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**UNITED STATES OF AMERICA  
DEPARTMENT OF ENERGY  
OFFICE OF FOSSIL ENERGY**

IN THE MATTER OF

Cheniere Marketing, LLC

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**FE DOCKET NO. 12-97-LNG**

**SIERRA CLUB'S RENEWED MOTION TO REPLY AND REPLY COMMENTS**

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Pursuant to 10 C.F.R. §§ 590.302(a) & 590.310, Sierra Club moves for leave to reply to Cheniere’s answer to its protest. Sierra Club’s reply is incorporated into this filing. Sierra Club stands by the arguments raised in its motion to intervene and protest, and re-asserts those arguments here. Below, we provide limited and specific responses to several arguments raised in Cheniere’s answer.

**I. Sierra Club’s Motion to Intervene Is Unopposed and Thereby Granted by Operation of Statute**

Sierra Club’s motion to intervene was timely filed. Although Cheniere filed an answer in opposition to the substance Sierra Club’s protest, Cheniere has not stated any opposition to Sierra Club’s intervention in this proceeding, nor has Cheniere offered any argument against Sierra Club’s intervention. Accordingly, Sierra Club’s motion to intervene is unopposed. Because no timely opposition to Sierra Club’s intervention was filed, and because DOE did not itself act to deny or limit our intervention within fifteen days of the filing of our motion, our motion to intervene must be deemed to be granted in full. 10 C.F.R. § 590.303(g).

**II. Sierra Club Hereby Renews its Motion for Leave to Reply to Cheniere’s Answer**

DOE/FE rules allow any party to move for additional procedures in any case. See 10 C.F.R. §§ 590.302(a) & 590.310. Sierra Club did so in its protest, moving for a reply if any party opposed its motion to intervene. See Sierra Club Protest at 3 n.2. Sierra Club now renews that motion.

DOE/FE is confronting a very large, and novel, wave of LNG export applications. Each such application raises important questions as to whether the economic and environmental implications of export are in the public interest. See 15 U.S.C. § 717b; see also *Nat’l Ass’n for the Advancement of Colored People v. Federal Power Comm’n*, 425 U.S. 662, 670 n.4 &n.6 (1976); *Udall v. Federal Power Comm’n*, 397 U.S. 428 (1967). As DOE/FE and Deputy Assistant Secretary Smith have acknowledged, “a sound evidentiary record is essential to reach a

reasoned decision in these [LNG export] proceedings.”<sup>1</sup> Sierra Club has provided DOE/FE with an extensive, careful, discussion of relevant impacts in its protest. DOE/FE should allow Sierra Club to reply in order to ensure that these arguments are fully aired before it, and the record is fully developed before DOE/FE makes its final determination.

### **III. Cheniere’s Reliance on Sabine Pass is Misplaced**

DOE/FE must reject Cheniere’s argument that DOE/FE has already decided the issues Sierra Club raises, in DOE/FE’s prior order on Sabine Pass, DOE/FE Orders 2961 and 2961-A. As we previously explained, Protest at 31-32, the *Sabine Pass* decisions were wrongly decided, and DOE/FE is not bound to follow those orders here. *Louisiana Pub. Serv. Comm’n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999) (Agency may reverse its position expressed in a prior order “with or without a change in circumstances” so long as it provides “a reasoned analysis” for the change.) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983)). The record here includes extensive discussion of EIA’s ability to predict the location and extend of induced production, factual information that was not present in the *Sabine Pass* record at the time DOE/FE issued its decisions. The record here is also distinct in that DOE/FE is now facing a vastly increased number of export applications, demonstrating the broader scope of export issues and thus the potential for these applications to cumulatively impact the domestic environment and economy.

### **IV. DOE Must Consider Environmental Impacts, Including Induced Production**

#### **A. FERC’s Role As Lead Agency Does not Relieve DOE/FE of Its Obligation to Consider Environmental Impacts**

Although Cheniere extensively discusses FERC’s role as lead agency for NEPA review, Answer at 6-8, Cheniere expresses no disagreement with Sierra Club’s statement that “if the NEPA analysis FERC prepares in its capacity as lead agency is inadequate to fully inform DOE/FE’s decision or discharge DOE/FE’s NEPA obligations, DOE/FE must prepare a separate EIS.” Answer at 7 (quoting Protest at 8). As we previously explained, both NEPA and the NGA oblige DOE/FE to consider the environmental effects of the proposed exports prior to making a decision, and if FERC does not adequately analyze these effects in its EIS, DOE/FE must do so separately.

#### **B. DOE/FE Must Consider Induced Production**

Among the environmental effects that must be considered are the effects of the additional gas production that would be induced by the proposed exports. Protest at 26-53. Cheniere

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<sup>1</sup> Letter from Secretary Smith to Rep. Edward Markey (Feb. 24, 2012) at 4.

proposes to export 2.1 bcf/d of exports. Cheniere further proposes to use natural gas fired compressors to liquefy pipeline gas for export, which will likely add 9% to the site's demand.<sup>2</sup> At least 63% of this demand will be satisfied by increases in production.<sup>3</sup> Thus, Cheniere's proposal, in isolation, will induce roughly 1.44 bcf/d of additional production.

Cheniere offers no discussion or refutation of EIA's predictions in this regard. Without acknowledging EIA's informed forecasts, Cheniere merely asserts that "it is reasonable to anticipate that natural gas production in the U.S. would continue to increase in the absence of proposed LNG export projects, including the CCL Project." Answer at 11. We note that Cheniere's application takes the contrary view, arguing that absent the stable demand created by exports, gas production (and investment therein) will *decrease*, leading to price volatility. App. at 33-34. Of course, neither of Cheniere's assertions is supported by the type of informed analysis presented by EIA. Notably, EIA acknowledges that total domestic gas production is likely to increase regardless of whether LNG is exported, but EIA determined that production will not increase *as much* without exports. The environmental effects of this marginal additional increase in production are what DOE/FE must analyze.

Cheniere cites several FERC pipeline proceedings in which FERC, in Cheniere's terms, found that pipelines were "not sufficiently causally related" to potential production, but those orders rest on markedly different facts than those presented by LNG export.<sup>4</sup> Answer at 10-11. For one, in the case of LNG exports, we have detailed forecasts of the ways in which exports will induce production, whereas this type of forecast was largely absent in the cited pipeline cases. In addition to these forecasts, the logical link between export approval and production is much closer than the link between pipelines and productions, because there is no way to connect foreign markets with US production absent DOE/FE approval of exports, whereas FERC has declined to consider induced production in the cited pipeline cases on the ground that the same gas fields can supply the same markets regardless of whether proposed pipelines are completed.

Accordingly, DOE/FE must acknowledge that LNG exports will induce additional gas production. As we explained, this induced production will have severe environmental effects, which Cheniere has not disputed. The environmental effects of induced production therefore must be considered as part of DOE/FE's NGA and NEPA review.

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<sup>2</sup> EIA Export Study at 6.

<sup>3</sup> *Id.*

<sup>4</sup> In addition, we contend that those orders were generally wrongly decided on their own facts, for reasons we have explained elsewhere.

## V. A Programmatic EIS Is Appropriate

Cheniere argues that “there is no basis for preparation of a programmatic EIS.” Answer at 9. In so doing, Cheniere relies on an overly cramped reading of 10 C.F.R. 1021.104(b). This regulation provides that “Programmatic NEPA document means a broad-scope EIS or EA that identifies and assesses the environmental impacts of a DOE program; it may also refer to an associated NEPA document, such as an NOI, ROD, or FONSI.” Cheniere argues that LNG exports are not a “DOE program,” because the individual applications are driven by separate companies, rather than by DOE/FE initiative. This is an overly cramped reading of “program.” Although DOE/FE is not programmatically initiating these applications, it has quite reasonably determined that it will take programmatic steps in their evaluation, as demonstrated by DOE/FE’s commissioning of the broadly-applicable EIA and NERA export studies. DOE/FE must adopt a similarly encompassing approach to the environmental impacts of the pending applications.

## VI. Economic Impacts

### A. Cheniere Misapplies DOE’s 1984 Import Guidance In Arguing That Price Impacts Are Outside The Scope of The Public Interest Analysis

Cheniere relies on import policy guidelines DOE adopted in 1984 to argue that DOE/FE should consider the need for the gas without considering the effect on prices. Answer 4-5, 12-14. This argument takes the 1984 policy guidelines out of context, and would unreasonably constrain the public interest analysis in the export context.

The issue confronting DOE/FE at the time it issued the 1984 guidelines was whether to directly regulate *prices* of natural gas being *imported* from Canada. 49 Fed. Reg. at 6684-85. Prices for these imports had been subject to Canadian regulation, and were locked in under long-term, take-or-pay contracts that were unfavorable in light of present market conditions. *Id.* DOE/FE concluded that, rather than directly regulating prices for imported gas, it would seek to ensure that future imports were structured to be responsive to changes in market conditions, frowning upon “import arrangements with contract terms and conditions that restrict the competitiveness of the gas over time.” *Id.* at 6687. DOE/FE reasoned that in the import context, if domestic purchasers were willing to pay competitive market rates for gas offered for import, this itself likely demonstrated a need for the gas and that import was in the public interest. *Id.*

This guidance’s discussion of the relationship between price and need for gas cannot be applied to exports. Although the *Sabine Pass* order briefly discussed these import guidelines in the context of exports, it would be nonsensical to assume that a foreign purchaser’s willingness to pay for gas *exported* from the United States provides a presumptive indication that there was not a domestic need for that gas. Similarly, a foreign purchaser’s willingness to pay for U.S. exports is independent of the environmental impacts that will result from producing that gas:

because DOE/FE must consider the latter as part of its public interest analysis, DOE/FE cannot simply presume that the market will reflect the public interest.

Similarly, the guidance's expression of reluctance to directly regulate prices in no way indicates that DOE/FE will or may ignore the effects of exports on prices.

Finally, Cheniere repeatedly argues that if DOE/FE were to conclude that the proposed exports were contrary to the public interest because of the effect exports would have on consumers and domestic energy intensive industries, that this would somehow improperly be a "select[ion] of winners among various market sectors." Answer at 5. Denying export authorization would not, however, "favor *one particular use* of natural gas versus other users," *id.*, especially because, as we and APGA have explained, natural gas exports will negatively impact vast swaths of the domestic economy.

## **B. Economic Impacts of Cheniere's Proposed Exports Are Contrary to The Public Interest**

As we have explained, Cheniere's proposed exports will entail significant environmental harms. Cheniere's assertions of economic benefit are unsupported and are refuted by other available evidence. Accordingly, it is clear that in balance, the proposed exports would be contrary to the public interest.

Cheniere's proposal will cause economic harm by increase the prices of domestic natural gas. As we previously explained, EIA has predicted the magnitude of price increases under various scenarios. Protest at 53-57. Although these estimates are unreasonably conservative, for reasons we previously explained, even this level of price increase would adversely affect the domestic economy, by raising the amount households pay for energy and by eliminating jobs in energy intensive industries.

These effects on other industries are severe. Indeed, analysts at Purdue University recently conducted independent modeling and concluded that LNG exports would cause a net decline in domestic GDP.<sup>5</sup> Although the NERA study predicts a slight net increase in GDP, the NERA study suffers significant flaws, as identified in our comments thereon.

Both the Purdue and NERA studies agree, however, that exports will negatively affect the majority of Americans. As we have explained, the NERA study predicts net loss of the equivalent of up to 270,000 jobs each year.<sup>6</sup> And NERA predicts that all persons who derive most of their income from wages—i.e., the vast majority of Americans—will be economically worse off.

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<sup>5</sup> Comment of Wallace Tyner on NERA Macroeconomic Impact Study (Jan. 14, 2013). As DOE/FE has explained, these comments will be included in the docket for this individual application.

<sup>6</sup> Sierra Club *et al.*, Initial Comment on NERA Study, Ex. 5 at 2 (Jan. 24, 2013). Although our initial protest in the instant docket characterized the NERA study as predicting no net effect on

Under any reasonable interpretation of the NGA’s “public interest” analysis, these broad impacts must be considered. Indeed, insofar as Cheniere argues that these impacts should not be considered in DOE/FE’s public interest analysis, it is unclear what Cheniere *would* include. Accordingly, DOE/FE must reject Cheniere’s assertion that these impacts, which are largely the result of price increases that export will cause, could or should be excluded from DOE/FE’s deliberation.

## VII. Conditional Authorization Should Not Precede Review of The Above

Cheniere again argues that DOE/FE should issue a conditional order now. Answer at 8-9. As we previously explained, DOE/FE regulations provide that DOE “shall take no action” concerning a proposal that is the subject of an EIS until the EIS is completed, and FERC has already determined that an EIS will be prepared here. 10 C.F.R. § 1021.211; Protest at 15-17. This regulation distinguishes the cases cited by Cheniere, and prohibits DOE/FE from taking action here.

At the outset, we reiterate our prior argument that both issuing a conditional evaluation of the public interest is logically incoherent prior to assessment of the environmental factors bearing on the public interest, and that any such conditional authorization violates general principles of NEPA law, independent of the operation of 10 C.F.R. § 1021.211. Protest 15-17.

In its answer, Cheniere cites two prior decisions regarding gas imports in which a conditional order was granted prior to completion of environmental review. *Ocean State Power, Final Order Granting Authorization to Import Natural Gas from Canada*, DOE Order 243-A (Sept. 14, 1988), *Rochester Gas and Electric Corp., Conditional Order granting Long-term Authorization to Import Natural Gas from Canada and Granting Intervention*, DOE/FE Order 503 (May 16, 1991). Both of these decisions precede the effective date of current 10 C.F.R. § 1021.211, and thus, these decisions were not made under the current regulatory regime that prohibits DOE action prior to completion of an EIS.<sup>7</sup>

Cheniere further cites DOE/FE’s conditional authorization of exports for *Sabine Pass*. As we have explained, *Sabine Pass* was wrongly decided. Moreover, *Sabine Pass* did not involve a full EIS, and therefore, did not implicate 10 C.F.R. §1021.211. Accordingly, it is inapplicable here.

Similarly, Cheniere cites *PUC of Calif. v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) as approving of FERC’s issuance of a conditional authorization prior completion of environmental review.

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jobs, further analysis of the NERA study indicates that it predicts a net job loss, as we explain in our comment thereon.

<sup>7</sup> 57 Fed. Reg. 15122 (Apr. 24, 1992).



Section 1021.211 was not at issue there, as the case concerned a separate agency and predated 1021.211's enactment.

We recognize, as we previously discussed, that section 1021.211 refers to cases in which DOE is preparing an EIS. Under any reasonable interpretation of the regulation, however, the regulation applies when the action DOE is considering is subject to an EIS, regardless of whether DOE is the lead or cooperating agency for the NEPA process.

### **VIII. Conclusion**

The most important issue raised in Sierra Club's protest is DOE/FE's obligation to consider the impacts of induced production. Cheniere's answer merely asserts that production is not causally related to exports, without acknowledging (much less refuting) Sierra Club's specific evidence showing such a causal relation. NEPA and the NGA require consideration and disclosure of the environmental impacts of this production. Fairly weighed, Sierra Club continues to contend, such impacts demonstrate that Cheniere's proposal is not in the public interest. This is particularly so given the project's questionable economic benefits. Whether or not these economic benefits are as large as Cheniere contends, it would be arbitrary and capricious to weigh them without counting the environmental cost. Accordingly, as we explained in our protest, DOE/FE's public interest review must consider the environmental effects of terminal construction and operation, of induced production, and of increased domestic gas prices. To ensure that these effects are given adequate consideration, DOE/FE should deny Cheniere's request for a conditional authorization prior to completion of environmental review.

Dated: January 25, 2013

Respectfully submitted,

*/s/ Nathan Matthews*

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused the above documents to be served on the applicant and all others parties in this docket, in accordance with 10 C.F.R. § 590.017, on January 25, 2013.

Dated at San Francisco, CA, this 25<sup>th</sup> day of January, 2013.



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VERIFICATION

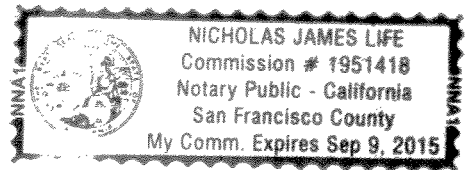
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Pursuant to C.F.R. §590.103(b), Nathan Matthews, being duly sworn, affirms that he is authorized to execute this verification, that he has read the foregoing document, and that facts stated herein are true and correct to the best of his knowledge, information, and belief.



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Subscribed and sworn to before me this 25<sup>th</sup> day of January, 2013.

  
Notary Public

My commission expires: 09/09/2015