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September 7, 2022

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N. E.
Washington, D.C. 20426

Re: Petition for Declaratory Order, Docket No. CP22-__-000

Dear Secretary Bose,

Pursuant to Rule 207(a)(2) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.207(a)(2), Sierra Club and Natural Resources Defense Council hereby electronically file a Petition for Declaratory Order (“Petition”). The Petition seeks a declaratory order from the Commission stating that the Fortress Liquefied Natural Gas (LNG) export project is subject to the Commission’s jurisdiction under section 3 of the Natural Gas Act.

As required by Rule 381.302(a), 18 C.F.R. § 385.302(a), Sierra Club has paid the required filing fee concurrent with submitting the Petition via wire transfer. If you have any questions, please contact me at (202) 495-3023.

Respectfully submitted,

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**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Sierra Club,)
Natural Resources Defense Council)

Docket No. CP22-__-000

**PETITION FOR DECLARATORY ORDER EXERCISING SECTION 3
JURISDICTION OVER THE FORTRESS LIQUEFIED NATURAL GAS
EXPORT PROJECT, INCLUDING THE WYALUSING GAS LIQUEFACTION
FACILITY AND GIBBSTOWN LNG EXPORT FACILITY**

Pursuant to Rule 207 of the Practices and Procedure of the Federal Energy Regulatory Commission (FERC or “Commission”), Sierra Club and Natural Resources Defense Council (together, “Petitioners”) respectfully petition the Commission to issue an order declaring that the Fortress Liquefied Natural Gas (LNG) export project, including the Wyalusing gas liquefaction facility and Gibbstown LNG export facility, is subject to the Commission’s jurisdiction under section 3 of the Natural Gas Act (NGA) and therefore must apply for a single FERC authorization and undergo a single review under the National Environmental Policy Act (NEPA). In the alternative, Petitioners respectfully request the Commission to issue an order declaring that two components of the Fortress LNG export project—the Wyalusing liquefaction facility and the Gibbstown export facility—are each subject to the Commission’s jurisdiction under section 3 of the NGA and therefore must each apply for a FERC authorization and must undergo review for the entire project under NEPA.

I. Description of Petitioners

A. Sierra Club

Sierra Club is a national non-profit organization with 67 chapters and approximately 750,000 members dedicated to exploring, enjoying, and protecting the wild

places of the Earth; to practicing and promoting the responsible use of the Earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Sierra Club runs national advocacy and organizing campaigns dedicated to reducing American dependence on fossil fuels, including natural gas and LNG facilities, and to protecting public health. These campaigns, including its Beyond Coal and Dirty Fuels campaigns, are dedicated to promoting a swift transition away from fossil fuels and towards reducing global greenhouse gas emissions. Central to the Sierra Club's advocacy is participation in administrative processes that facilitate meaningful public comment and comprehensive environmental review of proposed fossil fuel projects, including natural gas projects under the Commission's jurisdiction.

Sierra Club also has members who will be directly affected by the Fortress LNG export project. Sierra Club has approximately 29,600 members in Pennsylvania and 19,700 members in New Jersey. These members will be affected by, among other things, impacts from: construction and operation of the Wyalusing liquefaction facility; transportation of LNG via rail or truck from Wyalusing, Pennsylvania to Gibbstown, New Jersey; construction and operation of LNG facilities at the Gibbstown export facility; and vessel traffic to transport LNG from Gibbstown to its ultimate destination. Sierra Club members in Pennsylvania and New Jersey, as well as members across the nation, will also be impacted by the gas production needed to supply the Fortress LNG export project and by greenhouse gas emissions resulting from the project.

Pursuant to 18 C.F.R. § 385.203(b)(1)-(2), Sierra Club states that the exact name of the petitioner is the Sierra Club, and the petitioner's principal place of business is 2101

Webster Street, Suite 1300, Oakland, CA 94612. Pursuant to 18 C.F.R. § 385.203(b)(3), Sierra Club identifies the following persons for service of correspondence and communications regarding this petition:

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B. Natural Resources Defense Council

Natural Resources Defense Council (NRDC) is a national non-profit membership organization with more than 3 million members and engaged community participants worldwide, including in domestic areas with significant gas infrastructure development. As of August 30, 2022, NRDC has approximately 8,600 members in New Jersey, and 12,900 members in Pennsylvania. NRDC is committed to the preservation and protection of the environment, public health, and natural resources, and has a longstanding and active interest in ensuring need-driven and efficient energy resource development, protecting consumers from pipeline overbuild and stranded assets, expanding clean energy resources, and protecting the public from environmental threats. For more than 50 years, NRDC has worked to strengthen and enforce bedrock environmental laws such as NEPA. In 2020, for example, NRDC sued the Council on Environmental Quality over its regulations that would eliminate environmental reviews for many projects, curtail the harmful impacts that are

considered when reviews do take place, and hinder public participation.¹ NRDC also regularly participates at the Commission, such as by filing comments designed to inform FERC's decision on whether to authorize projects under sections 3 and 7 of the NGA. NRDC is also a leading voice in ensuring that the Commission's policies accord with federal law. The Fortress LNG export project is likely to affect all of these institutional interests.

Pursuant to 18 C.F.R. § 385.203(b)(1)-(2), NRDC states that the exact name of the petitioner is the Natural Resources Defense Council, and the petitioner's principal place of business is 40 W. 20th Street, New York, NY 10022. Pursuant to 18 C.F.R. § 385.203(b)(3), NRDC identifies the following persons for service of correspondence and communications regarding this application:

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¹ *Environmental Justice Health Alliance v. CEQ*, No. 1:20-cv-06143-CM (S.D.N.Y., stayed Feb. 16, 2021).

II. Background

A. Statement of facts

1. Construction and operation of the Fortress LNG export project

The proposed Fortress LNG export project² is an integrated project in which one arm of the operation would receive natural gas via an interconnection with a pipeline; process, liquefy, and store the gas; and then load and transport it for export at a second location. Specifically, a proposed liquefaction facility in Wyalusing, Pennsylvania, would receive natural gas transported by pipeline; process, liquefy, and store it; and load it for transport to an export facility in Gibbstown, New Jersey. The massive Wyalusing operation, which has the exclusive right to transload LNG at the Gibbstown facility,³ would include two liquefaction trains, an LNG production capacity of approximately 2.23 million metric tons per year (MTPA), and an LNG storage tank with a capacity of approximately 6 million gallons.⁴ The facility has not yet been constructed and does not have a required

² The relevant corporate entities, and their affiliations, are described in section II.A.2 below. We refer to the integrated project as the Fortress LNG export project.

³ See Bradford County LNG Marketing LLC, Docket No. 20-131-LNG Application for Long-Term Authorization to Export Liquefied Natural Gas, at Appx. D (Oct. 7, 2020) [hereinafter “DOE Application”] (“Public summary of the fuel handling agreement by and between Delaware River Partners LLC and Bradford County Real Estate Partners LLC”), <https://www.energy.gov/sites/prod/files/2020/11/f80/20-131-LNG.pdf>; see also Motion to Intervene of Bradford County Real Estate Partners LLC, Docket No. CP20-522, FERC eLibrary 20201014-5086 (Oct. 14, 2020) (“Bradford [County Real Estate Partners LLC] has entered into a contractual agreement with [Delaware River Partners LLC] whereby Bradford will have the sole and exclusive right to transload liquefied natural gas at the [Gibbstown] Facility.”); New Fortress Energy, SEC Form 10-K, at 8 (2019) (noting “exclusive rights to deliver and transload LNG” at Gibbstown), <https://ir.newfortressenergy.com/static-files/7d85a489-2748-4df7-b8ef-093d86816f63>.

⁴ Petition for Declaratory Order Disclaiming Jurisdiction and Motion for Expedited Action of Bradford County Real Estate Partners LLC, Docket No. CP20-524-000, at 3 (Sept. 18, 2020) [hereinafter “Bradford Petition”]; New Fortress Energy LLC,

permit from the Pennsylvania Department of Environmental Protection authorizing construction of air emissions sources at the site.⁵

The next link in the chain covers the transportation of the LNG to the point of export. This virtual pipeline would include as many as 100 railcars per day or hundreds of trucks transporting LNG more than 200 miles from Wyalusing to the Gibbstown export site.⁶

Next, the LNG would reach the point of direct loading onto vessels for export in Gibbstown, New Jersey. The Gibbstown export site, which is partially complete, consists of two docks and their attendant infrastructure.⁷ What would be known as “Dock 2,” which

Engineering, Procurement, and Construction Agreement for the Marcellus LNG Production Facility I, at 1 (Jan. 8, 2019), https://www.sec.gov/Archives/edgar/data/1749723/000114036119001592/s002392x11_ex10-17.htm (Exhibit 10.17 to New Fortress Energy LLC, Amendment 4 to SEC Form S-1 (Jan. 29, 2019), <https://ir.newfortressenergy.com/static-files/ead557e8-c703-40e6-bfb2-b55e50bd2a8d>).

⁵ Order, *Citizens for Penn.’s Future v. Commonwealth of Pennsylvania*, Penn. Env’t Hearing Bd. Docket No. 2021-083-L (Mar. 18, 2022), <https://ehb.courtapps.com/efile/documentViewer.php?documentID=55663> (dismissing appeal in consideration of the parties’ Stipulation for Settlement, which states that Bradford County Real Estate Partners “agrees that it will not engage in construction of air emissions sources under Plan Approval No. 08-00058A” and acknowledges that it “will need to apply for and obtain a new plan approval from the Department . . . in order to engage in construction of air emissions sources at the [Wyalusing] Site.”).

⁶ See Pipeline & Hazardous Materials Safety Admin., SP 20534 Special Permit to transport LNG by rail in DOT113C120W rail tank cars: Final Environmental Assessment 3 (2019) [hereinafter “PHMSA Special Permit EA”] (seeking authorization for “dedicated train configurations consisting of up to 100 tank cars”), <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/safe-transportation-energy-products/72911/environmental-assessment.pdf>; U.S. Army Corps of Eng’rs, Public Notice CENAP-OP-R-2016-0181-39, at 1 (July 16, 2019) (seeking approval for bypass to be used by 13 trucks per hour, 24 hours a day), <https://www.nap.usace.army.mil/Portals/39/docs/regulatory/publicnotices/Public-Notice-2016-0181-39.pdf>.

⁷ Dock 1, which was substantially completed in December 2018, contains a multi-purpose one-ship deep-water berth capable of handling a variety of freight from either trucks or

has not yet been built, would consist of a wharf featuring two deep-water berths to accommodate a range of ocean-going vessels.⁸ Dock 2 is designed for the loading of bulk liquid products, including liquefied natural gas, directly from railcar or truck onto ocean-going vessels for export and includes infrastructure for transloading operations.⁹ LNG will arrive at the site via railcar or truck and be directly transferred by means of a vacuum insulated LNG transfer line.¹⁰ As noted above, the Wyalusing arm of the integrated project has the “sole and exclusive right to transload liquefied natural gas at the Gibbstown Facility.”¹¹

Finally, the LNG from the project would be exported via oceangoing vessels. Thus, the Department of Energy granted a subsidiary of New Fortress Energy—an LNG company founded in 2014 by Wes Edens¹²— permission to export domestically produced LNG from

rail cars. *See* Delaware River Basin Commission, Delaware River Partners LLC, Gibbstown Logistics Center Dock 2, Docket No. D-2017-009-2 (draft), at 2 (2019) [hereinafter “DRBC Application”], <https://www.nj.gov/drbc/library/documents/dockets/061219/2017-009-2.pdf>. The Gibbstown site can only handle smaller volumes of LNG without the construction of Dock 2. *See* Petition for Declaratory Order Disclaiming Jurisdiction and Motion for Expedited Action of Delaware River Partners LLC, Docket No. CP20-522-000, at 4 (Sept. 11, 2020) [hereinafter “DRP Petition”] (noting Dock 2 would be built to “support potential future volumes of LNG”).

⁸ DRBC Application at 2.

⁹ *Id.*

¹⁰ DRP Petition at 4.

¹¹ DOE Application at Appx. D.

¹² *Powered by Positive Energy*, New Fortress Energy, <https://www.newfortressenergy.com/about> (last visited Aug. 31, 2022). Mr. Edens’ connections to the entities involved with both Gibbstown and Wyalusing are discussed below.

the proposed Wyalusing facility and from the Gibbstown Facility by waterborne vessel.¹³ The contract to construct the Wyalusing facility, which is also owned by a New Fortress Energy subsidiary, indicates that it would have a “nameplate capacity” of 2.23 MTPA.¹⁴ Thus, New Fortress Energy, through its subsidiary, requested and received authorization to export the “equivalent to approximately 2.44 [million] metric tons of LNG per year.”¹⁵

The inextricable connection between the two purportedly independent locations is shown in the relevant entities’ public statements and filings. As noted, a subsidiary of New Fortress Energy sought authorization to export LNG “sourced from” the Wyalusing liquefaction site, and “to export the LNG from the Gibbstown Facility.”¹⁶ In 2019, another subsidiary of New Fortress Energy sought approval from the Pipeline and Hazardous Materials Safety Administration (PHMSA) for an LNG-by-rail permit “to offer LNG for transportation . . . between Wyalusing, Pennsylvania and Gibbstown, New Jersey.”¹⁷ Notably, the proposal involved both the Wyalusing and Gibbstown locations, and “only”

¹³ Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Free Trade Agreement Nations, DOE/FE Order No. 4670, at 2, 10 (Mar. 12, 2021), <https://www.energy.gov/sites/prod/files/2021/03/f83/ord4670.pdf>.

¹⁴ New Fortress Energy LLC, Engineering, Procurement, and Construction Agreement for the Marcellus LNG Production Facility I, at 1 (Jan. 8, 2019), https://www.sec.gov/Archives/edgar/data/1749723/000114036119001592/s002392x11_ex10-17.htm (Exhibit 10.17 to New Fortress Energy LLC, Amendment 4 to SEC Form S-1 (Jan. 29, 2019), <https://ir.newfortressenergy.com/static-files/ead557e8-c703-40e6-bfb2-b55e50bd2a8d>). “The nameplate, or nominal, capacity of a liquefaction facility specifies the amount of LNG produced in a calendar year under normal operating conditions, based on the engineering design of a facility.” *U.S. Liquefied Natural Gas Export Capacity Will Be World’s Largest by End of 2022*, U.S. Energy Info. Admin. (Dec. 9, 2021), <https://www.eia.gov/todayinenergy/detail.php?id=50598>.

¹⁵ DOE Application at 4 (seeking authorization “to export up to 128 Bcf of natural gas per year (equivalent to approximately 2.44 [million] metric tons of LNG per year)”).

¹⁶ DOE/FE Order No. 4670, at 2.

¹⁷ PHMSA Special Permit EA at 4.

those locations.¹⁸ The Special Permit from PHMSA authorized shipments between Wyalusing and Gibbstown “with no intermediate stops.”¹⁹ Thus, the Gibbstown export location has been part and parcel of the integrated project from the start. As New Fortress Energy explained, PHMSA “granted a special permit to one of our subsidiaries to ship LNG by rail, which would allow us to transport the LNG produced by the [Wyalusing,] Pennsylvania Facility to a port for transloading onto marine vessels.”²⁰

2. Corporate structure of Fortress-related entities

In addition to the core operational connections between the two locations of this LNG export project, the corporate entities involved at the two locations are also inextricably related. New Fortress Energy created a wholly owned subsidiary called Bradford County Real Estate Partners LLC (“Bradford”) whose “primary business is to construct, own, and operate the Wyalusing Facility.”²¹ New Fortress Energy is itself the

¹⁸ PHMSA, Special Permit Evaluation Form for Special Permit No. 20534, at 10, <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/safe-transportation-energy-products/72921/special-permit-evaluation-form.pdf>; *see also* New Fortress Energy, DOT-SP 20534: Special Permit No. 20534 Renewal Pursuant to 49 C.F.R. § 107.109, at 1 (Nov. 29, 2021) [hereinafter “Special Permit Renewal Application”] (“[T]he product being shipped is intended to begin transport” at the Wyalusing facility “and be transported to” the Gibbstown facility), <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2021-12/Special%20Permit%20Renewal%20Application.pdf>.

¹⁹ PHMSA, DOT-SP 20534 (Dec. 5, 2019), <https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/safe-transportation-energy-products/72906/dot-20534.pdf>.

²⁰ New Fortress Energy, SEC Form 10-K, at 6 (2022), <https://ir.newfortressenergy.com/static-files/293f7481-c2b7-468d-b76f-049f904bb67e>. The Special Permit expired on November 30, 2021, and, to the best of Petitioners’ knowledge, the renewal application has not been granted. *See id.* (“On November 29, 2021, [New Fortress Energy] submitted [a] Special Permit Renewal letter request to PHMSA seeking an extension of the permit until December 1, 2025. To date, PHMSA has not responded to [the] letter request.”).

²¹ DOE Application at 2.

“sole offtaker” of LNG produced by Bradford.²² Yet another New Fortress Energy subsidiary, Energy Transport Solutions, will transport LNG by rail or truck to Gibbstown.²³ And another New Fortress Energy subsidiary, Bradford County LNG Marketing LLC, has authorization from DOE to export the gas.²⁴

The entities controlling the Gibbstown arm are connected to the New Fortress Energy (Wyalusing) arm, but the owners have created a byzantine corporate structure that has to be pieced together to reveal the full extent of corporate connections. On the Gibbstown side, we begin with Delaware River Partners LLC (“Delaware River Partners”), an entity that is developing Gibbstown.²⁵ Delaware River Partners is owned and controlled by a Fortress-related entity called FTAI Infrastructure Inc. (“FTAI Infrastructure”).²⁶ FTAI

²² Bradford Petition at 3.

²³ See Special Permit Renewal Application at 2-3. According to the project proponents, “New Fortress [Energy] will transport the LNG from the Facility by non-pipeline modes of transportation, *i.e.*, truck and rail, for delivery to marine vessels at the LNG transloading facility in Gibbstown, New Jersey or at other ports for export or to end users in the United States.” Bradford Petition at 3. To petitioners’ knowledge, no other ports or end users have been identified. See also DOE/FE Order at 10 (authorizing a New Fortress Energy subsidiary to export a volume equivalent to 128 Bcf/yr of natural gas of “domestically produced LNG sourced from the proposed Wyalusing Facility” and “transported by rail or truck from the Wyalusing Facility to the proposed Gibbstown Facility . . . for export by waterborne vessel”).

²⁴ DOE/FE Order No. 4670, at 3 (explaining that the authorized entity, Bradford County LNG Marketing LLC, “is wholly owned by New Fortress Energy Inc.”).

²⁵ DRP Petition at 2.

²⁶ See FTAI Infrastructure Inc., SEC Form 10-Q, at 18 (Aug. 25, 2022), (“[FTAI Infrastructure] currently hold[s] an approximately 98% economic interest, and a 100% voting interest in DRP. DRP is solely reliant on [FTAI] to finance its activities . . .”), <https://www.sec.gov/ix?doc=/Archives/edgar/data/1899883/000189988322000005/fip-20220630.htm>. Delaware River Partners previously informed FERC that it was owned and controlled by Fortress Transportation and Infrastructure Investors LLC. DRP Petition at 2. On August 1, 2022, Fortress Transportation and Infrastructure Investors LLC announced that it had completed a spin-off of FTAI Infrastructure Inc. Pursuant to the separation and distribution agreement, the two entities have taken “all actions necessary so that FTAI Infrastructure” owns “all of [Fortress Transportation and Infrastructure

Infrastructure is managed by, and “completely reliant on,” another member of the Fortress family called FIG LLC.²⁷ FIG LLC, in turn, is a wholly owned subsidiary of still another Fortress entity, Fortress Investment Group LLC.²⁸ And that Fortress entity owns a minority share of *New Fortress Energy* (which is developing Wyalusing).²⁹ The Fortress Investment Group subsidiary FIG LLC “has significant discretion as to the implementation of [FTAI Infrastructure’s] operating policies and strategies, to conduct [FTAI Infrastructure’s]

Investors’] investments in . . . Repauno” (referring to the former DuPont Repauno site that includes where the Gibbstown facility will be sited). Fortress Transportation and Infrastructure Investors LLC, SEC Form 8-K, at 2 (Aug. 1, 2022), <https://ir.ftandi.com/static-files/f0b2cb41-c3c9-49ad-a0f1-016690ad1c9e>.

²⁷ FTAI Infrastructure Inc., SEC Form 10-Q, at 76 (Aug. 25, 2022), <https://www.sec.gov/ix?doc=/Archives/edgar/data/1899883/000189988322000005/fip-20220630.htm>. In connection with the recent spin-off, Fortress Transportation and Infrastructure Investors “assigned its existing management and advisory agreement, dated as of May 20, 2015, by and between [Fortress Transportation and Infrastructure Investors] and its manager FIG LLC to FTAI Infrastructure.” *Id.*

²⁸ Fortress Investment Group LLC’s website states that it “manages three publicly traded permanent capital vehicles as part of the Private Equity business,” including FTAI Infrastructure Inc., and Fortress Transportation and Infrastructure Investors LLC. *Permanent Capital Vehicles*, Fortress, <https://www.fortress.com/businesses/permanent-capital-vehicles> (last visited Aug. 31, 2022). SoftBank Group Corp. acquired Fortress Investment Group LLC in 2017. FTAI Infrastructure Inc., SEC Form 10-Q, at 49 (Aug. 25, 2022), <https://www.sec.gov/ix?doc=/Archives/edgar/data/1899883/000189988322000005/fip-20220630.htm>.

²⁹ Motion for Leave to Answer and Answer of BCREP to the Comments in Opposition to the Petition for Declaratory Order of DRP, Accession No. 20201030-5423, FERC Docket No. CP20-522-000, at 7-8 (Oct. 30, 2020) [hereinafter “Bradford Answer”].

business,”³⁰ and also has an administrative services agreement with New Fortress Energy (the Wyalusing entity).³¹

Beyond all that are the senior leadership and ownership connections. Mr. Edens, introduced above, is New Fortress Energy’s Founder, Chief Executive Officer, and chairman of its board of directors.³² Randal Nardone is another member of New Fortress Energy’s board of directors.³³ New Fortress Energy is majority owned by Mr. Edens and Mr. Nardone.³⁴ Mr. Nardone is also a co-founder and principal of Fortress Investment Group LLC,³⁵ which currently employs him.³⁶ Mr. Edens (Chairman and CEO of New

³⁰ FTAI Infrastructure Inc., SEC Form 10-Q, at 76 (Aug. 25, 2022); *see also* Amended and Restated Management and Advisory Agreement among FTAI Infrastructure Inc. and FIG LLC (July 31, 2022), https://www.sec.gov/Archives/edgar/data/1899883/000114036122027683/brhc10040169_ex10-1.htm (Exhibit 10.1 to FTAI Infrastructure Inc., SEC Form 8-K (Aug. 1, 2022), https://www.sec.gov/Archives/edgar/data/1899883/000114036122027683/brhc10040169_8k.htm).

³¹ New Fortress Energy, SEC Form 10-K, at 50 (2022), <https://ir.newfortressenergy.com/static-files/293f7481-c2b7-468d-b76f-049f904bb67e>.

³² *Id.*; *Wes Edens, Founder and CEO*, New Fortress Energy, <https://www.newfortressenergy.com/stories/wes-edens-founder-and-ceo> (last visited Sept. 2, 2022).

³³ New Fortress Energy, SEC Form 10-K, at 50 (2022), <https://ir.newfortressenergy.com/static-files/293f7481-c2b7-468d-b76f-049f904bb67e>.

³⁴ *Id.* at F-50; *see also id.* at 45 (“Affiliates of certain entities controlled by Wesley R. Edens, Randal A. Nardone and affiliates of Fortress Investment Group LLC (‘Founder Entities’) hold a majority of the voting power of [New Fortress Energy’s] stock The beneficial ownership of greater than 50% of [New Fortress Energy’s] voting stock means affiliates of the Founder Entities are able to control matters requiring stockholder approval, including the election of directors, changes to our organizational documents and significant corporate transactions.”); *id.* at 42 (“We depend to a large extent on the services of our chief executive officer, Wesley R. Edens, some of our other executive officers and other key employees.”).

³⁵ *About*, Fortress, <https://www.fortress.com/about> (last visited Aug. 31, 2022).

³⁶ New Fortress Energy, SEC Form 10-K, at 50 (2022), <https://ir.newfortressenergy.com/static-files/293f7481-c2b7-468d-b76f-049f904bb67e>.

Fortress Energy) is also “a principal, Co-Chief Executive Officer and a member of the board of directors” of Fortress Investment Group LLC.³⁷

Finally, as noted above, beyond this corporate, ownership, and management overlap, the New Fortress Energy subsidiary created to build the Wyalusing facility entered into an exclusive contract with Delaware River Partners (Gibbstown) giving that New Fortress subsidiary the “sole and exclusive right to transload liquefied natural gas at the Gibbstown Facility.”³⁸ A public summary of the fuel handling agreement between the New Fortress subsidiary and Delaware River Partners states that the contract will commence when (1) the Wyalusing facility “has been completed, commissioned, placed into service, and is capable of producing commercial quantities of gas” meeting certain quality specifications, (2) the Gibbstown facility “has been completed, commissioned, and placed

³⁷ FTAI Infrastructure Inc., SEC Form 10-Q, at 76 (Aug. 25, 2022), <https://www.sec.gov/ix?doc=/Archives/edgar/data/1899883/000189988322000005/fip-20220630.htm>. As FTAI Infrastructure’s manager, Fortress Investment Group LLC subsidiary FIG LLC can only assign the Management Agreement to an entity “whose business and operations are managed or supervised by Mr. Wesley R. Edens.” *See id.*; *see also* Amended and Restated Management and Advisory Agreement among FTAI Infrastructure Inc. and FIG LLC (July 31, 2022), https://www.sec.gov/Archives/edgar/data/1899883/000114036122027683/brhc10040169_ex10-1.htm (Exhibit 10.1 to FTAI Infrastructure Inc., SEC Form 8-K (Aug. 1, 2022), https://www.sec.gov/Archives/edgar/data/1899883/000114036122027683/brhc10040169_8k.htm). Based on the extensive relationships described above, and for ease of reference, we at times use the term “Fortress entities” to describe the relevant entities throughout the remainder of the petition.

³⁸ DOE Application at Appx. D; *see also id.* at 3 (“New Fortress has entered into a multi-year agreement with [Delaware River Partners] to have the exclusive right to transload LNG through the Gibbstown Facility.”); Motion to Intervene of Bradford County Real Estate Partners LLC, Docket No. CP20-522, FERC eLibrary 20201014-5086 (Oct. 14, 2020) (“[The subsidiary] has entered into a contractual agreement with [Delaware River Partners LLC] whereby [it] will have the sole and exclusive right to transload liquefied natural gas at the [Gibbstown] Facility.”); New Fortress Energy, SEC Form 10-K, at 8 (2019) (noting “exclusive rights to deliver and transload LNG” at Gibbstown), <https://ir.newfortressenergy.com/static-files/7d85a489-2748-4df7-b8ef-093d86816f63>.

into service, and is capable of receiving and transloading the required volume in gallons per day of gas,” and (3) “all other work to be performed by [Delaware River Partners] at the Gibbstown Facility necessary to perform its obligations under the agreement has been completed.”³⁹

In sum, the extensive corporate, management, ownership, financial, logistical, and contractual links between the Wyalusing operations and the Gibbstown operations show that the facilities comprise a single LNG export project.

B. Statutory background

Congress declared in the Natural Gas Act that “Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.”⁴⁰ The NGA “vests the Commission with broad authority to regulate the transportation and sale of natural gas.”⁴¹

The Commission exercises its jurisdiction over LNG facilities under three provisions of the NGA: section 3(a), section 3(e), and section 7(c).⁴² Section 3(a) of the NGA states that “no person shall export any natural gas from the United States to a foreign country . . . without first having secured an order of the Commission authorizing it to do so.”⁴³ Initially, FERC’s predecessor, the Federal Power Commission (FPC) was “vested with exclusive jurisdiction under section 3 to decide all natural gas import and export

³⁹ DOE Application at Appx. D.

⁴⁰ 15 U.S.C. § 717(a).

⁴¹ *New Fortress Energy, Inc. v. FERC*, 36 F.4th 1172, 1174 (D.C. Cir. 2022).

⁴² *EcoEléctrica, L.P.*, 176 FERC ¶ 61,192, at P 4 (2021) (Glick, Chairman, and Clements, Comm’r, concurring).

⁴³ 15 U.S.C. § 717b(a).

issues, including the authorization to import and export natural gas and to construct and operate necessary facilities.”⁴⁴ In 1974, the D.C. Circuit held in *Distrigas Corp. v. Federal Power Commission*,⁴⁵ that the FPC “had authority to regulate LNG import facilities under section 3 of the NGA that was at least as broad as its section 7 authority over facilities in interstate commerce.”⁴⁶ This authority extended to LNG export facilities.

In 1977, the Department of Energy Organization Act transferred the regulatory functions of section 3 from the FPC to the Department of Energy.⁴⁷ The Secretary of Energy subsequently delegated jurisdiction over the siting, construction, and operation of gas import and export facilities back to the newly established Federal Energy Regulatory Commission. Specifically, the Commission was delegated authority, with respect to “the imports and exports of natural gas,” to “[a]pprove or disapprove [1] the construction and operation of particular facilities, [2] the site at which such facilities shall be located, and [3] with respect to natural gas that involves the construction of new domestic facilities, the

⁴⁴ Applications for Authorization To Construct, Operate, or Modify Facilities Used for the Export or Import of Natural Gas, 62 Fed. Reg. 30,435, 30,436 (June 4, 1997); *see also Japan Line, Ltd. v. Los Angeles Cnty.*, 441 U.S. 434, 448 (1979) (“Foreign commerce is pre-eminently a matter of national concern.”); *Sound Energy Sols.*, 106 FERC ¶ 61,279, at P 27 (2004) (“The nation’s energy needs are best served by a uniform national policy applicable to LNG imports. It is in the country’s best interest that each state not have to develop and maintain the regulatory resources necessary for effective regulation of LNG imports and facilities.”).

⁴⁵ 495 F.2d 1057 (D.C. Cir. 1974).

⁴⁶ *Dynegy LNG Prod. Terminal, L.P.*, 97 FERC ¶ 61,231, 62,049-50 (2001) (citing *Distrigas*, 495 F.2d at 1064). Section 7 of the NGA “prescribes a regulatory framework for natural gas facilities engaged in interstate commerce.” *New Fortress Energy*, 36 F.4th at 1174. Under section 7(c), “before an applicant can construct or extend an interstate facility for the transportation of natural gas, it must obtain a ‘certificate of public convenience and necessity’ from the Commission.” *Minisink Residents for Env’t Pres. & Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014) (quoting 15 U.S.C. § 717f(c)(1)(A)).

⁴⁷ Pub. L. No. 95-91, § 301(b), 91 Stat. 565, 578 (1977).

place of entry for imports or exit for exports.”⁴⁸ Pursuant to the *Distrigas* decision, the Commission “has imposed ‘the equivalent of Section 7 certification requirements . . . as to facilities’ when exercising its delegated authority over the siting, construction, and operation of facilities used to import or export gas.”⁴⁹

The Commission also exercises jurisdiction over LNG import and export facilities under section 3(e) of the NGA, which was added in 2005.⁵⁰ In the early 2000s, as U.S. domestic gas production declined and demand for gas increased, there was a surge in proposals for LNG import facilities.⁵¹ This resulted in jurisdictional disputes between the Commission and states, which led to Congress adding section 3(e) as part of the Energy Policy Act of 2005. Section 3(e) provides the Commission with “exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”⁵² The term “LNG terminal” was defined to

include[] all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel.⁵³

Also in 2005, Congress clarified that the NGA applied to “the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation

⁴⁸ DOE Delegation Order No. 00-004.00A, § 1.21(A) (May 16, 2006); *see also* DOE Delegation Order Nos. 0204-112 (1984) and 00-04.000 (2001).

⁴⁹ *Sound Energy Sols.*, 106 FERC ¶ 61,279, at P 15 (quoting *Distrigas*, 495 F.2d at 1064).

⁵⁰ Pub. L. 109-58, § 311, 119 Stat. 594, 685-86 (2005).

⁵¹ *See* Cong. Rsch. Serv., RL32205, U.S. Liquefied Natural Gas (LNG) Import Terminals: Siting, Safety, and Regulation 1 (2009) (describing growth in demand and proposals for new LNG terminals).

⁵² 15 U.S.C. § 717b(e)(1).

⁵³ *Id.* § 717a(11). The definition specifies that “LNG terminal” does not include “waterborne vessels used to deliver natural gas to or from any such facility” or “any

or exportation.”⁵⁴ Ultimately, the Commission may exercise its section 3 authority to approve or deny an application, or “apply terms and conditions as necessary and appropriate to ensure that the proposed project’s siting, construction, operation, and maintenance are not inconsistent with the public interest.”⁵⁵

C. Relationship to existing dockets

There are two existing FERC dockets related to the Gibbstown and Wyalusing facilities,⁵⁶ but this Petition presents new arguments, addresses more recent authority, and does not depend on a procedural hurdle at issue in the existing dockets. This petition raises new arguments, not raised elsewhere, related to the integration of the two components of the Fortress LNG export project for the purposes of section 3 jurisdiction.⁵⁷ Petitioners’ arguments also incorporate recent legal developments from Commission decisions about its jurisdiction under section 3 of the NGA⁵⁸ and decisions from the D.C. Circuit.⁵⁹ Furthermore, the petition presents an opportunity for the Commission to rule directly on the jurisdictional question presented by the Fortress LNG export project as a whole without

pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.” *Id.* § 717a(11)(A)-(B).

⁵⁴ Pub. L. 109-58, § 311, 119 Stat. 594, 685-86 (2005) (amending 15 U.S.C. § 717(b)).

⁵⁵ *Roadrunner Gas Transmission, LLC*, 153 FERC ¶ 61,041, at P 11 (2015); see 15 U.S.C. § 717b(a) (providing for the Commission’s approval of an application unless “it finds that the proposed exportation or importation will not be consistent with the public interest”).

⁵⁶ See *Delaware River Partners, LLC*, Dkt. No. CP20-522; *Bradford Cnty. Real Estate Partners, LLC*, Dkt. No. CP20-524.

⁵⁷ See *infra* part III.A.

⁵⁸ See, e.g., *New Fortress Energy, LLC*, 174 FERC ¶ 61,207 (2021); *Nopetro LNG, LLC*, 178 FERC ¶ 61,168 (2022); *Nopetro LNG, LLC*, 180 FERC ¶ 61,057 (2022).

⁵⁹ See, e.g., *New Fortress Energy, Inc. v. FERC*, 36 F.4th 1172 (D.C. Cir. 2022).

having to address procedural issues raised by the existing dockets, such as the test for consolidating separate proceedings.

III. Discussion

A. The Commission has exclusive jurisdiction over the Fortress LNG export project under section 3 of the NGA

In determining its jurisdiction, the Commission should treat the Wyalusing and Gibbstown facilities as one integrated project and require the project to obtain one FERC authorization. They are interconnected facilities developed by related Fortress entities and treating them separately would be contrary to the public interest, thereby frustrating the purposes of the NGA. Together, the operations and facilities meet the definition of an LNG terminal as interpreted by the Commission in recent orders. The Commission therefore has exclusive jurisdiction over this export project under section 3 of the Natural Gas Act.⁶⁰

1. The Commission should treat the Wyalusing and Gibbstown facilities as one integrated project

The Commission treats multiple interconnected facilities as a single integrated project when the facilities' developers are affiliated entities, and when doing so is in the public interest. This determination is necessarily "flexible and practical in nature."⁶¹ Generally, though, when treating the facilities separately would frustrate the comprehensive regulatory scheme Congress intended, the Commission has considered them one integrated project. Here, the Commission should treat the Wyalusing and Gibbstown facilities as one integrated project because doing otherwise would ignore their

⁶⁰ 15 U.S.C. § 717b(e).

⁶¹ *KansOk P'ship*, 73 FERC ¶ 61,160, 61,484 n.26 (1995).

financial, managerial, contractual, and logistical interconnections and would be contrary to the public interest.

a. The Wyalusing and Gibbstown facilities are interconnected components of the Fortress LNG export project

The interconnections and interdependence of the Wyalusing and Gibbstown facilities demonstrate that they are components of a single LNG export project. As explained above, Delaware River Partners, developer of the Gibbstown facility, and Bradford, developer of the Wyalusing facility, are related entities in the Fortress group of companies. The projects they propose are inextricably intertwined, forming a unified LNG liquefaction and export enterprise. The developers contemplate that natural gas extracted from the Marcellus shale will be liquefied at the Wyalusing facility and then transported across state lines by rail and truck for delivery to the Gibbstown facility, where the LNG will be transloaded onto ships for international export—all by Fortress entities.⁶² As noted above, a Fortress entity has the exclusive right to transload LNG at Gibbstown, and it plans to align its production schedule at Wyalusing with Gibbstown’s construction schedule.⁶³ In short, related Fortress entities control the entire, linked LNG export scheme—from the receipt of natural gas via pipeline at the liquefaction facility to the point of export via direct loading of the same LNG onto waterborne vessels.

⁶² See Bradford Petition at 3-5; Bradford Answer at 2-3; Special Permit Renewal Application at 3 (explaining in the application to transport LNG between Wyalusing and Gibbstown that “[t]he capability to move LNG by rail remains integral to the viability of this enterprise”).

⁶³ See Bradford Answer at 2-3; Bradford Petition at 4-5.

b. Improperly evaluating this integrated project as two distinct projects, and declining to assert jurisdiction, would undermine the public interest and the goals of the Natural Gas Act

If the Commission does not treat these highly intertwined operations as a single project for purposes of assessing jurisdiction, it would undermine the public interest and artificially shrink the Commission’s jurisdiction over LNG export facilities, contrary to the comprehensive regulatory scheme that the NGA envisions.

The Commission evaluates interconnected facilities developed by affiliated entities as a single, integrated project when doing so is in the public interest.⁶⁴ As the D.C. Circuit and the First Circuit have confirmed, agencies “may disregard the corporate form in the interest of public convenience, fairness, or equity.”⁶⁵ The Commission has stated that it is in the public interest to consider multiple facilities as one project when doing otherwise would “frustrate the purposes of the NGA.”⁶⁶ Consequently, the Commission has treated affiliated entities’ facilities as one project where a failure to do so would not be “consistent with the ‘comprehensive scheme of federal regulation’ contemplated by the NGA.”⁶⁷ This

⁶⁴ Compare *La. Gas Sys. Inc.*, 73 FERC ¶ 61,161, 61,503 (1995), and *KansOk P’ship*, 73 FERC ¶ 61,160, 61,485-86 (holding affiliated entities’ pipeline segments were a single project), with *KN Wattenberg Transmission, LLC*, 83 FERC ¶ 61,285, 62,186-87 (1998) (declining to disregard corporate forms because the corporations involved were unaffiliated).

⁶⁵ *Town of Highlands*, 37 FERC ¶ 61,149, 61,356 (1986); *Cap. Tel. Co. v. FCC*, 498 F.2d 734, 738 (D.C. Cir 1974); *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir. 1981); see also *KansOk P’ship*, 73 FERC ¶ 61,160, 61,486.

⁶⁶ *KansOk P’ship*, 73 FERC ¶ 61,160, 61,486; see *id.* at 61,484 n.26 (“The inquiry is simply a question of whether the statutory purposes would be frustrated by the corporate form.”).

⁶⁷ *Id.* at 61,487.

comprehensive regulation of “matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.”⁶⁸

For instance, the Commission has multiple times treated multiple pipeline segments run by different affiliates as a single integrated pipeline to assert jurisdiction over the entire pipeline. In *Louisiana Gas System, Inc.*, the Commission treated three interconnected pipelines run by affiliates as one integrated 70-mile pipeline subject to the Commission’s jurisdiction.⁶⁹ In doing so, the Commission explained that treating these facilities as separate, exempt pipelines, and thereby allowing them to escape the Commission’s jurisdiction, “would subvert the purposes of the NGA and Commission policy,” because it would allow the pipeline to avoid key provisions of the Commission’s orders and policies.⁷⁰ Similarly, in *KansOk Partnership*, the Commission evaluated a chain of three physically linked and operationally affiliated intrastate pipelines that together spanned three states.⁷¹ The Commission found that the public interest required it to disregard the corporate forms of the pipeline companies and treat the pipeline as a single integrated system because treating the projects separately would deny consumers the protections of

⁶⁸ 15 U.S.C. § 717(a); *see also id.* § 717b(a) (“no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so”); *Distrigas*, 495 F.2d at 1064 (“[W]e find it fully within the Commission's power, so long as that power is responsibly exercised, to impose on imports of natural gas the equivalent of Section 7 certification requirements both as to facilities and . . . as to sales within and without the state of importation.”); *EcoEléctrica, L.P.*, 176 FERC ¶ 61,192, at P 4 & n.59 (2021) (Glick, Chairman, and Clements, Comm’r, concurring) (explaining that, in *Distrigas*, “the court held that [section 3(a)] empowers the Commission to impose the same certification requirement for LNG facilities, as well as certification conditions, as the Commission applies under section 7 of the statute”).

⁶⁹ *La. Gas Sys. Inc.*, 73 FERC ¶ 61,161, 61,500, 61,503.

⁷⁰ *Id.* at 61,502.

⁷¹ *KansOk P’ship*, 73 FERC ¶ 61,160, 61,480-81.

the Commission’s regulations and would give KansOk and its affiliates a competitive advantage over other pipelines.⁷² The Commission explained that “condoning the arrangement advocated here by Kansas Pipeline, *et al.* . . . is not consistent with the ‘comprehensive scheme of federal regulation’ contemplated by the NGA.”⁷³

Here, the Commission should treat the Gibbstown and Wyalusing facilities as integrated parts of one whole for the purpose of determining the Commission’s jurisdiction because to do otherwise would undermine the comprehensive scheme of federal regulation of gas exports contemplated by the NGA and the Commission’s role as the agency with exclusive authority to act on applications for the siting, construction, and operations of LNG export facilities. Such an artificially narrowed jurisdiction would prevent the Commission from overseeing these major industrial facilities and conducting adequate public-interest analyses and environmental review of an LNG export project of this scale.⁷⁴ “The Commission spends considerable resources on LNG safety matters,” including those that are “site specific.”⁷⁵ Narrowing the Commission’s jurisdiction would prevent it from carrying out these important responsibilities and would also subject these projects to a

⁷² *Id.* at 61,482, 61,485-86.

⁷³ *See id.* at 61,487.

⁷⁴ *See id.* at 61,485-87.

⁷⁵ *Sound Energy Sols.*, 106 FERC ¶ 61,279, at P 34; *see also ConocoPhillips Alaska Natural Gas Corp. & Marathon Oil Co.*, 126 FERC ¶ 61,037, at P 1 (2009) (“The Commission currently exercises its [section 3] jurisdiction over the siting, construction, operation, and maintenance of LNG terminals to impose reporting and inspection requirements that serve to ensure the safety and security of such facilities.”); *EcoEléctrica, L.P.*, 176 FERC ¶ 61,192, at P 2 (Glick, Chairman, and Clements, Comm’r, concurring) (explaining the Commission’s “well-established” authority to regulate operational safety).

patchwork of state laws.⁷⁶ Further, for projects subject to either section 3 or section 7 jurisdiction, the Commission weighs the benefits of the project against its adverse impacts to determine if it is in the public interest and should thus be approved.⁷⁷ If the Commission were to treat the Gibbstown and Wyalusing facilities as separate projects, and decline to exercise its jurisdiction, the full adverse impacts of the Fortress LNG export project would not be evaluated and weighed against any benefits, and the project would not undergo the public interest analysis that the NGA contemplates for LNG export facilities.⁷⁸ Even if the Commission were to exercise jurisdiction over one or both facilities separately, the impacts of one or both facilities assessed individually would be smaller than and different from the total impacts of the two facilities when properly considered together.

Furthermore, declining to subject the Gibbstown and Wyalusing facilities to the Commission's public interest review as a unified project (and allowing its developers to play corporate shell games to evade the Commission's jurisdiction) would reward the

⁷⁶ See *Sound Energy Sols.*, 106 FERC ¶ 61,279, at P 27 (“Exclusive Federal regulation of [these] facilities also serves an important public policy goal. The nation’s energy needs are best served by a uniform national policy applicable to LNG imports.”); see also *Pivotal LNG, Inc.*, 151 FERC ¶ 61,006, 61,059-60 (2015) (Bay, Comm’r, dissenting).

⁷⁷ See *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,749 (1999); see also FERC Fiscal Years 2022-2026 Strategic Plan, at 15 (“Under both sections 3 and 7 of the Natural Gas Act, Congress vested authority in the Commission to make a record-based determination and to decide the appropriate balance between the benefits and need for the project relative to the project’s adverse impacts, including environmental impacts (based on the Commission’s findings under the National Environmental Policy Act [NEPA]), impacts on landowners and communities, including environmental justice communities.”), https://www.ferc.gov/sites/default/files/2022-04/FERC-FY22-26-Strategic-Plan_3-31-2022.pdf.

⁷⁸ In circumstances such as this where “the export will be to a natural gas free-trade country, the only potential public-interest analysis ever made is the Commission’s” when evaluating the “siting, construction, [and] operation” of the LNG project. *Sierra Club v. FERC*, 827 F.3d 36, 41 (D.C. Cir. 2016) (quoting 15 U.S.C. § 717b(e)(1)).

developers with a competitive advantage over other, functionally similar natural gas liquefaction and export operations of comparable scale that remain subject to Commission jurisdiction because they did not artificially segment operations among the same corporate family.⁷⁹ As New Fortress Energy explained in a recent SEC filing, it attempts to “design[] and construct[] [its] U.S. facilities so that they do not meet the statutory definition of an ‘LNG terminal’ as interpreted by FERC pursuant to its case law.”⁸⁰ In other words, artificially dividing this single enterprise into components controlled by related corporate entities in order to avoid Commission jurisdiction—and the accompanying federal scrutiny of whether the proposed siting, construction, and operation of its facilities are in the public interest—is a fundamental part of the company’s operating model. This attempt to create an LNG-tanker-sized gap in the Commission’s jurisdiction is contrary to Congress’s mandate and the public interest. If the Commission acquiesces and declines to exercise jurisdiction here, that would incentivize other entities to follow the Fortress entities’ lead and artificially segregate their comprehensive liquefaction and export operations in this way to avoid the federal regulatory oversight the NGA contemplates.

In sum, the Commission should treat the Fortress entities’ interrelated Wyalusing and Gibbstown facilities as one integrated project because of their extensive overlap, detailed in section II.A above, and because doing so furthers the purpose of the NGA to establish comprehensive federal oversight over LNG export facilities.

⁷⁹ See *KansOk P’ship*, 73 FERC ¶ 61,160, 61,486.

⁸⁰ See New Fortress Energy, SEC Form 10-K, at 10 (2022), <https://ir.newfortressenergy.com/static-files/293f7481-c2b7-468d-b76f-049f904bb67e>.

2. The Fortress LNG export project meets the definition of LNG terminal in the NGA and as applied by FERC

Under the NGA, the Commission has jurisdiction over the siting and construction of natural gas export facilities. This includes “the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”⁸¹ The NGA defines “LNG terminal” to “include[] all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is . . . exported to a foreign country from the United States.”⁸² The Fortress LNG export project meets the terms of this statutory definition because it involves several of the listed natural gas activities⁸³ and its stated purpose is to export LNG.⁸⁴

The project likewise meets all three criteria that the Commission has recently applied to determine if a facility meets the statutory definition of “LNG terminal.” In recent orders, the Commission has

considered three criteria when determining whether a facility is an LNG import or export terminal subject to [its] jurisdiction: (1) whether an LNG

⁸¹ 15 U.S.C. § 717b(e)(1); *see also* DOE Delegation Order No. 00-004.00A, at ¶ 1.21.A (delegating to the Commission, with respect to exports of natural gas, the authority 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 . . . exit for exports”).

⁸² 15 U.S.C. § 717a(11).

⁸³ Specifically, the proposed project is comprised of facilities used to “receive,” “unload,” “process,” “liquefy,” “store,” “load,” and “transport” natural gas that would be “exported to a foreign country from the United States.”

⁸⁴ *See, e.g., supra* section II.A; DOE Application at 1 (explaining that New Fortress Energy subsidiary Bradford County LNG Marketing LLC “seeks authorization to export LNG from a natural gas liquefaction and truck and rail loading facility in Wyalusing Township”); DOE/FE Order No. 4670, at 10 (Bradford County LNG Marketing LLC obtained an order authorizing it “to export domestically produced LNG sourced from the proposed Wyalusing Facility”); PHMSA Special Permit EA at 1 (New Fortress Energy subsidiary Energy Transport Solutions “intends to use the special permit to facilitate shipments to customers who are principally exporters of LNG to foreign markets”).

terminal would include facilities dedicated to the import or export of LNG; (2) whether the facility would be located at or near the point of import or export; and (3) whether the facility would receive or send-out gas via a pipeline.⁸⁵

The Fortress LNG export project satisfies each of these criteria.⁸⁶

For the first criterion, the project includes “facilities dedicated to the . . . export of LNG.”⁸⁷ Dock 2 at the Gibbstown export facility “is designed for the loading of bulk liquid products directly from railcar or truck onto ocean-going vessels for export and includes infrastructure for transloading operations.”⁸⁸ The dock “would allow for the transfer of liquefied natural gas products from shore to vessels.”⁸⁹ The Gibbstown site will include “infrastructure designed to receive and transfer LNG onto marine vessels.”⁹⁰ The Gibbstown developers have informed the Commission that “LNG will be directly transferred from the trucking and railcar facilities by means of a vacuum insulated LNG

⁸⁵ *New Fortress Energy LLC*, 174 FERC ¶ 61,207, at P 10; *accord Nopetro LNG, LLC*, 178 FERC ¶ 61,168, at P 9.

⁸⁶ As discussed below, *infra* section III.B, some of these criteria lack statutory support in the NGA.

⁸⁷ *New Fortress Energy LLC*, 174 FERC ¶ 61,207, at P 10; *accord Nopetro LNG, LLC*, 178 FERC ¶ 61,168, at P 9.

⁸⁸ Delaware River Basin Commission, Delaware River Partners LLC, Gibbstown Logistics Center Dock 2, Docket No. D-2017-009-2 (draft), at 2 (June 12, 2019), <https://www.nj.gov/drbc/library/documents/dockets/061219/2017-009-2.pdf>. The existence of infrastructure to transfer other liquid fuels at Gibbstown, *see, e.g.*, Reply of Delaware River Partners LLC, FERC Accession No. 20220302-5092, FERC Docket No. CP20-522-000, at 2 (Mar. 2, 2022), does not defeat jurisdiction. FERC’s test is whether the facility “includes” LNG dedicated facilities, not whether it *only* has LNG dedicated facilities.

⁸⁹ U.S. Army Corps of Eng’rs, Public Notice No. CENAP-OP-R-2016-0181-39, at 1 (2019), <https://www.nap.usace.army.mil/Portals/39/docs/regulatory/publicnotices/Public-Notice-2016-0181-39.pdf>.

⁹⁰ DRP Petition at 5-6.

transfer line . . . to a marine vessel.”⁹¹ The liquefaction trains at the Wyalusing site are similarly dedicated to creating LNG for export. Further, a New Fortress Energy subsidiary sought, and received, authorization from the Department of Energy “to export LNG” from the “liquefaction and truck and rail loading” portion of the project at Wyalusing.⁹² And New Fortress Energy has described multiple links in the liquefaction-to-export chain as “dedicated” assets for LNG, including tanker trucks and marine vessels.⁹³ Accordingly, as set out in permit applications and regulatory filings, these facilities are dedicated to LNG export.

For the second criterion, the Gibbstown component of the project is located “at . . . the point of . . . export.”⁹⁴ FERC has alternatively described this criterion as whether “LNG [can] be directly transferred to vessels for export.”⁹⁵ As noted above, the Gibbstown export facility will involve direct transfer from trucks and railcars to marine vessels. These vessels will then “transport LNG from the Gibbstown Facility directly to foreign ports without any intermediary transfer.”⁹⁶ The second criterion is therefore satisfied because “LNG can be directly transferred to vessels for export.”⁹⁷

⁹¹ *Id.* at 4.

⁹² DOE Application at 1.

⁹³ New Fortress Energy LLC, Amendment No. 4 to SEC Form S-1, at 7 (2019), <https://ir.newfortressenergy.com/static-files/ead557e8-c703-40e6-bfb2-b55e50bd2a8d>.

⁹⁴ *New Fortress Energy LLC*, 174 FERC ¶ 61,207, at P 10; *accord Nopetro LNG, LLC*, 178 FERC ¶ 61,168, at P 9.

⁹⁵ *Nopetro LNG, LLC*, 180 FERC ¶ 61,057, at P 4.

⁹⁶ DOE/FE Order No. 4670, at 5; *see also* Bradford Answer at 9 (“LNG will be transloaded from rail cars and trucks onto a floating storage vessel.”).

⁹⁷ *Nopetro LNG, LLC*, 180 FERC ¶ 61,057, at P 9.

For the third criterion, the “facility would receive . . . gas via a pipeline.”⁹⁸ The project is connected to a pipeline that delivers natural gas to the liquefaction facility in Wyalusing. Specifically, the project would receive gas “via an interconnection with Stagecoach Pipeline, a FERC-jurisdictional pipeline.”⁹⁹

The Fortress LNG export project therefore satisfies all three criteria that FERC has applied to determine whether the statutory definition of an LNG terminal is met. It includes components dedicated to the export of LNG in foreign commerce; a facility at the point of export where LNG will be directly transferred onto ocean-going LNG tankers; and a connection to receive gas by pipeline at the point of liquefaction. This conclusion is a relatively straightforward application of the three factors the Commission has previously considered and is “perfectly consistent” with those decisions.¹⁰⁰ Indeed, the Commission has already explained how a similar integrated project in Alaska with geographically separate gas treatment and liquefaction and export facilities falls under FERC’s jurisdiction under section 3 of the NGA. In that case, the Commission asserted jurisdiction over all aspects of a proposal by the Alaska Gasline Development Corporation to construct an inland gas treatment plant and a coastal liquefaction and export facility, connected by an over 800-mile long pipeline.¹⁰¹ The Commission held that the “definition of LNG terminal in NGA [section] 2(11) is broad enough to encompass” the inland gas treatment plant and

⁹⁸ *New Fortress Energy LLC*, 174 FERC ¶ 61,207, at P 10; *accord Nopetro LNG, LLC*, 178 FERC ¶ 61,168, at P 9.

⁹⁹ DOE Application at 2.

¹⁰⁰ *New Fortress Energy*, 36 F.4th at 1176.

¹⁰¹ *Alaska Gasline Development Corp.*, 171 FERC ¶ 61,134, at P 4 (2020).

the pipeline connecting it to the liquefaction and export facility.¹⁰² The Commission should similarly exercise its jurisdiction here over the Fortress LNG export project as a single LNG terminal.

B. Alternatively, each component is separately jurisdictional under section 3 of the NGA

Even if considered independently, the Wyalusing and Gibbstown components of the Fortress LNG export project each meet the statutory definition of an “LNG terminal” or fall within the Commission’s jurisdiction under section 3(a), and are therefore jurisdictional under Section 3 of the NGA.¹⁰³ Each facility was developed for the express purpose of exporting LNG, as the project proponents have explained in numerous regulatory filings,¹⁰⁴ and no one contests that each facility would receive and load LNG that is exported to a foreign country.

Under its current analysis, however, 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.”¹⁰⁵ Because the Gibbstown export facility would receive LNG by train or truck rather than by pipeline,

¹⁰² *Id.* at P 11. The Commission wrote that in a typical case it would be able to exercise jurisdiction over the pipeline connecting the treatment plant to the liquefaction and export facility through section 7 of the NGA, as most pipelines are subject to section 7 jurisdiction as interstate pipelines. *Id.* at P 9. However, because there was no interstate component, and the entire project involved gas treatment, liquefaction, and transportation infrastructure for LNG export, the project fell under the Commission’s jurisdiction under section 3 of the NGA. *Id.* at PP 9-11. The Fortress LNG export project presents a similar situation where the infrastructure for liquefaction and export are connected, but not by a typical section 7 pipeline, and the entire project therefore falls under section 3 of the NGA.

¹⁰³ *See* 15 U.S.C. §§ 717a(11), 717b.

¹⁰⁴ *See supra* section II.A.

¹⁰⁵ *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163, at P 43 (2014).

applying this criterion would render the facility non-jurisdictional, if considered as a stand-alone project unrelated to the Wyalusing liquefaction facility. But this restriction is not supported by the text or legislative history of the NGA. If the Commission considers the facilities in isolation, it should not apply this arbitrary and unsupported pipeline requirement here and instead should find the Gibbstown export facility jurisdictional. The Wyalusing liquefaction facility also falls under the Commission’s jurisdiction under section 3 of the NGA, and not exercising that jurisdiction would create a gap in the regulatory review of the project.

1. The Gibbstown facility is jurisdictional, notwithstanding its lack of a pipeline connection

a. The NGA unambiguously does not require a pipeline connection for LNG terminals

Section 3 of the NGA contains no pipeline requirement—the NGA nowhere requires LNG export facilities to be connected to a pipeline to be considered jurisdictional.¹⁰⁶ The definition of “LNG terminal” added by Congress in the Energy Policy Act of 2005 contains no references to pipes or pipelines.¹⁰⁷ Thus, the Commission should not apply this extra-textual requirement to the Gibbstown facility.

“As with all questions of statutory interpretation, we start with the text.”¹⁰⁸ And as two commissioners have recognized, “[n]owhere does the statute say that a facility must be connected to a pipeline to qualify as an LNG terminal and, thus, come within the

¹⁰⁶ See 15 U.S.C. § 717b.

¹⁰⁷ See *id.* § 717a(11).

¹⁰⁸ *Pharm. Mfg. Research Servs., Inc. v. Food & Drug Admin.*, 957 F.3d 254, 260 (D.C. Cir. 2020).

Commission’s jurisdiction under section 3.”¹⁰⁹ The Commission has in the past indicated that the requirement that a facility be connected to a pipeline comes from how it defines the phrase “natural gas facilities” in the NGA’s definition of an LNG terminal at 15 U.S.C. Section 717a(11).¹¹⁰ But there is nothing about the phrase “natural gas facilities” that indicates a pipeline connection is required.¹¹¹ That should be the end of the matter. Agencies are bound to interpret the text of the laws Congress passes, and may not substitute their own judgment for Congress’s.¹¹² And agencies have a “duty to respect not only what Congress wrote but, as importantly, what it didn’t write.”¹¹³ Accordingly, the Commission should not apply this pipeline requirement to the Gibbstown facility.

In *Shell U.S. Gas & Power, LLC*, the Commission inferred that when Congress passed the Energy Policy Act of 2005 it did not intend “to redefine the term ‘natural gas facilities’ as commonly understood for purposes of Commission jurisdiction,” under which the Commission had “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.”¹¹⁴ But the phrase “natural gas facilities” does not require that such facilities be connected to pipelines. The Commission borrowed the pipeline requirement from another part of the Natural Gas Act, section 7, which regulates interstate, but not

¹⁰⁹ *New Fortress Energy LLC*, 174 FERC ¶ 61,207, at P 3 (Glick, Chairman, and Clements, Comm’r, concurring).

¹¹⁰ *See Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163, at P 43.

¹¹¹ *New Fortress Energy LLC*, 174 FERC ¶ 61,207, at P 3 (Glick, Chairman, and Clements, Comm’r, concurring).

¹¹² *See, e.g., 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.”).

¹¹³ *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) (plurality opinion).

¹¹⁴ 148 FERC ¶ 61,163, at P 43.

foreign, commerce.¹¹⁵ This understanding regarding section 3, which has not been ratified by any court,¹¹⁶ is based on the language and legislative history of section 7 that seems to assume the transportation of gas is taking place via pipeline.¹¹⁷

But, as both the Commission and the D.C. Circuit have recognized, “sections 3 and 7 are not interchangeable.”¹¹⁸ The Commission cannot simply graft on the assumptions it has used to interpret section 7, which deals with interstate transportation, to section 3, which deals with imports and exports. Section 3 contains no language that assumes the use of pipelines to receive gas for export.¹¹⁹ The legislative history also does not indicate that the definition of “LNG terminal” was written to apply only to facilities connected to gas pipelines.¹²⁰ Because there is no reason to graft this extra-textual requirement onto the

¹¹⁵ See *id.* at P 40; *City of Oberlin, Ohio v. FERC*, 39 F.4th 719, 723 (D.C. Cir. 2022) (explaining distinction in NGA between section 7, which “define[s] interstate commerce to exclude foreign commerce,” and “[i]mport/export facilities[, which] are instead governed by Section 3”).

¹¹⁶ See *New Fortress Energy*, 36 F.4th at 1178-79 (reserving the question of the pipeline requirement).

¹¹⁷ See *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163, at P 32.

¹¹⁸ *New Fortress Energy Inc.*, 36 F.4th at 1177 (citing *New Fortress Energy LLC*, 176 FERC ¶ 61,031, at P 18 (2021)).

¹¹⁹ See *Emera CNG, LLC*, 148 FERC ¶ 61,219, 62,392 (2014) (Bay, Comm’r, dissenting) (“[N]one of the language which led the Commission to conclude that section 7 is limited to transportation by pipelines is present in section 3 (nor any of the related delegation and executive orders).”).

¹²⁰ In *Shell U.S. Gas & Power, LLC*, the Commission cited two Congressional Research Service reports that it says indicated that natural gas facilities had to include a pipeline connection. 148 FERC ¶ 61,163, at P 43 n.81. But neither of these reports discusses the phrase “natural gas facility” at any length—one doesn’t mention it at all, and the other mentions the phrase once in a footnote and once in the appendix. See Cong. Rsch. Serv., RL32386, Liquefied Natural Gas (LNG) in U.S. Energy Policy: Infrastructure and Market Issues (2006); Cong. Rsch. Serv., RL32205, Liquefied Natural Gas (LNG) Import Terminals: Siting, Safety, and Regulation (2009). There is also no evidence that Congress considered either report as it was writing its definition of LNG terminal—both reports were published after the passage of the Energy Policy Act of 2005.

phrase “natural gas facilities,” the Commission must interpret it as written—that is, without a pipeline requirement. Congress set the scope of the Commission’s jurisdiction in section 3 of the NGA, and “it is Congress to which the Constitution assigns the power to set the metes and bounds of agency authority.”¹²¹

b. Even if the Commission believes the definition of LNG terminal is ambiguous, FERC should not apply the pipeline requirement here

To the extent that the Commission believes the definition of “LNG terminal” is ambiguous,¹²² the Commission should still not apply the pipeline requirement to the Gibbstown operation. The “Commission makes jurisdictional determinations regarding LNG projects on a case-by-case basis.”¹²³ These determinations are often “highly fact-specific.”¹²⁴ And while it may have once seemed sensible for the Commission to only exercise jurisdiction under section 3 over facilities that were connected to a pipeline, changes in industry practice and the increasingly “‘wide variability’ in LNG facility configurations”¹²⁵ make that no longer reasonable. Recent changes in LNG practice make it increasingly likely that many LNG export terminals will not have a traditional pipeline connection.

More and more facilities, including the Gibbstown export facility, are being considered that would receive LNG by truck or rail rather than a pipeline. This is often

¹²¹ *Mozilla Corp. v. FCC*, 940 F.3d 1, 83 (D.C. Cir. 2019) (per curiam).

¹²² *See Nopetro LNG, LLC*, 180 FERC ¶ 61,057, at P 24.

¹²³ *Id.* at P 11.

¹²⁴ *New Fortress Energy LLC*, 176 FERC ¶ 61,031, at P 15.

¹²⁵ *Id.* (citation omitted).

referred to as a “virtual pipeline.”¹²⁶ The Commission has previously considered the use of virtual pipelines on a large scale unlikely because of economic impracticability.¹²⁷ But along with LNG’s rapid growth in recent years, the interest in the use of virtual pipelines has increased.¹²⁸ Industry groups have characterized “the transport of LNG by rail” as “a growing opportunity.”¹²⁹ Indeed, New Fortress Energy here *rejected* the use of a traditional pipeline because of the lack of an existing one between the point of liquefaction and export, and because “pipeline construction takes years to achieve due to potential opposition,

¹²⁶ For an industry definition of “virtual pipeline,” see *Virtual Pipeline*, Nopetro, <http://nopetro.com/our-solution/virtual-pipeline/> (last visited Sept. 1, 2022) (“In virtual pipelines, CNG or LNG is transported by various modes – highway, railway, waterway, and the sea.”).

¹²⁷ See FERC, Atlantic Coast Pipeline and Supply Header Project, Final Environmental Impact Statement Vol. I, at 3-10 (2017) (finding transportation by truck or rail “would not be economically practical”), https://cms.ferc.gov/sites/default/files/2020-05/volume-I_9.pdf.

¹²⁸ See, e.g., *Nopetro LNG, LLC*, 178 FERC ¶ 61,168, at P 10 (describing facility which will liquefy gas and ship it via truck to nearby ports); *Am. LNG Mktg. LLC*, DOE/FE Order No. 3690, at 2 (Aug. 7, 2015) (describing inland liquefaction facility that will load LNG “into approved ISO IMO7/TVAC-ASME LNG (ISO) containers (truck or rail mounted)” and transport them via rail or truck to the “Port of Miami or other ports in Florida capable of handling ISO containers without modification”), <https://www.energy.gov/sites/prod/files/2015/08/f25/ord3690.pdf>; *Am. LNG Mktg. LLC*, DOE/FE Order No. 3656, at 2 (May 29, 2015) (describing liquefaction facility transporting LNG via rail or truck to “Port Canaveral or other ports in Florida capable of handling such ISO containers without modification”), <https://www.energy.gov/sites/prod/files/2015/08/f25/ord3656.pdf>; *Eagle LNG Partners Jacksonville II LLC*, DOE/FE Order No. 4078, at 2 (Sept. 15, 2017) (describing inland liquefaction facility that will load LNG “into approved ISO IMO7/TVAC-ASME LNG (ISO) containers” and transport them via truck “for export at the nearby Port of Jacksonville or other ports capable of handling ISO containers without modification”), https://www.energy.gov/sites/prod/files/2017/09/f36/ord4078_0.pdf.

¹²⁹ Press Release, Natural Gas Supply Ass’n & Ctr. for Liquefied Natural Gas, NGSA and CLNG Joint Statement on Executive Order Promoting Energy Infrastructure (Apr. 10, 2019), <https://www.ngsa.org/wp-content/uploads/sites/3/2020/06/5-NGSA-CLNG-Statement-on-Infrastructure-EO.pdf>.

planning, permitting and construction.”¹³⁰ The Commission, which is well aware of the rapid growth of LNG and the emergence of novel configurations, must recognize this reality and not fail in its duty to exercise section 3 jurisdiction over the Gibbstown facility, a coastal facility able to receive and directly load LNG onto ocean-going vessels for export, simply because New Fortress Energy chose a different means of transportation that serves the same purpose, and has the same effect, as a traditional pipeline.

c. The Commission has several methods through which it can find the pipeline requirement does not apply to the Gibbstown facility

As explained above, the definition of “LNG terminal” unambiguously does not include a pipeline requirement. Because “[t]here is no such limitation in the plain language of the NGA,”¹³¹ the Commission should not apply it. But even if the Commission finds the definition of “LNG terminal” to be ambiguous, there are two ways it could revise the “pipeline requirement” criterion and find the Gibbstown facility jurisdictional. First, because “case-by-case adjudication sometimes results in decisions that seem at odds but can be distinguished on their facts,”¹³² the Commission could explain that the third criterion “turns on” whether a facility is able to “receive . . . or send out [natural gas].”¹³³ As the Commission has already explained, “[t]he physical characteristics of the piping, and whether the piping connects the facility to the interstate or intrastate pipeline grid, are

¹³⁰ PHMSA Special Permit EA at 31.

¹³¹ *New Fortress Energy LLC*, 174 FERC ¶ 61,207, at P 2 (Glick, Chairman, and Clements, Comm’r, concurring).

¹³² *Belmont Mun. Light Dep’t v. FERC*, 38 F.4th 173, 185 (D.C. Cir. 2022) (quoting *New England Power Generators Ass’n v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018)).

¹³³ *New Fortress Energy*, 36 F.4th at 1178 (alteration in original) (quoting *New Fortress Energy LLC*, 176 FERC ¶ 61,031, at P 15).

immaterial to this [jurisdictional] determination.”¹³⁴ An overly narrow interpretation of this criterion focused on only one type of connection that allows for sending out or receiving gas “could lead to the result that the Commission’s jurisdiction would not attach to a large-scale LNG export terminal”¹³⁵—here, one that connects by rail and trucks. If the Commission takes this approach, that would satisfy its “responsibility to provide a reasoned explanation of why those facts matter” to the Gibbstown adjudication.¹³⁶

Second, the Commission could explicitly overturn the pipeline requirement from its earlier decision in *Shell*. In doing so, it would have to “display awareness that it is changing position,’ show ‘the new policy is permissible under the statute,’ and ‘show that there are good reasons for the new policy.’”¹³⁷ As described above, there are good reasons for removing the pipeline requirement, including the changing nature of the LNG industry and the increasing interest in virtual pipelines. This analysis would also require addressing any reliance interests from *Shell*.¹³⁸ The pipeline requirement from *Shell* is a particularly weak ground for reliance, as commissioners have explained a need to revisit that decision¹³⁹ and the D.C. Circuit has left the question open for a petition—such as this one—that directly addresses it.¹⁴⁰ And the fact that Delaware River Partners and Bradford filed

¹³⁴ *New Fortress Energy LLC*, 176 FERC ¶ 61,031, at P 15.

¹³⁵ *New Fortress Energy*, 36 F.4th at 1178 (quoting *New Fortress Energy LLC*, 174 FERC ¶ 61,207, at P 23).

¹³⁶ *Belmont Mun. Light Dep’t*, 38 F.4th at 185 (quoting *New England Power Generators Ass’n*, 881 F.3d at 211).

¹³⁷ *New Fortress Energy*, 36 F.4th at 1176 (quoting *Balt. Gas & Elec. Co. v. FERC*, 954 F.3d 279, 286 (D.C. Cir. 2020)).

¹³⁸ *Id.* at 1178.

¹³⁹ *New Fortress Energy LLC*, 176 FERC ¶ 61,031, at P 3 (Glick, Chairman, and Clements, Comm’r, concurring).

¹⁴⁰ *See New Fortress Energy*, 36 F.4th at 1178-79.

their own petitions seeking declaratory orders shows they are anything but certain how the Commission’s “case-by-case” jurisdictional analysis would come out as applied to Gibbstown and Wyalusing.¹⁴¹ There may be no better opportunity for the Commission to revisit the *Shell* decision’s pipeline requirement than this case, where the facts of a virtual pipeline are apparent.

In sum, even if the Commission declines to consider the Fortress LNG export project in a single authorization proceeding, the Commission should exercise its jurisdiction under section 3 of the NGA over the Gibbstown export facility. There is no pipeline requirement in the statutory text, and the facility unambiguously falls under the relevant provisions’ terms. And even if the Commission believes those statutory provisions are ambiguous, changing circumstances in the LNG industry warrant revising the framing of the third criterion of the jurisdictional test or overturning *Shell* so that a regulatory gap does not emerge for large-scale LNG export facilities such as this one.

2. The Wyalusing facility is jurisdictional under section 3 of the NGA

The Commission has also stated that the requirement that an LNG facility be “onshore or in State waters” implies that it must be located on the waterfront so that it can load LNG “directly onto ocean-going, bulk-carrier LNG tankers.”¹⁴² Similarly, the Commission has concluded that “the text of section 2(11) sets forth a broad, ambiguous

¹⁴¹ Bradford Petition; DRP Petition.

¹⁴² *Pivotal LNG, Inc.*, 151 FERC ¶ 61,006, at PP 7, 12; *see also Nopetro LNG, LLC*, 178 FERC ¶ 61,168, at P 12 (“The term ‘onshore,’ when used in conjunction with ‘or in State waters,’ and combined with the fact that section 3 applies to LNG that is ‘transported in interstate commerce by waterborne vessel,’ connotes that section 2(11) applies to facilities that are located on or near the water or the coast.” (citations omitted)).

definition of ‘LNG terminal,’ the plain language of which, if interpreted unmoored from the context in which the statute was enacted, could be read to include in its ambit a far larger universe of facilities than Congress intended.”¹⁴³ But properly interpreting the term “onshore” would give FERC jurisdiction over all LNG import or export terminals located on land, not just marine terminals on the coast. Even if FERC interprets the term “onshore” more narrowly, the Commission still has jurisdiction over the Wyalusing liquefaction facility separate from the definition of “LNG terminal” because of FERC’s longstanding jurisdiction under section 3(a) over natural gas export facilities.¹⁴⁴ And under section 3(a), none of the statutory terms that FERC cites as the reason to limit its jurisdiction to only coastal facilities are present.

As former Commissioner Norman Bay wrote in a dissenting opinion regarding Pivotal LNG, “the Commission’s jurisdiction under section 3 extends to export facilities, not merely ‘LNG terminals.’ The two are not the same. Under section 2(11), ‘LNG terminal’ is defined to include facilities used for import, export, or interstate commerce. An LNG terminal is simply one type of export facility.”¹⁴⁵ Under section 3(a) of the NGA, the Commission’s jurisdiction applies to any facility that is used to “export any natural gas from the United States to a foreign country or import any natural gas from a foreign

¹⁴³ *Nopetro LNG, LLC*, 180 FERC ¶ 61,057, at P 24 (citations omitted).

¹⁴⁴ *See EcoEléctrica, L.P.*, 176 FERC ¶ 61,192, at P 4 (Glick, Chairman, and Clements, Comm’r, concurring); *New Fortress Energy LLC*, 174 FERC ¶ 61,207, at P 17 & n.21 (noting that in *Emera CNG, LLC* and *Andalusian Energy, LLC*, “the Commission was considering its jurisdiction over export facilities, not LNG terminals”).

¹⁴⁵ *Pivotal LNG, Inc.*, 151 FERC ¶ 61,006, 61,059 (Bay, Comm’r, dissenting) (footnote omitted).

country.”¹⁴⁶ The Commission has “to date” exercised its section 3(a) authority where a pipeline crosses an international border, and over coastal import and export facilities that are accessible to ocean-going LNG tankers (i.e., located at the site of export) and connected to a pipeline.¹⁴⁷ But there is no basis for a “coastal” requirement—nothing in the statutory text requires a facility to be located at the point of export.¹⁴⁸ And, unlike the definition of “LNG terminal,” section 3(a) nowhere references “onshore” facilities or “waterborne vessels.”

As already noted, the Commission “makes jurisdictional determinations concerning LNG projects on a case-by-case basis.”¹⁴⁹ FERC has used that approach to attempt to craft practical jurisdictional determinations. Recent orders concluded that natural gas facilities that transported liquefied or compressed gas by truck in International Organization of Standardization (ISO) containers to public, general purpose ports were not jurisdictional.¹⁵⁰

¹⁴⁶ 15 U.S.C. § 717b(a); *see also Emera CNG, LLC*, 148 FERC ¶ 61,219, 62,391-92 (Bay, Comm’r, dissenting) (discussing “foreign commerce” references in sections 1(a), 1(b), and 3(a) of the NGA, and arguing that the facilities at issue “fall within the four corners of the statute” because they “involv[e] natural gas intended for export to a foreign country”); *Pivotal LNG, Inc.*, 151 FERC ¶ 61,006, 61,058-59 (Bay, Comm’r, dissenting) (discussing “plain language” of the NGA in sections 1(a), 1(b), and 3(a), and arguing that the facilities in question were jurisdictional because “[t]here can be little doubt” that they will be involved in exporting gas in foreign commerce).

¹⁴⁷ *Nopetro LNG, LLC*, 178 FERC ¶ 61,168, at P 14; *Andalusian Energy, LLC*, 174 FERC ¶ 61,107, at P 9 (2021).

¹⁴⁸ *See Emera CNG, LLC*, 148 FERC ¶ 61,219, at 62,392 (Bay, Comm’r, dissenting) (explaining that “the Department of Energy Delegation Order providing the Commission with authority over export facilities differentiates between the place of export and the facilities necessary to implement that export, and gives no indication that the former must be located within the latter”).

¹⁴⁹ *Nopetro LNG, LLC*, 180 FERC ¶ 61,057, at P 6.

¹⁵⁰ *See CNG Holding 1 LLC*, 180 FERC ¶ 61,077, at P 2 (2022); *Nopetro LNG, LLC*, 178 FERC ¶ 61,168, at P 3; *Emera CNG, LLC*, 148 FERC ¶ 61,219, at P 13; *Andalusian Energy, LLC*, 174 FERC ¶ 61,107, at PP 10-11.

Those orders drew on an earlier order that found that loading compressed natural gas (CNG) into CNG containers was “more like existing, unregulated facilities that deliver LNG into trucks which are subsequently driven across the border into Canada or Mexico.”¹⁵¹ But the operation of the Wyalusing liquefaction facility is distinct from those examples. Although it may load some LNG by truck in ISO containers,¹⁵² the Wyalusing facility will primarily load bulk LNG into tank cars for rail transportation.¹⁵³ And this LNG will be directly transported to one port that is constructing facilities dedicated to LNG export.¹⁵⁴ FERC has yet to be presented with a natural gas facility that loads LNG into bulk tank cars by rail to a port for export “with no intermediate stops.”¹⁵⁵ Because the facility will primarily use LNG-specific rail tank cars rather than general-use ISO containers, and will ship the LNG to a dock specifically built for LNG export, every aspect of the export chain that the facility is a part of will be dedicated to LNG export. The facility will not be sending its LNG on general use trucks or to a public, general use port where LNG-filled ISO containers will be comingled with numerous other products that the Commission has no mandate to assume jurisdiction over. Rather, this facility will be designed and used to facilitate LNG export,¹⁵⁶ which the Commission decidedly does have jurisdiction over.

¹⁵¹ *Emera CNG, LLC*, 148 FERC ¶ 61,219, at P 13.

¹⁵² DOE/FE order at 4.

¹⁵³ *Id.*; *see also* Special Permit Renewal Application at 3 (“The capability to move LNG by rail remains integral to the viability of this enterprise . . .”).

¹⁵⁴ *See supra* section II.A.1.

¹⁵⁵ DOT-SP 20534, at 2 (Dec. 5, 2019).

¹⁵⁶ *See* DOE Application at 3 (giving the owner of the Wyalusing facility the exclusive right to deliver LNG to the Gibbstown export terminal); *id.* at Appx. D (stating that the fuel handling contract between the owners of the Gibbstown and Wyalusing facilities would only begin when the Gibbstown facility “is capable of receiving and transloading the required volume in gallons per day of gas” for export).

The Wyalusing liquefaction facility is therefore factually distinct from other section 3(a) jurisdictional determinations the Commission has made, and the Commission should exercise its pragmatic approach to section 3(a) jurisdiction to recognize that this type of liquefaction facility—focused squarely on the export of LNG—falls under its jurisdiction.¹⁵⁷ The LNG-specific aspects of the Wyalusing facility makes it less like the analogies FERC has previously drawn to facilities that load gas onto trucks that subsequently drive across the border to Canada or Mexico, and more like the specialized, LNG-specific facilities the Commission has previously considered section 3 jurisdictional.¹⁵⁸

The Commission can follow the plain text of section 3(a) of the NGA and exercise jurisdiction over the Wyalusing liquefaction facility as an export facility without subjecting to FERC 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.”¹⁵⁹ The Commission has explained its jurisdiction over import and export facilities under section 3(a) in the following way:

The intent to import or export gas and the physical capability to convey the gas are two halves of a whole transaction. . . . Hence, section 3 has

¹⁵⁷ Cf. Cong. Research Serv., R46414, Rail Transportation of Liquefied Natural Gas: Safety and Regulation 6 (2020), <https://crsreports.congress.gov/product/pdf/R/R46414/5> (explaining that “[s]ome facilities producing, storing, or accepting LNG transported by rail could fall under the commission’s jurisdiction”).

¹⁵⁸ See, e.g., *Freeport LNG Development, L.P.*, 107 FERC ¶ 61,278, at P 7 (2004), *clarified on reh’g*, 108 FERC ¶ 61,253 (2004) (authorizing a 9.6-mile-long pipeline under section 3 of the NGA).

¹⁵⁹ *New Fortress Energy LLC*, 174 FERC ¶ 61,207, at P 3 (Danly, Comm’r, dissenting). The same can be said for Commissioner Danly’s worry that jettisoning the Commission’s recent jurisdictional test for LNG terminals under section 3(e) would subject to FERC jurisdiction “nearly everything including gathering facilities, local distribution systems and wholly intrastate pipelines.” *Id.* at P 3 & n.70.

traditionally required authorization of both a plan on paper to move gas and a proposal to put facilities in place to make that happen.¹⁶⁰

Here, the proposal to make the LNG export happen requires the use of the Wyalusing facility, which will liquefy the gas and use specialized tank cars to transport large volumes of LNG directly from the point of liquefaction to the point of export, rather than using general-use ISO containers that will pass through intermediate points or be commingled with non-jurisdictional products at a point of export that requires no specialized facilities. Furthermore, Bradford County LNG Marketing LLC's application for export approval to the Department of Energy explicitly states that the Wyalusing facility is *necessary* to the export scheme.¹⁶¹ In contrast, a Topeka rail yard is not essential to make import or export happen.

In conclusion, the Commission has jurisdiction under section 3(a) over Wyalusing as a natural gas facility that is necessary for the export of natural gas.¹⁶² It can exercise that authority without sweeping into its jurisdiction facilities that are tangentially related to gas import or export. The Commission must exercise its authority to ensure the appropriate federal review of environmental impacts of the facility and whether it is in the public interest.

¹⁶⁰ *Sound Energy Sols.*, 107 FERC ¶ 61,263, at P 35.

¹⁶¹ DOE Application at Appx. D (explaining export will not commence until the “Wyalusing Facility has been completed, commissioned, placed into service, and is capable of producing commercial quantities of gas”).

¹⁶² In addition, as noted above, properly interpreting the term “onshore” would give FERC jurisdiction over the Wyalusing facility under section 3(e).

C. FERC must analyze the Fortress LNG export project in a single environmental impact statement

Because the Fortress LNG export project constitutes “a single course of action,” the Commission must analyze it “in a single environmental impact statement” (EIS).¹⁶³ This requirement to evaluate the project in a single EIS applies even if the Commission requires applications for authorization for one or more of the project components separately. The components of the Fortress LNG export project are “connected actions” due to the “clear physical, functional, and temporal nexus” between them.¹⁶⁴ Under NEPA, FERC therefore may not segment its review of these contemporaneous and interconnected components, and instead must consider their impacts in a single EIS.¹⁶⁵ This prohibition on segmentation recognizes the usefulness of a “comprehensive approach,”¹⁶⁶ rather than dividing analysis of an “integrated project” across multiple documents and processes.¹⁶⁷ And under NEPA, the Commission must also disclose and analyze a project’s indirect and cumulative impacts.¹⁶⁸ Therefore, even if FERC rules it only has jurisdiction over one of the facilities,

¹⁶³ 40 C.F.R. § 1502.4(a) (“Agencies shall evaluate in a single environmental impact statement proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action.”); *see also supra* section III.A.1.

¹⁶⁴ *See Del. Riverkeeper v. FERC*, 753 F.3d 1304, 1308 (D.C. Cir. 2014). The D.C. Circuit in this case quotes 40 C.F.R. § 1508.25(a)(1) (1978). The Council on Environmental Quality’s (CEQ) 2020 revision of its NEPA regulations moved the definition for “connected actions” from 40 C.F.R. § 1508.25(a)(1) to 40 C.F.R. § 1501.9(e)(1). The definition of “connected actions” remains unchanged.

¹⁶⁵ *Id.* at 1314.

¹⁶⁶ *Id.*

¹⁶⁷ *City of Bos. Delegation v. FERC*, 897 F.3d 241, 251-52 (D.C. Cir. 2018).

¹⁶⁸ 40 C.F.R. § 1508.1(g)(2)-(3); *see also Food & Water Watch v. FERC*, 28 F.4th 277, 285, 291 (D.C. Cir. 2022). As in *Delaware Riverkeeper*, the D.C. Circuit in *Food & Water Watch* quotes the definition for “connected actions” at 40 C.F.R. § 1508.25(a)(1) (1978) which was moved to 40 C.F.R. § 1501.9(e)(1) in 2020.

it must analyze the impacts of the non-jurisdictional facility in the EIS for the jurisdictional facility as a reasonably foreseeable indirect effect of approval of the jurisdictional facility.

1. NEPA requires that connected actions be considered in a single EIS

An agency “impermissibly ‘segments’ NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.”¹⁶⁹ Accordingly, connected actions “should be discussed in the same impact statement.”¹⁷⁰ Actions are “‘connected’ if they trigger other actions, cannot proceed without previous or simultaneous actions, or are ‘interdependent parts of a larger action and depend on the larger action for their justification.’”¹⁷¹

The purpose of this broad scope is to ensure a federal agency “can assess the true costs of an integrated project when it is best situated to ‘evaluate different courses of action’ and mitigate anticipated effects.”¹⁷² Prohibiting segmentation also “prevents agencies from dividing one project into multiple individual actions each of which individually has an insignificant environmental impact, but which collectively have a substantial impact,” and furthers NEPA’s goal of instilling “a more comprehensive approach so that long term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major federal action

¹⁶⁹ *Del. Riverkeeper*, 753 F.3d at 1313.

¹⁷⁰ 40 C.F.R. § 1501.9(e)(1).

¹⁷¹ *Id.* at 1309 (quoting 40 C.F.R. § 1508.25(a)(1) (1978)); *see also* 40 C.F.R. § 1501.9(e)(1) (2020)).

¹⁷² *City of Bos. Delegation*, 897 F.3d at 251-52 (quoting *Del. Riverkeeper*, 753 F.3d at 1313-14).

under consideration.”¹⁷³ Evaluating the actions separately also risks “foreclos[ing] the opportunity to consider alternatives,” such as whether an alternative with fewer adverse impacts would better serve the public interest.¹⁷⁴

The D.C. Circuit has “developed ‘a set of factors that help clarify’ when natural gas infrastructure projects—which frequently involve some degree of interconnection with other projects in the area—may be considered separately under NEPA.”¹⁷⁵ The criteria “focus[] on the projects’ degree of physical and functional interdependence, and their temporal overlap.”¹⁷⁶

2. The interdependent components of the Fortress LNG export project lack substantial independent utility

The Wyalusing and Gibbstown facilities are “connected, contemporaneous, closely related, and interdependent”¹⁷⁷ components of the larger Fortress LNG export project.¹⁷⁸ These interrelated links in what New Fortress Energy describes as a “vertical supply chain, from liquefaction to delivery of LNG,”¹⁷⁹ are financially and functionally connected and

¹⁷³ *Del. Riverkeeper*, 753 F.3d at 1314 (internal quotations and modification omitted).

¹⁷⁴ *Id.* at 1315 (internal quotation omitted).

¹⁷⁵ *Food & Water Watch*, 28 F.4th at 291 (quoting *City of Bos. Delegation*, 897 F.3d at 252).

¹⁷⁶ *Id.* (internal citations omitted).

¹⁷⁷ *Del. Riverkeeper*, 753 F.3d at 1308.

¹⁷⁸ *See supra* section III.A.1.

¹⁷⁹ New Fortress Energy, Amendment No. 4 to Form S-1, at 59, 81 (Jan. 29, 2019), <https://ir.newfortressenergy.com/static-files/ead557e8-c703-40e6-bfb2-b55e50bd2a8d>; *see also* New Fortress Energy, Form 10-K, at F-53 (2022) (“Terminals and Infrastructure includes the Company’s vertically integrated gas to power solutions, spanning the entire production and delivery chain from natural gas procurement and liquefaction to logistics, shipping, facilities and conversion or development of natural gas-fired power generation.”), <https://ir.newfortressenergy.com/static-files/293f7481-c2b7-468d-b76f-049f904bb67e>.

interdependent, and have significant temporal overlap. Because the facilities “[a]re interdependent parts of a larger action and depend on the larger action for their justification,”¹⁸⁰ they must be considered in a single EIS.¹⁸¹

First, the components of the project are physically and functionally interdependent. The purpose of the Wyalusing facility is to liquefy gas for transport to Gibbstown for export, as indicated in filings before FERC and other federal agencies.¹⁸² For instance, New Fortress Energy, through its transport affiliate, has stated that “[t]he capability to move LNG by rail” from the Wyalusing facility to the Gibbstown facility is “integral to the viability of this enterprise.”¹⁸³ The Wyalusing facility’s utility is thus “inextricably intertwined”¹⁸⁴ with the ability to ship LNG via rail to the Gibbstown facility, where the Wyalusing facility has exclusive transloading rights. In other words, each component of the Fortress LNG export project “fit[s] with the others like puzzle pieces to complete” the overall project.¹⁸⁵

Second, the components of the Fortress LNG export project share a temporal overlap.¹⁸⁶ As Bradford explained in its petition for a declaratory order, “[t]he timeline for

¹⁸⁰ 40 C.F.R. § 1501.9(e)(1)(iii).

¹⁸¹ *Del. Riverkeeper*, 753 F.3d at 1308-09.

¹⁸² *See supra* section II.A.

¹⁸³ Special Permit Renewal Application at 3. *See also* Energy Transport Solutions, Application for a Special Permit to Transport Methane Refrigerated in Liquid in DOT 113 Tank Cars 9 at 5 (Aug. 21, 2017) [hereinafter “Special Permit Application”], https://downloads.regulations.gov/PHMSA-2019-0100-0941/attachment_1.pdf (noting that this “commercial opportunity . . . can be realized only through the approval of a special permit”).

¹⁸⁴ *Del. Riverkeeper*, 753 F.3d at 1317.

¹⁸⁵ *Id.* at 1319.

¹⁸⁶ *See, e.g.*, Minor Source Plan Approval Application for Wyalusing Facility (dated Dec. 2018),

production at the [Wyalusing] Facility is expected to be aligned with the timetable for completion of construction at the Gibbstown Facility.”¹⁸⁷ This temporal overlap is unsurprising because each component of the Fortress LNG export project must be permitted and built before the project becomes operational. The overlap reinforces the functional interdependence: these components of the Fortress export project rely on each other for justification and “[c]annot or will not proceed unless other actions are taken previously or simultaneously.”¹⁸⁸ The facilities are also under simultaneous consideration by FERC: Delaware River Partners filed its petition for declaratory order with the Commission on September 11, 2020, and Bradford filed its petition one week later, on September 18, 2020.¹⁸⁹

A comprehensive EIS that considers the Fortress LNG export project must consider the impacts associated with each component of the project, including but not limited to

[https://files.dep.state.pa.us/regionalresources/NCRO/NCROPortalFiles/NewFortressEnergy/New%20Fortress%20Energy%20LNG%20Plant%20Plan%20Approval%20Application%20\(December%202018\).pdf](https://files.dep.state.pa.us/regionalresources/NCRO/NCROPortalFiles/NewFortressEnergy/New%20Fortress%20Energy%20LNG%20Plant%20Plan%20Approval%20Application%20(December%202018).pdf), and Extension applications (dated Aug. 2020 and June 2021); Special Permit Application (dated Aug. 2017), and Special Permit Renewal Application (dated Nov. 2021); DRBC Application (discussion application submitted Mar. 2019); DOE Application (dated Oct. 2020).

¹⁸⁷ Bradford Petition at 4-5; *see also* DOE/FE Order No. 4670, at 13 (requiring New Fortress Energy subsidiary Bradford County LNG Marketing to file “written reports describing the status of the proposed Gibbstown and Wyalusing Facilities” that must include “information on the progress of the proposed Gibbstown and Wyalusing Facilities, the date the Wyalusing Facility is expected to commence producing LNG for export, the date the Gibbstown Facility is expected to commence first exports of LNG, and the status of any long-term supply and export contracts associated with the long-term export of LNG”).

¹⁸⁸ 40 C.F.R. § 1501.9(e)(1)(ii). *See also* DOE Application at 3 (“New Fortress has entered into a multi-year agreement with DRP to have the exclusive right to transload LNG through the Gibbstown Facility.”); *cf. Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1326-27 (D.C. Cir. 2015) (upholding segmentation of review where “neither [project] depends on the other for its justification”).

¹⁸⁹ *See* DRP Petition at 23; Bradford Petition at 14.

LNG transport under the U.S. Department of Transportation’s jurisdiction and LNG export under the U.S. Department of Energy’s jurisdiction.¹⁹⁰ Under the Natural Gas Act, “[t]he Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969.”¹⁹¹ And under NEPA regulations,

A lead agency shall supervise the preparation of an environmental impact statement . . . if more than one Federal agency either: (1) Proposes or is involved in the same action; or (2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.¹⁹²

Therefore, FERC must serve as the lead agency for the NEPA review. Such an approach would ensure that the public and decisionmakers are informed of the environmental costs of Fortress’s project in its entirety.

In sum, the interrelated components of the Fortress LNG export project, which all require federal approval, are financially and functionally interdependent parts of one project. Because these components lack substantial independent utility, as further demonstrated by their temporal nexus and exclusive transloading rights, their impacts must be analyzed and disclosed in a single, comprehensive EIS.

¹⁹⁰ As Energy Transport Solutions explained in its application for a special permit, “transporting LNG by rail as authorized by this special permit would result in an increase in U.S. exports.” Special Permit Application at 9.

¹⁹¹ 15 U.S.C. § 717n(b)(1); *accord Sierra Club v. FERC*, 827 F.3d 36, 41 (D.C. Cir. 2016); *see also* 40 C.F.R. § 1508.1(e) (“Cooperating agency means any Federal agency (and a State, Tribal, or local agency with agreement of the lead agency) other than a lead agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action that may significantly affect the quality of the human environment.”).

¹⁹² 40 C.F.R. § 1501.7(a).

IV. Conclusion

For the stated reasons, Petitioners respectfully request that the Commission declare its jurisdiction over the Fortress LNG export project under section 3 of the NGA and require the developers to seek a single authorization from FERC for the project, and undertake a NEPA review of the project's environmental impacts. In the alternative, Petitioners respectfully request that the Commission declare its jurisdiction under section 3 of the NGA over the Wyalusing liquefaction facility and the Gibbstown export facility separately, require the developers to seek Commission authorization for each project, and undertake a review for the entire project under NEPA.

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Respectfully submitted,

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