The only relief as to which Sierra Club even arguably has standing to seek rehearing or judicial review is the denial of its motion for intervention. However, the ability to make such a limited challenge does not make Sierra Club a party to the full proceedings. As the United States Court of Appeals for the District of Columbia Circuit has explained in dismissing a petition for review of a merits decision filed by a denied intervenor, "a would-be intervenor is a party to the proceeding in a particular and peculiar, limited sense" and "a would-be intervenor whose application to intervene has been denied is not a party to the full proceeding upon the merits and is not aggrieved, within the statutory meaning, at the time or upon the occasion of the entry of the final order by the Commission upon the merits." *Pub. Serv. Comm'n of N.Y.*, 284 F.2d at

203-04. Such a would-be intervenor is "restricted to the proceedings upon the application for intervention." *Id.* At 204.

It necessarily follows that Sierra Club has no standing to seek a stay of DOE/FE's merits determination. Sierra Club seeks a stay "pending resolution of this motion for rehearing and any judicial appeal of DOE/FE's decision thereon." Mot. at 25. Sierra Club has no right to seek either rehearing or judicial review of DOE/FE's merits determination. Therefore, it has no concomitant right to seek a stay pending such review. In other words, because the right to a stay depends on the right to seek review, non-parties denied intervention have no ability to seek a stay of decisions on the merits. *See, e.g., Piambino v. Bailey*, 757 F.2d 1112, 1136 n.62 (11th Cir. 1985) ("Sylva, not being a party to the proceedings, lacked standing to move the court to . . . stay the execution of the final judgment. As a nonparty, what Sylva was actually seeking was an injunction . . . . In our view, the district court, having denied Sylva intervention, had to deny his application for such injunctive relief."); *Ameren Services Co.*, 127 FERC ¶ 61,121 at P 36 (2009) ("In light of our decision to deny Lighthouse's late motion to intervene, we reject its comments in support of the Indicated Participants' emergency motion and request for stay. Because Lighthouse is not a party [to] this proceeding, it lacks standing to comment on the request for stay of the Order on Paper Hearing."); *Southern Cal. Edison Co.*, 124 FERC ¶ 61,157 at P 10 (2008) ("Given that we have determined that intervention does not lie in the prefiling process, and thus there are no "parties" in such a process, the ACC lacks standing to seek a stay here. Therefore, we reject its stay request.").

II. SIERRA CLUB HAS NOT SATISFIED THE STANDARDS FOR A STAY

Even if Sierra Club had standing to seek a stay—and it does not—it has not satisfied the stringent standards justifying such extraordinary relief. FERC has already reached that

conclusion after considering the same arguments made by Sierra Club here. *See Sabine Pass Liquefaction, LLC*, 140 FERC ¶ 61,076 at PP 34-35 (2012).[2]

In its barebones motion, Sierra Club asks DOE/FE to apply the traditional four-factor test utilized by the courts and by agencies when assessing a request for stay pending rehearing or appeal. *See* Mot. at 24-25 These factors are as follows: (1) irreparable harm to the movant; (2) lack of substantial harm to the nonmovant; (3) whether a stay is in the public interest; and (4) the movant's showing of a substantial likelihood of success on the merits. *See Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (1958). In its assessment of a request for stay, FERC, which shares jurisdiction under Section 3 of the NGA with DOE/FE, does not give each factor equal weight: "If the party requesting a stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors." *Devon Power LLC*, 119 FERC ¶ 61,150 at P 21 (2007); *accord Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,020 at P 17 (2011).

A. Sierra Club Has Not Shown Irreparable Injury

As FERC has held, to obtain a stay, Sierra Club must show a "certain and great" harm and "proof indicating that the harm is certain to occur in the near future." *Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,020 at P 17. Moreover, Sierra Club "must show that the alleged harm will ***directly result*** from the action which the movant seeks to enjoin." *Id.* (emphasis added).

Exports from the Liquefaction Project will not occur in the "near future," but rather, are anticipated to commence in 2015. Nonetheless, Sierra Club asserts that DOE/FE's export authorization "will produce immediate and irreparable environmental impacts" because natural gas producers are likely to increase their production in anticipation of export. Mot. at 25.

[2] Unlike this proceeding, Sierra Club had standing to seek such relief because FERC granted it intervenor status. *See Sabine Pass Liquefaction, LLC*, 139 FERC ¶ 61,039 at P 15 (2012).

However, DOE/FE has already found that Sierra Club's unsubstantiated concerns do not establish a causal connection of "whether or how the Liquefaction Project and the exports of natural gas from the Project will affect shale gas development." Order No. 2961-A at 28.

Accordingly, consistent with the approach taken by FERC, DOE/FE need not even consider the remaining factors. Sierra Club alleges no harms that are supported by evidence, are imminent, and are directly linked to the specific actions that DOE/FE has authorized Sabine to undertake. Having failed to show harm that is both imminent and irreparable, Sierra Club is not entitled to a stay as a matter of law.

B. A Stay Will Substantially Harm Sabine

Granting a stay would cause Sabine substantial and irreparable injury. In denying Sierra Club's untimely motion for intervention, DOE/FE has already found that "it is reasonable to conclude at least that Sabine Pass's own business interests will be negatively affected by further delay in the issuance of a final order herein." Order No. 2961-A at 26. That finding applies as well to Sierra Club's request for a stay. Sabine has incurred substantial development costs, has entered into complex financing arrangements and recently commenced construction of the Liquefaction Project. A stay would result in a delay in construction, which in turn, would lead to increased construction and other costs.

C. The Public Interest Does Not Favor A Stay

DOE/FE has already determined that the Liquefaction Project is consistent with the public interest. In this regard, granting a stay would be ***contrary*** to the public interest because, among other things, it would deny the communities of Southwestern Louisiana stable jobs, tax revenues and other economic benefits associated with the current ongoing construction of the

Liquefaction Project on the basis of a speculative argument that already has been rejected by both DOE/FE and FERC.

D. Sierra Club Will Not Succeed On The Merits

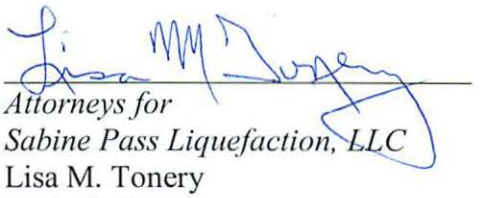
Sierra Club cannot succeed on its challenge to the merits of DOE/FE's ruling for the simple reason that, as explained above, it lacks standing to bring such a challenge, either on a motion for rehearing or on judicial review. However, even if Sierra Club had standing to seek either form of relief—which it does not—there is no likelihood that Sierra Club would succeed on the merits. Sierra Club already has raised its merits arguments at least three times—before FERC initially and on rehearing, and before DOE/FE in its late motion to intervene—and the arguments have been rejected every time. Sierra Club has shown no basis to question DOE/FE's reasoned determinations, much less that it would succeed in a challenge to them.

Moreover, even if Sierra Club seeks review of the denial of its intervention, there is no reasonable likelihood that DOE/FE's reasoned determination in denying Sierra Club's tardy intervention would be overturned. A denial of intervention can be overturned only for abuse of discretion. *See, e.g.*, *City of Orrville, Ohio v. FERC*, 147 F.3d 979, 990-91 (D.C. Cir. 1998). The Supreme Court has long stressed that "the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress [has] confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978). Accordingly, "[a]gencies must have the ability to manage their own dockets and set reasonable limitations on the processes by which interested persons can support or contest proposed actions." *California Trout v. FERC*, 572 F.3d 1003, 1007 (9th Cir. 2009).

III. CONCLUSION

WHEREFORE, Sabine respectfully requests that DOE/FE deny Sierra Club's motion for stay on the grounds that Sierra Club is not a party to this proceeding, and accordingly, lacks standing to seek review or stay of the merits determinations in this proceeding. As fully discussed herein, even if Sierra Club had standing to seek a stay—and it does not—it has not come close to satisfying the stringent standards necessary for such extraordinary relief.

Respectfully submitted,



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Dated: September 21, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list in this proceeding.

Dated at New York, NY this 21st day of September, 2012.

Dionne McCallum-George
on behalf of
Sabine Pass Liquefaction, LLC