

174 FERC ¶ 61,207  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;  
Neil Chatterjee, James P. Danly,  
Allison Clements, and Mark C. Christie.

New Fortress Energy LLC

Docket No. CP20-466-000

ORDER ON SHOW CAUSE

(Issued March 19, 2021)

1. On June 18, 2020, the Commission issued an order directing New Fortress Energy LLC (New Fortress Energy) to show cause why the liquefied natural gas (LNG) handling facility it constructed at the Port of San Juan in Puerto Rico is not subject to the Commission's jurisdiction under section 3 of the Natural Gas Act (NGA) (Show Cause Order).<sup>1</sup> New Fortress Energy filed a response on July 20, 2020. For the reasons discussed below, we find that the LNG handling facility is subject to the Commission's jurisdiction under NGA section 3 and direct New Fortress Energy to file an application for authorization to operate the facility within 180 days of this order.<sup>2</sup> We also find that allowing operation of the facility to continue during the pendency of an application is in the public interest.

**I. Background**

**A. New Fortress Energy's Facility**

2. New Fortress Energy, through its subsidiary, NFEnergía LLC, constructed and operates an LNG handling facility on an approximately 6.1-acre plot of land at Wharves A and B of the Port of San Juan.<sup>3</sup> New Fortress Energy describes Wharves A and B as a multi-use fuel handling berth and states that it chose this specific location

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<sup>1</sup> *New Fortress Energy, LLC*, 171 FERC ¶ 61,230 (2020).

<sup>2</sup> Because the New Fortress Energy facility is already constructed, we waive the mandatory pre-filing procedures. *See* 18 C.F.R. § 153.12 (2020).

<sup>3</sup> A description of New Fortress Energy's facility is included in Appendix B of New Fortress Energy's July 20, 2020 Response.

because it is in a part of the San Juan Harbor that has long been used to deliver fuels into Puerto Rico and that will continue to receive various fuels in the future.

3. LNG reaches the facility through a floating storage unit (FSU) that is semi-permanently moored at San Juan Harbor. Specifically, shuttle vessels deliver LNG to the FSU after conducting lightering operations with ocean-going, bulk-carrier LNG tankers which are anchored off the coast of Puerto Rico outside of Puerto Rican waters. The FSU transfers LNG onshore through cargo transfer pumps located on the vessel and two or three non-permanent, flexible, eight-inch-diameter cryogenic hoses that extend from the FSU. One or two hoses are used to handle the liquid natural gas, depending on the desired flow rate, and the third hose is used to maintain the boil-off gas vapor on the marine vessel.

4. The facility distributes LNG in two ways: (1) via truck, following ship-to-truck LNG trans-loading operations; and (2) through a direct natural gas vapor connection to Puerto Rico Electric Power Authority's (PREPA) San Juan Power Plant. When the facility is operating its truck loading facilities, LNG flows from the cryogenic hoses to an onshore liquid header and is then routed to a truck-loading rack with four bays for loading into International Standard Organization (ISO) containers or tankers. A pressure vessel is required in order to maintain and balance pressure during the unloading process from the FSU to the truck-loading rack. This pressure vessel provides a buffering function, but, according to New Fortress Energy, does not function as onsite storage. The LNG is then distributed throughout Puerto Rico to industrial consumers via truck.

5. When the facility is providing natural gas vapor to the abutting San Juan Power Plant, LNG is routed from the onshore liquid header to vaporizers for regasification. As with the truck-loading operations, the piping system includes a pressure vessel that provides a buffer between the FSU and the sendout pump. New Fortress Energy states that it cannot send gas to the San Juan Power Plant or load trucks without the FSU present, which it contends indicates that the pressure vessel does not function as onsite storage. Four LNG withdrawal lines connect the pressure vessel to a single high-pressure sendout pump, which is fully submerged in LNG and contained within pump cans. LNG from the pump then flows to two regasification units. Natural gas exits each regasification unit via 10-inch-diameter, stainless steel process piping, which combine into a 14-inch-diameter stainless steel process pipe that connects to a metering skid. Natural gas flows directly from the metering skid to the San Juan Power Plant via a 75-foot, 10-inch-diameter, carbon steel pipe. New Fortress Energy's portion of the pipe terminates at the wall that separates the LNG facility from the power plant and connects with power plant piping owned by the PREPA.<sup>4</sup>

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<sup>4</sup> New Fortress Energy states that the piping, including the portion that is part of New Fortress Energy's facility, is identical to the piping typically used on-site at

**B. New Fortress Energy's July 20, 2020 Response to the Show Cause Order**

6. On July 20, 2020, New Fortress Energy filed a response to the Show Cause Order arguing that its facility should not be subject to the Commission's NGA section 3 jurisdiction. New Fortress Energy contends that the facility is not a jurisdictional LNG terminal because it: (1) does not receive natural gas or deliver regasified LNG through a pipeline; (2) is not located at the point of import or export such that LNG is directly transferred to or from oceangoing, bulk-carrier LNG tankers; and (3) does not have sufficient physical elements to constitute natural gas facilities as commonly understood by the Commission and the regulated community.<sup>5</sup>

**II. Comments, Interventions, and Answers**

7. On July 31, 2020, a group of 11 non-profit environmental, community, and labor groups<sup>6</sup> (collectively, NGOs) filed a motion to intervene and protest of New Fortress Energy's July 20, 2020 response. On August 14, 2020, New Fortress Energy filed an answer to the protest and opposed the NGOs' motion to intervene, noting that the Commission's Show Cause Order did not seek interventions in this proceeding. New Fortress Energy and the NGOs each filed additional answers to answers. The Commission's Rules of Practice and Procedure do not permit answers to protests or answers to answers;<sup>7</sup> however, we find good cause to waive our rules and accept the answers because they provide information that has assisted in our decision-making process. Atlantic Climate Justice Alliance, PREPA, Sierra Club, and Ms. Diana Dakey also filed comments.

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gas-fired power plants, including Units 5 and 6 of the San Juan Power Plant, to move natural gas both around the site and inside the plant itself.

<sup>5</sup> New Fortress Energy July 20, 2020 Response at 3.

<sup>6</sup> They are: (1) The Comité Pro Seguridad y el Ambiente del Barrio Sabana; (2) El Puente de Williamsburg, Inc. – Enlace Latino de Acción Climática; (3) Comité Yabucoeño Pro-Calidad de Vida, Inc.; (4) Alianza Comunitaria Ambientalista del Sureste, Inc.; (5) Sierra Club Puerto Rico, Inc.; (6) Mayagüezanos por la Salud y el Ambiente, Inc.; (7) Coalición de Organizaciones Anti Incineración, Inc.; (8) Amigos del Río Guaynabo, Inc.; (9) Campamento Contra las Cenizas en Peñuelas, Inc.; (10) Comité Diálogo Ambiental, Inc.; and (11) Unión de Trabajadores de la Industria Eléctrica y Riego, Inc.

<sup>7</sup> 18 C.F.R. § 385.213(a)(2) (2020).

8. Although the Show Cause Order did not seek comments or interventions, the NGOs have demonstrated that good cause exists to grant their motion because no other party can represent their interests and permitting intervention would not disrupt the proceeding. Therefore, we grant the NGOs' motion to intervene. The protest, answers, and comments are addressed below.

### III. Discussion

9. Section 3(e)(1) of the NGA 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.”<sup>8</sup> NGA section 2(11), which was added to the act in 2005, defines an LNG terminal 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 . . . , exported to a foreign country . . . , 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].<sup>9</sup>

10. The Commission makes jurisdictional determinations concerning projects, including LNG projects, on a case-by-case basis.<sup>10</sup> Further, the vast majority of proposals the Commission has had the opportunity to consider involved large, coastal facilities either receiving natural gas vapor from a transportation pipeline and delivering LNG into a large, ocean going bulk carrier, or receiving LNG from a large bulk carrier and delivering vapor into a pipeline for subsequent transportation. Based on this experience, we have considered three criteria when determining whether a facility is an LNG import or export terminal subject to the Commission's jurisdiction: (1) whether an

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<sup>8</sup> 15 U.S.C. § 717b(e)(1). The 1977 DOE Organization Act (42 U.S.C. § 7151(b)) placed all section 3 jurisdiction under DOE. The Secretary of Energy subsequently delegated authority to the Commission to “[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports.” DOE Delegation Order No. 00-004.00A, section 1.21A (May 16, 2006).

<sup>9</sup> 15 U.S.C. § 717a(11).

<sup>10</sup> *Gulf Oil Limited Partnership*, 148 FERC ¶ 61,029, at P 8 (2014) (citing *Marathon Oil Company*, 53 F.P.C. 2164 (1975)).

LNG terminal would include facilities dedicated to the import or export of LNG;<sup>11</sup> (2) whether the facility would be located at or near the point of import or export;<sup>12</sup> and (3) whether the facility would receive or send-out gas via a pipeline.<sup>13</sup> For LNG terminals operating in interstate commerce the Commission considered a fourth criterion – whether after leaving the facility the LNG is reintroduced into a pipeline such that the LNG terminal facilitates the interstate transportation of natural gas by pipelines.<sup>14</sup>

11. As discussed below, we find that the New Fortress Energy facility is an LNG terminal as defined by the NGA.

**A. Jurisdiction of New Fortress Energy’s Facility**

**1. New Fortress Energy Constructed a Dedicated LNG Facility**

12. New Fortress Energy has constructed and operates a dedicated LNG facility at the Port of San Juan. Although New Fortress Energy notes that Wharves A and B, the location of the LNG facility at the port, make up a multi-use fuel handling berth, the Commission would not be exerting jurisdiction over the wharves themselves. Rather, the Commission’s jurisdiction would extend only to the facility constructed by New Fortress Energy for the purpose of importing LNG, and nothing in the record indicates that the New Fortress Energy facility would be used for any other purpose. Nor does

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<sup>11</sup> See *The Gas Company, LLC*, 142 FERC ¶ 61,036 (2013) (*The Gas Company*) (finding no jurisdiction where the same facilities would be used to import ISO containers full of LNG and other ISO containers filled with general goods).

<sup>12</sup> See *Pivotal LNG, Inc.*, 151 FERC ¶ 61,006 (2015) (*Pivotal II*) (finding that inland liquefaction facilities that transport ISO containers by truck to the point of export are not LNG terminals).

<sup>13</sup> See *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163 (2014) (*Shell*) (finding LNG import facilities that receive LNG by ship and subsequently send the LNG out by vessel, rail, or truck are not LNG terminals).

<sup>14</sup> *Id.* P 45 (“an LNG terminal receiving LNG transported in interstate commerce by waterborne vessel would be subject to section 7 jurisdiction if any of the gas received at the terminal would be revaporized and injected into a jurisdictional pipeline. Such facilities would be links in an interstate chain, liquefying and regasifying in order to enable gas to be ferried across a stretch of water interrupting what would otherwise be a continual flow of gas by pipeline from one state to another.”).

New Fortress Energy allege that its LNG facility is integrated with the facilities used to import fuels other than LNG.

13. This is in contrast with the facilities that the Commission found not to be jurisdictional in *The Gas Company*.<sup>15</sup> In that case, the applicant proposed to use general port facilities to import LNG-filled ISO containers into Hawaii. However, because the pier facilities, which would receive, load, and unload the vessels carrying ISO containers of LNG, were the same facilities currently receiving, loading, and unloading containers filled with other products, the Commission determined that the pier facilities did not constitute “natural gas facilities” and therefore, the Commission lacked jurisdiction over them.<sup>16</sup> As stated above, there is no indication that the New Fortress Energy facility will be used to import anything other than LNG.

14. We also disagree with New Fortress Energy’s claim that an LNG terminal must include certain specific natural gas facilities, such as a storage tank or LNG processing.<sup>17</sup> Although nearly every authorized LNG terminal has included onshore storage and processing, nothing in section 2(11) of the NGA requires LNG terminals to include specific equipment. Rather, the definition states that an LNG terminal consists of “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 . . . [or] exported to a foreign country . . . .”<sup>18</sup> In fact, the Commission has exerted jurisdiction over facilities with various configurations, including those that lack onshore LNG storage.<sup>19</sup>

15. Similarly, we are not persuaded by New Fortress Energy’s assertion that its facility does not include “natural gas facilities” due to the acreage it occupies or the federal permits required to construct it.<sup>20</sup> The size and federal permits required for

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<sup>15</sup> *The Gas Company*, 142 FERC ¶ 61,036.

<sup>16</sup> *Id.* P 14.

<sup>17</sup> The NGOs allege that the New Fortress Energy facility includes, or will include in the future, onshore LNG storage. NGOs July 31, 2020 Protest at 24-25. Because the existence of onshore LNG storage is not determinative of our jurisdiction, we need not speculate regarding whether pressure vessels act as storage or whether New Fortress Energy intends to construct LNG storage in the future.

<sup>18</sup> 15 U.S.C. § 717a(11) (emphasis added).

<sup>19</sup> *See, e.g., Aguirre Offshore GasPort, LLC*, 152 FERC ¶ 61,071 (2015) (*Aguirre*).

<sup>20</sup> New Fortress Energy July 20, 2020 Response at 39-40.

a given facility are primarily a function of the volume of LNG imported (or exported) and the equipment used to effectuate such imports (or exports). The NGA does not distinguish between large or small LNG terminals for any purpose, including jurisdiction.

16. Because New Fortress Energy constructed a facility exclusively used to unload and gasify LNG imported to the United States, we find that New Fortress Energy has constructed a dedicated LNG facility at the Port of San Juan.

## 2. New Fortress Energy's Facility Is Located At the Point of Import

17. We also find that New Fortress Energy's facility is located at the point of import and capable of transferring LNG from an ocean-going LNG tanker. New Fortress Energy's operation of transferring LNG from an anchored LNG tanker outside of Puerto Rican waters to smaller supply ships, which then supply the FSU, does not render New Fortress Energy's facility non-jurisdictional. In the context of determining whether facilities constitute an LNG terminal, the Commission has only once found that the facilities were not an LNG terminal because of their location in relation to the point of import or export.<sup>21</sup> In *Pivotal II*, the Commission determined that if certain inland liquefaction facilities produce LNG that would subsequently be exported, those inland facilities would not be jurisdictional LNG terminals.<sup>22</sup> However, that case is distinguishable from New Fortress Energy's facility because the facilities at issue in *Pivotal II* were located over one hundred miles from the point of export and LNG was not capable of being directly transferred from the facilities onto an ocean-going LNG tanker. Instead, the LNG would be transported to the ultimate point of export by truck or tanker.<sup>23</sup> Here, New Fortress Energy's waterside LNG facility connects directly to an LNG vessel via a hose.

18. New Fortress Energy also asserts that LNG tankers are commonly understood to be of a particular size and the vessels used in its operation are much smaller.<sup>24</sup> Thus, New Fortress Energy concludes that its facility is not capable of directly transferring

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<sup>21</sup> We note that in *Emera CNG, LLC* and *Andalusian Energy, LLC*, the Commission found certain compressed natural gas facilities to be non-jurisdictional. *Emera CNG, LLC*, 148 FERC ¶ 61,219 (2014); *Andalusian Energy, LLC*, 174 FERC ¶ 61,107 (2021). However, in those cases, the Commission was considering its jurisdiction over export facilities, not LNG terminals.

<sup>22</sup> *Pivotal II*, 151 FERC ¶ 61,006.

<sup>23</sup> *Id.* P 12.

<sup>24</sup> New Fortress Energy July 20, 2020 Answer at 35-38.

LNG from an ocean-going, bulk-carrier LNG tanker.<sup>25</sup> While the Commission has noted that it has thus far only exercised its jurisdiction over facilities located at the point of import or export such that LNG is directly transferred to or from an ocean-going, bulk-carrier LNG tanker, those statements were meant to distinguish dedicated LNG tankers from general use cargo ships that may transport LNG-filled ISO containers.<sup>26</sup> New Fortress Energy's assertion that an LNG carrier must be a certain size is without merit and contrary to the NGA, which, as stated above, contains no minimum size limits under the definition of LNG terminal<sup>27</sup> or in section 3 or 7.

19. Nor does the NGA exempt facilities that rely on a chain of transfers from ocean-going vessels to smaller ocean-going vessels to avoid the Commission's jurisdiction.<sup>28</sup> Adopting such an approach would undermine the NGA's purpose of providing Commission oversight of the siting and construction of LNG terminals. For example, a developer could construct an LNG export terminal that includes liquefaction, storage, and other facilities typically found at LNG terminals, but avoid the Commission's jurisdiction by building a dock capable of having two ships moored to it and routing LNG through one of the vessels before transferring it to the vessel that would ultimately export it.

20. We also note that the fact that the Commission would not have jurisdiction over the FSU would not itself render the other LNG facilities non-jurisdictional. In *Aguirre*,<sup>29</sup> the applicant proposed to construct an offshore berthing platform where LNG would be transferred from an LNG tanker to a floating storage and regasification unit (FSRU).<sup>30</sup>

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<sup>25</sup> *Id.* at 38.

<sup>26</sup> The Commission has not been presented with a project that would include a dedicated LNG facility at the point of import/export that only imported or exported LNG through ISO containers; thus, we have not considered whether such a facility would be jurisdictional.

<sup>27</sup> Section 2(11) of the NGA only uses the term waterborne vessel, and contrary to New Fortress Energy's argument, a "pocket-sized" LNG vessel is still an ocean-going, bulk-carrier LNG tanker.

<sup>28</sup> As the NGOs note in their protest, the vessels used as FSUs are ocean-going LNG tankers. NGOs July 31, 2020 Protest at 23-24.

<sup>29</sup> *Aguirre*, 152 FERC ¶ 61,071.

<sup>30</sup> New Fortress Energy argues that the Commission should not rely on *Aguirre* or *EcoEléctrica* to assert jurisdiction here because the jurisdictional question was not litigated in either of those proceedings. Under NGA section 3, the Commission does not have discretion to determine that an otherwise non-jurisdictional LNG facility is



Aguirre's FSRU would then transfer natural gas onshore to a power plant. Although the Commission did not have jurisdiction over the LNG tanker or Aguirre's FSRU, finding the latter to also be a "waterborne vessel[] used to deliver natural gas to or from any such [LNG Terminal] facility" under section 2(11),<sup>31</sup> the Commission asserted jurisdiction over the berthing platform and pipeline as an LNG import terminal.<sup>32</sup>

21. We conclude that New Fortress Energy's facility is located at the point of import and is unlike the inland facilities the Commission has previously found to be non-jurisdictional. Further, the transfer of LNG from a larger ocean-going vessel to a smaller one or the Commission's jurisdiction over some but not all facilities does not render the New Fortress Energy facility non-jurisdictional.

### 3. New Fortress Energy's Facility Is Connected to a Pipeline

22. In *Shell U.S. Gas & Power, LLC*, the Commission found that a proposed LNG import facility that would be constructed on Lake Michigan in Michigan would not be a jurisdictional LNG terminal because the facility would not be connected to a pipeline.<sup>33</sup> However, unlike the import facility at issue in *Shell*, which was not connected to any type of piping, New Fortress Energy's facility is connected to an adjacent power plant via a 10-inch-diameter pipeline.

23. New Fortress Energy argues that the Commission should consider various physical characteristics of the piping, such as the design specifications, operating pressure, length, and diameter of pipe, in determining whether an LNG facility is connected to a pipeline.<sup>34</sup> We disagree. The Commission has never considered such physical characteristics when

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jurisdictional. Therefore, despite New Fortress Energy's assertion that the "cases give no meaningful guidance," the fact that those facilities were considered to be jurisdictional LNG terminals is informative to this inquiry. *See also The Gas Company*, 142 FERC ¶ 61,036 (dismissing an application because the Commission would not have jurisdiction over the facilities).

<sup>31</sup> 15 U.S.C. § 717a(11)(A).

<sup>32</sup> *Aguirre*, 152 FERC ¶ 61,071.

<sup>33</sup> *Shell*, 148 FERC ¶ 61,163 at P 43 (citations omitted).

<sup>34</sup> New Fortress Energy July 20, 2020 Response at 20; *see also* New Fortress Energy August 14, 2020 Answer at 4-7 (noting that the Commission considers physical characteristics of the pipeline in determining if a facility is gathering). The NGO's disagree that such characteristics meaningfully distinguish the New Fortress Energy facility from other jurisdictional LNG terminals. NGOs July 31, 2020 Protest at 31-39.

determining whether a facility is an LNG import or export terminal. Examining those factors here makes it clear that none of them are indicative of the function of the LNG facility itself. Rather, the physical characteristics of any piping are a function of the volume of LNG to be imported or exported and the relative distance between the LNG terminal and the ultimate end-user. Section 3 contains no minimum size limit in the definition of LNG terminal, nor does section 7 as to pipelines; accordingly, jurisdiction under section 3 or 7 is not dependent on the size of a facility. Further, to the extent that New Fortress Energy's balancing test seeks to determine whether a connected pipeline is engaged in transportation (as opposed to some other function), it is arguable that such a formulation could lead to the result that the Commission's jurisdiction would not attach to a large-scale LNG export terminal that receives natural gas directly from nearby production and gathering facilities or an import facility directly connected to a large local distribution company. Thus, the physical characteristics of the piping cited by New Fortress Energy are not relevant to our jurisdictional determination.<sup>35</sup>

24. Next, New Fortress Energy states that in *Shell*, the Commission declined to assert jurisdiction over a proposed LNG facility in Geismar, Louisiana,<sup>36</sup> that would have included piping similar to the piping at the New Fortress Energy facility. Specifically, New Fortress Energy notes that the proposed Geismar facility would include short segments of pipe that would deliver boil-off gas to large industrial customers adjacent to the liquefaction site<sup>37</sup> and that any LNG delivered from the Geismar facility to end-users would necessarily have been regasified and transferred in piping similar to the pipe found at New Fortress Energy's facility.<sup>38</sup> Thus, New Fortress Energy contends that Commission has previously found similar piping to not be a pipeline for the purpose of its jurisdiction.

25. The Commission's analysis of the Geismar facility bears no relevance to whether New Fortress Energy's facility is an LNG import terminal subject to the Commission's

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<sup>35</sup> This is in contrast with the Commission's primary function test for gathering facilities, which does examine these physical characteristics. However, for those facilities, the diameter and pressure of the lines are relevant to determining whether the facility operates as a gathering facility because historically, gathering facilities are of a particular size and configuration. That is not the case as here where the physical characteristics of the piping is simply related to the location and size of this LNG terminal, not its operation as an LNG terminal.

<sup>36</sup> The Geismar facility is distinct from the Lake Michigan facility discussed above.

<sup>37</sup> *Id.* at 26.

<sup>38</sup> New Fortress Energy July 20, 2020 Response at 25-28.

jurisdiction because the Geismar facility would operate in interstate commerce, not foreign commerce. As stated above, for facilities operating in interstate commerce, like the Geismar facility, the Commission considers whether after leaving the facility, the LNG is reintroduced into a pipeline such that the LNG terminal facilitates the interstate transportation of natural gas by pipelines. New Fortress Energy's argument regarding the segments of piping that deliver regasified LNG to end-users is related only to this consideration, which is irrelevant to whether New Fortress Energy's facility is an LNG terminal operating in foreign commerce.

26. New Fortress Energy also argues that exerting jurisdiction here would greatly expand the Commission's regulatory reach over facilities that have never been considered jurisdictional LNG terminals.<sup>39</sup> New Fortress Energy speculates that if the Commission were to find that its piping were a pipeline, the Commission could find LNG facilities that transfer LNG by truck directly to end-users, such as power plants or other industrial customers, are jurisdictional LNG terminals because those end-users move regasified LNG within their facilities using piping similar to that found at New Fortress Energy's facility.<sup>40</sup>

27. New Fortress Energy's concerns are misplaced. The hypothetical posited by New Fortress Energy, involving liquefaction of natural gas for purposes of the *interstate* delivery of LNG by truck to end users, is distinguishable from this case because New Fortress Energy's facility operates in foreign commerce. As discussed above, when examining LNG facilities operating in interstate commerce, the Commission exerts jurisdiction only where the conversion of natural gas into LNG enables interstate transportation of such gas by pipeline.<sup>41</sup> If the LNG does not reenter a pipeline system, this does not occur. In fact, this is the precise set of facts that the Commission considered in *Pivotal I* and found the facilities to be non-jurisdictional.<sup>42</sup>

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<sup>39</sup> New Fortress Energy July 20, 2020 Response at 9, 33-35.

<sup>40</sup> *Id.* at 9-10, 33-35 (noting that those facilities authorized under section 7 of the NGA would also be granted eminent domain authority).

<sup>41</sup> *See Shell*, 148 FERC ¶ 61,163 at P 45 (“an LNG terminal receiving LNG transported in interstate commerce by waterborne vessel would be subject to section 7 jurisdiction if any of the gas received at the terminal would be revaporized and injected into a jurisdictional pipeline. Such facilities would be links in an interstate chain, liquefying and regasifying in order to enable gas to be ferried across a stretch of water interrupting what would otherwise be a continual flow of gas by pipeline from one state to another.”).

<sup>42</sup> *Pivotal I*, 148 FERC ¶ 61,164.

28. Because the New Fortress Energy facility includes facilities dedicated to the importation of LNG in foreign commerce, is located at or near the point of import, and includes a pipeline that sends out gas, it is an LNG terminal subject to the Commission's jurisdiction.

**B. New Fortress Energy's Intent and the Public Benefits of the Project Are Not Relevant**

29. New Fortress Energy argues that the LNG facility has many public benefits to Puerto Rico, most notably its ability to provide cleaner, affordable, and reliable power to the island.<sup>43</sup> The NGOs assert that several documents, including PREPA's request for proposal for the LNG facility, acknowledge that the New Fortress Energy facility is an LNG terminal subject to the Commission's jurisdiction.<sup>44</sup> The NGOs also claim that, contrary to New Fortress Energy's assertion,<sup>45</sup> the facility does not have a positive impact on the electric grid or Puerto Rican consumers.<sup>46</sup>

30. The NGA establishes the Commission's jurisdiction over facilities. As discussed above, a facility's physical configuration and function determines whether it is an LNG terminal under the NGA. The understanding of the applicant or the potential public impacts of a project are not relevant to our jurisdictional determination.

**C. No Regulatory Gap Exists**

31. The NGOs argue that New Fortress Energy constructed its facility and claimed its non-jurisdictional status in order to avoid review under the National Environmental Policy Act (NEPA).<sup>47</sup> They contend that if the Commission fails to assert jurisdiction, the facility will not have undergone a comprehensive environmental review, thus resulting in a regulatory gap.<sup>48</sup>

32. As the court explained in *ExxonMobil Gas Marketing Company v. FERC*, the "need for regulation cannot alone create authority to regulate," and "jurisdiction may not

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<sup>43</sup> New Fortress Energy July 20, 2020 Response at 49-54.

<sup>44</sup> NGOs July 31, 2020 Protest at 21-22.

<sup>45</sup> New Fortress Energy July 20, 2020 Response at 49-54.

<sup>46</sup> NGOs July 31, 2020 Protest at 25-29.

<sup>47</sup> *Id.* at 29.

<sup>48</sup> *Id.* at 29, 45-54 (noting that a NEPA review would have included an analysis of the safety of the facility, which, according to the NGOs, was not conducted).

be presumed based solely on the fact that there is not an express withholding of jurisdiction.”<sup>49</sup> However, we note that the fact that this Commission had not reviewed New Fortress Energy’s facility prior to its construction does not mean that other federal and local regulatory agencies lacked the authority to impose environmental and safety conditions on the construction and operation of the facility. According to New Fortress Energy, the U.S. Coast Guard has overseen the design, construction, and implementation of the marine cargo transfer systems and will continue to do so during the operation of the facility.<sup>50</sup> The U.S. Coast Guard has also issued a final rule adjusting the existing moving safety zone in San Juan Harbor to accommodate the safe navigation and mooring of shuttle vessels within the San Juan Harbor.<sup>51</sup> In addition, the U.S. Army Corps of Engineers regulates the facility under a nationwide permit, which required consultations with the U.S. Fish and Wildlife Service, National Marine Fisheries Service, and state historic preservation office.<sup>52</sup> Further, multiple territorial permits and requirements apply to the design, construction, and operation of the facility, which included an environmental analysis under the territorial equivalent of NEPA. New Fortress Energy received permits from the Puerto Rico Department of Transportation and Public Works, which is responsible for inspection and enforcement of certain pipeline safety regulations in Puerto Rico, determines what regulations apply to the power-plant piping connecting the facility to the San Juan Power Plant, and, if applicable, verifies a project’s compliance with the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration’s regulations.<sup>53</sup>

33. With respect to the NGOs allegation that New Fortress Energy violated NEPA, NEPA applies to federal agencies, not applicants, and requires the federal agency to assess the environmental effects of their proposed actions prior to making decisions.<sup>54</sup>

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<sup>49</sup> 297 F.3d 1071, 1088 (D.C. Cir. 2002).

<sup>50</sup> New Fortress Energy July 20, 2020 Answer at 48; New Fortress Energy August 14, 2020 Answer at 27-28.

<sup>51</sup> New Fortress Energy July 20, 2020 Answer at 48-49; New Fortress Energy August 14, 2020 Answer at 27-28, 30.

<sup>52</sup> New Fortress Energy July 20, 2020 Answer at 49; New Fortress Energy August 14, 2020 Answer at 24.

<sup>53</sup> New Fortress Energy August 14, 2020 Answer at 24-26.

<sup>54</sup> *Macht v. Skinner*, 916 F.2d 13, 18 (D.C. Cir. 1990) (“NEPA requires federal agencies—not states or private parties—to consider the environmental impacts of their proposed actions.”); *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 155 (D.C. Cir. 1985) (“NEPA applies only to federal agencies.”).

Here, because we find that the LNG facility constructed by New Fortress Energy is a jurisdictional LNG terminal, the Commission will conduct a NEPA analysis based on the application that New Fortress Energy submits in response to this order.<sup>55</sup>

34. New Fortress Energy contends that the Commission's jurisdiction is unnecessary because the facility is already regulated on both the federal and territorial level.<sup>56</sup> While it is true that other federal and local agencies exercise some jurisdiction over the facility, this is true of all LNG terminals and is not a basis, in and of itself, for not finding jurisdiction here.

#### **D. NGO's Remaining Arguments**

35. The NGOs allege that New Fortress Energy may commit violations of the Jones Act by importing domestically produced natural gas on foreign vessels and may have committed violations of other federal and territorial statutes and regulations.<sup>57</sup> The Commission has no authority to enforce the Jones Act or the other statutes cited by the NGOs, and therefore, these arguments are hereby dismissed.

36. The NGOs also request that the Commission open an enforcement action against New Fortress Energy for constructing the LNG facility without prior approval.<sup>58</sup> Given the rapid growth in interest in LNG and the wide variability among facility configurations, we acknowledge that the Commission's precedent regarding its jurisdiction over LNG facilities is not easily extrapolated from one facility to another. We believe that this order should improve that situation. At the same time, we emphasize that uncertainty regarding the scope of our authority does not give an entity carte blanche to pursue an action which ultimately might be found to violate the NGA – while New Fortress had informal discussions of with Commission staff, it chose not to seek a declaratory order from the Commission on its jurisdiction before constructing its facility. However, on the facts here, although we find that New Fortress Energy has constructed an LNG terminal subject to the Commission's jurisdiction without obtaining the necessary prior authorization, presuming they comply with the requirements of this order, we do not believe an enforcement action is warranted.

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<sup>55</sup> To the extent that the NGOs argue that this action requires review under NEPA, our action is categorically excluded. *See* 18 C.F.R. § 380.4(a)(1) (2020).

<sup>56</sup> New Fortress Energy July 20, 2020 Response at 48-49.

<sup>57</sup> NGOs July 31, 2020 Protest at 22-23, 54-57; *see also* NGOs August 24, 2020 Answer at 13-16.

<sup>58</sup> NGOs July 31, 2020 Protest at 58-59.

**E. New Fortress May Continue Operating While the Commission Processes Its Application**

37. The NGOs argue that the Commission should require New Fortress Energy to halt operation until it receives a section 3 authorization.<sup>59</sup> They contend that by not seeking authorization prior to construction, New Fortress Energy evaded environmental review, upending the requirements of NEPA.<sup>60</sup> The NGOs claim that allowing the continued operation of the facility would allow continued violations of NEPA, which are particularly acute because of the alleged significant environmental and safety concerns associated with the site and type of facilities.<sup>61</sup>

38. We disagree. The New Fortress Energy facility supplies cleaner burning natural gas to the San Juan Power Plant. As stated above, the U.S. Coast Guard oversaw the design, construction, and implementation of the marine cargo transfer systems, which included waterway suitability assessments and onshore operational assessments. In addition to the U.S. Coast Guard's review, the U.S. Army Corps of Engineers regulates the facility under a nationwide permit, which required consultations with the U.S. Fish and Wildlife Service and National Marine Fisheries Service. Further, multiple territorial permits and requirements apply to the design, construction, and operation of the facility and included an environmental review by Puerto Rican agencies. Under these circumstances, we find that allowing operation of the facilities to continue during the pendency of an application is in the public interest.<sup>62</sup>

**IV. Conclusion**

39. For the reasons discussed above, we find that the siting, construction, and operation of the LNG handling facility constructed by New Fortress at the Port of San Juan in Puerto Rico is subject to the Commission's jurisdiction under section 3 of

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<sup>59</sup> *Id.* at 58.

<sup>60</sup> *Id.* at 46.

<sup>61</sup> *Id.* at 45-54.

<sup>62</sup> *Egan Hub Partners, L.P.*, 73 FERC ¶ 61,334, at 61,932 (1995) (“[I]n order to avoid hardship to Egan’s customers, we will not require Egan to terminate storage service pending final action in this proceeding and Commission disposition of the certificate application required herein.”); *see also Kansok Partnership*, 73 FERC ¶ 61,160, at 61,488 (1995) (“Accordingly, the Commission is requiring Kansas Pipeline, et al. to comply with the applicable requirements of the NGA. Specifically, Kansas Pipeline, et al. must file an application for certificate authorization, pursuant to NGA section 7 and Part 157 of the Commission's regulations, to operate its system.”).

the NGA. Therefore, should New Fortress desire to continue operation of that facility, it must file with the Commission an application for authorization under section 3 of the NGA within 180 days of the date of this order. However, at this time, we will not require the facility to cease operating as a result of this order. Finally, we again note that abundant supplies of natural gas and technological advancements have changed the nature of LNG facilities throughout the United States and enabled the development of novel configurations for importing, exporting, and transporting natural gas as LNG. Although not required by the NGA, we urge project developers to seek the Commission's formal guidance through a petition for declaratory order regarding novel questions of jurisdiction prior to constructing their facilities. Such a process will ensure that the public, federal and state agencies, and other stakeholders understand the Commission's role, if any, in authorizing such facilities.

The Commission orders:

(A) The LNG handling facility constructed by New Fortress Energy is subject to the Commission's jurisdiction.

(B) New Fortress Energy shall submit an application for authorization to operate the facility within 180 days.

(C) The NGOs' motion to intervene is granted.

By the Commission. Chairman Glick and Commissioner Clements are concurring with a joint separate statement attached.  
Commissioner Danly is dissenting with a separate statement attached.  
Commissioner Christie is concurring with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.



UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

New Fortress Energy LLC

Docket No. CP20-466-000

(Issued March 19, 2021)

GLICK, Chairman, and CLEMENTS, Commissioner, *concurring*:

1. We concur in today's order finding New Fortress Energy LLC's (New Fortress Energy) liquefied natural gas (LNG) facility subject to the Commission's jurisdiction under section 3 of the Natural Gas Act (NGA). We write separately to explain our view that it is time to reconsider our precedent in *Shell U.S. Gas & Power, LLC (Shell)*, which held that a facility must be connected to a pipeline to be a jurisdictional LNG terminal.<sup>1</sup>
2. There is no such limitation in the plain language of the NGA. Section 3(e)(1) of the NGA 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."<sup>2</sup> NGA section 2(11), which was added to the NGA in 2005, defines an LNG terminal 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 . . . , exported to a foreign country . . . , 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]."<sup>3</sup>
3. Nowhere does the statute say that a facility must be connected to a pipeline to qualify as an LNG terminal and, thus, come within the Commission's jurisdiction under section 3.<sup>4</sup> We should revisit *Shell* to ensure that we are carrying out our statutory responsibilities under the letter of the law.

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<sup>1</sup> *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163, P 43 (2014).

<sup>2</sup> 15 U.S.C. § 717b(e)(1) (2018).

<sup>3</sup> 15 U.S.C. § 717a(11).

<sup>4</sup> *See Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020) ("[T]his Court may not narrow a provision's reach by inserting words Congress chose to omit."): *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) (plurality opinion) (The Court's "duty [is] to respect not only what Congress wrote but, as importantly, what it didn't

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For these reasons, we respectfully concur.

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Richard Glick  
Chairman

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Allison Clements  
Commissioner

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write.”).

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

New Fortress Energy LLC

Docket No. CP20-466-000

(Issued March 19, 2021)

DANLY, Commissioner, *dissenting*:

1. I dissent from today's order because it finds that the LNG handling facility owned and operated by New Fortress Energy LLC (New Fortress Energy) is subject to the Commission's jurisdiction under Natural Gas Act (NGA) section 3.<sup>1</sup> Accordingly, the majority directs New Fortress Energy to file an application, pursuant to NGA section 3, for authorization to operate the facility. I dissent because, in my view, the Commission should have fully applied its precedent and declined to exercise jurisdiction in this case. Instead, I would have found that LNG facilities are only "LNG terminals" if they are connected to a natural gas pipeline that transports imported or exported natural gas to or from an interstate or intrastate gas transmission system. Because New Fortress Energy is not connected to a "pipeline," it fails this test and should have been found non-jurisdictional.

2. I acknowledge that the language of NGA section 3 is poorly drafted. Section 3(e)(1) 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."<sup>2</sup> The Energy Policy Act of 2005 (EPAct 2005) amended the NGA to add section 2(11) to define "LNG terminal" to

[i]nclude[] 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—

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<sup>1</sup> 15 U.S.C. § 717b.

<sup>2</sup> *Id.* § 717b(e)(1). *See also* U.S. Department of Energy Delegation Order No. 00-004.00A, section 1.21A (May 16, 2006) (delegating authority to the Commission to "[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports").

(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 717f of this title.<sup>3</sup>

3. This text is ambiguous and broad. Although LNG facilities are typically marine terminals that take receipt of LNG by ship for storage and processing, by its plain terms the statute could be read to encompass *any* facility that takes receipt of LNG from a foreign country or handles natural gas that is destined for export. Under a strict reading, the statute could be interpreted to subject to the Commission's jurisdiction a rail yard in downtown Topeka that takes shipments of LNG in ISO containers shipped by rail from Canada and holds them for a period of time before sending them elsewhere by rail. This is because our hypothetical rail yard meets every requirement of the statute's definition—it would be 1) a “facility” that; 2) is “onshore”; 3) “stores” the LNG that has been 4) imported from “a foreign country” and is itself 5) neither a waterborne vessel nor a section 7 pipeline. I doubt the statutory text was ever intended to be so broadly interpreted and doubt even more that any majority of commissioners charged with implementing the statute from the time of its enactment would have found that jurisdiction should have been exercised over our rail yard in Topeka.<sup>4</sup>

4. Given that the definition of “LNG terminal” is so broad as to encompass virtually every “facility” that encounters LNG (aside from section 7 pipelines and marine vessels, of course), the Commission imposed rational limits on what would be deemed an LNG

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<sup>3</sup> *Id.* § 717a(11).

<sup>4</sup> Illustration of the expansiveness of the statute's definition does not require strained hypotheticals like that above. A plain reading of the statute would also subject to our jurisdiction all manner of natural gas infrastructure that would otherwise be exempt from the NGA so long as it transported natural gas originating from another country or that was ultimately bound for export. This expansive reading could include nearly everything including gathering facilities, local distribution systems and wholly intrastate pipelines. See *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163, at P 43 n.78 (2014) (*Shell*) (“Indeed, a literal reading of section 2(11)'s definition of ‘LNG Terminal’ would cause otherwise NGA-exempt gathering, intrastate pipeline, processing, and local distribution facilities to be jurisdictional under section 3 as LNG terminal facilities if they transport gas that was imported or gas that will be exported.”); *cf. id.* P 43 (“we find that while section 2(11) sets forth a very broad definition of an ‘LNG Terminal’ . . . it does not seek to redefine the term ‘natural gas facilities’ as commonly understood for purposes of Commission jurisdiction”).

terminal for the exercise of its jurisdiction in *Shell*.<sup>5</sup> In *Shell*, the Commission recited the history of its jurisdiction over LNG facilities before the EPAct 2005 amendments, including that it had declined to exercise jurisdiction over LNG facilities that did “not have pipelines connecting the facility with either the interstate or an intrastate grid.”<sup>6</sup> It further found that “the Commission has only asserted NGA jurisdiction under either section 3 or 7 over natural gas pipeline and storage facilities, including LNG facilities, that receive and/or send out gas by pipeline.”<sup>7</sup> It also explained that although the added section 2(11) “sets forth a very broad definition of ‘LNG Terminal’ . . . it does not seek to redefine the term ‘natural gas facilities’ as commonly understood for purposes of Commission jurisdiction.”<sup>8</sup> In support, it cited to the Commission’s issuances, to the implications of the statute’s broad language, and even to two Congressional Research Service reports that were “consistent” with the Commission’s conclusion that a pipeline connecting the LNG facility to the natural gas grid had been required in order to exercise jurisdiction.<sup>9</sup> I agree with this precedent insofar as it establishes *some* limitation on the Commission’s jurisdiction.

5. The issue in this case boils down to a single question: whether New Fortress Energy transports natural gas by “pipeline.” In my opinion, it does not. New Fortress Energy’s facility includes short segments of internal plant piping that moves LNG and regasified LNG within the facility. These flows terminate at the facility’s fence line where the gas directly enters the adjacent San Juan Power Plant to be burned.<sup>10</sup> This is a pipe, not a “pipeline.”<sup>11</sup>

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<sup>5</sup> See *Shell*, 148 FERC ¶ 61,163 at PP 37-50.

<sup>6</sup> *Id.* P 40.

<sup>7</sup> *Id.* P 43.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* P 43 n.81.

<sup>10</sup> In contrast, in *Aguirre Offshore GasPort, LLC*, the proposed LNG terminal included a subsea pipeline that would transport regasified LNG approximately 4.0 miles from the offshore berthing platform to the interconnection with the onshore power plant. 152 FERC ¶ 61,071, at P 6 (2015), *vacated*, 166 FERC ¶ 61,055 (2019).

<sup>11</sup> Compare Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/pipeline> (defining “pipeline” as “a very long large tube, often underground, through which liquid or gas can flow for long distances”), and Oxford Learner’s Dictionaries, <https://www.oxfordlearnersdictionaries.com/us/definition/english/pipeline?q=pipeline> (defining “pipeline” as “a series of pipes that are usually

6. More importantly, the imported LNG is never transported on the interstate or intrastate system because, prior to its delivery for ultimate end-use, the regasified LNG does not exit the import facility via pipeline. The immediate, co-located use of the gas means that none of the analytical concerns raised in *Shell* are implicated here. Therefore, finding that the New Fortress Energy LNG facility is non-jurisdictional would be consistent with the NGA and the Commission's findings in *Shell*.

7. Although today's decision purports to rely on *Shell*, it finds New Fortress Energy's LNG facility to be jurisdictional based on the majority's interpretation of that case to mean that an LNG facility is a jurisdictional LNG terminal if it is connected to "any type of piping."<sup>12</sup> Because New Fortress Energy's facility "is connected to an adjacent power plant via a 10-inch-diameter pipeline," the majority finds the facility to be jurisdictional.<sup>13</sup>

8. I disagree with the majority's interpretation. *Shell* did not establish a bright line that merely required connection to "any type of piping." Nor did *Shell* or any other relevant Commission precedent employ that formulation. In fact, *Shell* cautioned against such literal reading of NGA section 2(11), stating such an interpretation "would cause otherwise NGA-exempt gathering, intrastate pipeline, processing, and local distribution facilities to be jurisdictional under section 3 as LNG terminal facilities if they transport gas that was imported or gas that will be exported."<sup>14</sup> *Shell* explained that it was the connection to (and the *effect* on) the interstate or intrastate natural gas transportation system that undergirded its decision. The majority does not explain how New Fortress Energy's facility is connected to the interstate or intrastate transportation system or why that consideration is no longer relevant. The Commission does offer *some* reasoning when it declines to consider "whether a connected pipeline is engaged in transportation (as opposed to some other function)" because "such a formulation could lead to the result that the Commission's jurisdiction would not attach to a large-scale LNG export terminal that receives natural gas directly from nearby production and gathering facilities or an

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underground and are used for carrying oil, gas, etc. over long distances"), *with* Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/pipe> (defining a "pipe" as "a tube inside which liquid or gas flows from one place to another"), *and* Oxford Learner's Dictionaries, [https://www.oxfordlearnersdictionaries.com/definition/american\\_english/pipe\\_1](https://www.oxfordlearnersdictionaries.com/definition/american_english/pipe_1) (defining "pipe" as "a tube through which liquids and gases can flow").

<sup>12</sup> See *New Fortress Energy LLC*, 174 FERC ¶ 61,207, at P 22 (2021).

<sup>13</sup> *Id.*

<sup>14</sup> *Shell*, 148 FERC ¶ 61,163 at P 43 n.78.

import facility directly connected to a large local distribution company.”<sup>15</sup> Even assuming this is an adequate rationale, it is not in accordance with the NGA. NGA section 2(11) defines LNG terminal as including facilities that “are used to receive, unload, load, store, *transport*, gasify, liquefy, or process” imported or exported natural gas.<sup>16</sup>

9. The majority’s determination that *Shell* remains good law *and* its finding that any pipe, of any size and length, serving any purpose, can be deemed a “pipeline,” is at best inconsistent and at worst renders *Shell* a nullity, reversing a decade of precedent without actually doing the litigants the courtesy of coming out and saying so. Failure to explain departure from policy is an obvious violation of the APA.<sup>17</sup> It is beyond cavil that an agency must explain its departure from prior precedent and “may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”<sup>18</sup>

10. If the Commission does not want to apply the finding in *Shell*, it should either explicitly reverse that position or find that New Fortress Energy is non-jurisdictional. Though I offer a word of warning should the majority decide to do so on rehearing: it would be well-advised to establish some alternate limiting principle because, as flawed as they may view *Shell*’s requirement that jurisdiction requires the facility to be connected to a pipeline on the gas transportation system, if no other limit is established, they will put us right back where the Commission was when it decided *Shell*: everything from gathering facilities to LDCs to hypothetical Topeka rail yards will be subject to our jurisdiction.

11. This abrupt reversal of policy is bad governance.<sup>19</sup> Nearly a decade has passed since *Shell*. During that time, the LNG business has thrived. A great deal of capital has

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<sup>15</sup> *New Fortress Energy LLC*, 174 FERC ¶ 61,207 at P 23.

<sup>16</sup> 15 U.S.C. § 717a(11) (emphasis added).

<sup>17</sup> *See New England Power Generators Ass’n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018) (finding “that FERC did not engage in the reasoned decisionmaking required by the Administrative Procedure Act” because it “failed to respond to the substantial arguments put forward by Petitioners and *failed to square its decision with its past precedent*”) (emphasis added).

<sup>18</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.”) (emphasis in original).

<sup>19</sup> This order circumvents *Shell*, rendering it meaningless, because anything with any type of pipe in it to convey or handle LNG can be subject to our jurisdiction. What it

been sought and deployed in reliance on the Commission's issuances. Reversing course on a matter of such consequence in a one-off adjudication is doubtless the Commission's prerogative under the APA. Whether the Commission *can* employ such a maneuver is different from whether it should. As a matter of governance, when in doubt, and when not compulsory, I would always disclaim jurisdiction. Prudence counsels the most limited possible exercise of our authority to accomplish the objectives assigned to us by Congress. To do otherwise is to insert ourselves into decision making that is best left to others and in some cases, as here, to create obstacles to the development of the very industries we are charged with encouraging and overseeing.<sup>20</sup>

12. And in this case, what is the urgency? What remedy does the Commission have in mind? For New Fortress Energy to cease operating? Surely not. To do so would all but ensure that Puerto Rico has yet another reliability crisis. But we will require an NGA section 3 application, the contents of which we cannot anticipate, and then roll the dice and see if New Fortress Energy can be allowed to remain in operation. I question the wisdom of this course of action.

13. If we are going to make this drastic change, we should do it by rulemaking or a policy statement. I acknowledge that I did not vote for *Shell* in the first instance and may not have were I on the Commission at the time. But given that *Shell* is the state of the law, rather than nominally preserving it while rendering it ineffectual, we should limit the statute's broad jurisdictional language by imposing different limitations through a generic proceeding that allows for notice and comment. Good governance (and fairness) demand it.

For these reasons, I respectfully dissent.

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James P. Danly  
Commissioner

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amounts to is another decision by the Commission to grant itself discretion as it picks and chooses which pipes are "pipelines" and which are just pipes.

<sup>20</sup> See *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976) (stating that the Commission's role in administering the NGA is to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices").



UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

New Fortress Energy LLC

Docket No. CP20-466-000

(Issued March 19, 2021)

CHRISTIE, Commissioner, *concurring*:

1. I concur in today's order finding that New Fortress Energy LLC's (New Fortress) liquefied natural gas (LNG) handling facility located at the Port of San Juan in Puerto Rico is subject to the Commission's jurisdiction under section 3 of the Natural Gas Act (NGA). I write separately to explain my decision.

2. First, the order reasonably and consistently applies the Commission's existing *Shell* precedent<sup>1</sup> without expanding or, conversely, overturning it. The order makes clear, consistent with *Shell*, that an LNG facility that does not receive or send out gas to an end-user via a pipeline will not be subject to the Commission's jurisdiction under NGA section 3. The order also declines to further interpret the statutory text of NGA section 3, or the Commission's interpretation of that text in *Shell*, to arbitrarily define what a "pipeline" may or may not be. Thus facilities, existing or planned, that relied on *Shell*'s criteria for an LNG facility for purposes of this Commission's section 3 jurisdiction will not and should not be affected by this order.<sup>2</sup>

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<sup>1</sup> *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163 (2014).

<sup>2</sup> As a practical matter there is little doubt that substantial investments and plans likely have been made in reliance on *Shell* and the Commission's subsequent orders applying it. Consequently, overturning or expanding the Commission's original reasoning in *Shell* here would be an exercise in changing a significant legal precedent that has been in place for years and that has been relied on by many. To the extent the Commission may choose to re-examine *Shell*, as advocated in the joint concurrence in this proceeding of Chairman Glick and Commissioner Clements, I would strongly encourage that such re-examination be conducted through a general proceeding in which all interested persons, companies and groups are provided the opportunity to express their views.

3. I regard the facility at issue here as so functionally similar to the facility in *Aguirre*, which was issued after *Shell*, as to be essentially indistinguishable.<sup>3</sup> That facility was considered to be a jurisdictional LNG terminal under NGA section 3.

4. Finally, I recognize that PREPA, the public-power load-serving utility in Puerto Rico, has made it abundantly clear that the continued operation of the New Fortress facility is essential to PREPA's ability to provide a reliable supply of electrical power to Puerto Rico and its people.<sup>4</sup> I would not join this order absent its pledge that the New Fortress facility will be allowed to continue operating throughout the process of obtaining all necessary authorizations from this Commission. Given this facility's critically important role in providing power to Puerto Rico, shutting it down, directly or indirectly, through the imposition of unreasonable regulatory burdens and costs, should not be part of this Commission's exercise of jurisdiction. As the order makes clear, there is no "regulatory gap" that needs to be filled, as this facility is already regulated by several federal and state agencies.<sup>5</sup>

For these reasons, I respectfully concur.

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Mark C. Christie  
Commissioner

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<sup>3</sup> *Aguirre Offshore GasPort, LLC*, 152 FERC ¶ 61,071 (2015). *See also* Order at P 20 n. 49.

<sup>4</sup> *See, e.g.*, PREPA's Statement in Support for Continued Operation of New Fortress Energy's San Juan Harbor LNG Receiving Facility, Docket No. CP20-466-000 (filed March 16, 2021).

<sup>5</sup> Order at PP 31-32.

Document Content (s)

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