UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Texas LNG Brownsville LLC Docket No. CP16-116-001

(Issued February 20, 2020)

McNAMEE, Commissioner, *concurring*:

1. Today's order denies Sierra Club's[1] rehearing request of the Commission's November 22, 2019 Order (2019 Order)[2] authorizing pursuant to section 3 of the Natural Gas Act (NGA) the siting, construction, and operation of Texas LNG Brownsville LLC's (Texas LNG) Texas LNG Project (Project).[3]

2. Because the 2019 Order complies with the Commission's statutory responsibilities under the NGA and the National Environmental Policy Act (NEPA), I fully support today's order denying rehearing and affirming the 2019 Order. The 2019 Order determines that the siting, construction, and operation of the Project is not inconsistent with the public interest.[4] The 2019 Order also finds that the Project is an environmentally acceptable action.[5] Further, consistent with the holding in *Sierra Club v. FERC* (*Sabal Trail*),[6] the 2019 Order and the Environmental Impact Statement (EIS) for the Project quantified and considered the direct and indirect greenhouse gases (GHGs) emitted during the construction and operation of the Project.[7]

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[1] Sierra Club filed its rehearing request together with Texas RioGrande Legal Aid (on behalf of Shrimpers and Fisherman of the RGV and Vecinos para el Bienestar de la Comunidad Costera), Save RGV from LNG, Defenders of Wildlife, the City of South Padre Island, the City of Port Isabel, and the Town of Laguna Vista.

[2] *Texas LNG Brownsville LLC*, 169 FERC ¶ 61,130 (2019) (2019 Order).

[3] 170 FERC ¶ 61,139 (2020) (2020 Rehearing Order).

[4] 2019 Order, 169 FERC ¶ 61,132 at P 21.

[5] *Id.* P 53.

[6] 867 F.3d 1357 (D.C. Cir. 2017).

[7] 2019 Order, 169 FERC ¶ 61,132 at P 67; Texas LNG Project Final EIS at Table 4.11.1-11.

3. Although I fully support today's order denying rehearing, I write separately to address what I perceive to be a misinterpretation of the Commission's authority under the NGA and NEPA. There have been contentions that the Commission violates the NGA and NEPA by not determining whether GHG emissions significantly affect the environment, and that the NGA authorizes the Commission to establish measures to mitigate project-related GHG emissions. I disagree.

4. I believe that the Commission can consider project-related emissions in its NGA section 3 public interest determination and is required to consider them in its NEPA analysis. However, the Commission has no objective basis to determine whether GHG emissions will have a significant effect on climate change nor the authority to establish its own basis for making such a determination. Further, the Commission does not have the authority to unilaterally establish measures to mitigate GHG emissions. It is my intention that my discussion below will assist the Commission, the courts, and other parties in their arguments regarding the Commission's consideration of a project's effect on climate change.

I. The Commission has no reliable objective standard for determining whether GHG emissions significantly affect the environment

5. Sierra Club argues that the Commission violates the NGA and NEPA by not determining the significance of GHG emissions that are effects of the Project.[8] My colleague has made similar arguments.[9] He has challenged the Commission's explanation that it cannot determine significance because there is no standard for determining the significance of GHG emissions.[10] He has argued that the Commission can adopt the Social Cost of Carbon[11] to determine whether GHG emissions are significant or rely on its own expertise as it does for other environmental resources, such as wetlands, vegetation, wildlife, and migratory bird populations.[12] He has suggested that the Commission does not make a finding of significance in order to find that a project is

[8] Sierra Club Request for Rehearing at 27-28.

[9] See paragraphs 2, 5, and 15-16 of Commissioner Glick's dissent of the 2019 Order. *See* 2019 Order, 169 FERC ¶ 61,130 (Glick, Comm'r, dissenting) (2019 Order Dissent).

[10] 2019 Order Dissent P 17.

[11] *Id.* P 18.

[12] *Id.* P 19 n.46.

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not inconsistent with the public interest.[13]

6. I disagree with these contentions. The Social Cost of Carbon is not a suitable method for determining whether GHG emissions that are caused by a proposed project will have a significant effect on climate change and the Commission has no authority or objective basis using its own expertise to make such a determination.

A. Social Cost of Carbon is not a suitable method to determine significance

7. The Commission has found, and I agree, that the Social Cost of Carbon is not a suitable method for the Commission to determine significance of GHG emissions.[14] Because the courts have repeatedly upheld the Commission's reasoning,[15] I will not restate the Commission's reasoning here.

8. However, I will address the suggestion that the Social Cost of Carbon can translate a project's impact on climate change into "concrete and comprehensible terms" that will help inform agency decision-makers and the public at large.[16] The Social Cost of Carbon, described as an estimate of "the monetized damages associated with an incremental increase in carbon emissions in a given year,"[17] may appear straightforward.

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[13] *Id.* P 5.

[14] *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at P 48 (2018).

[15] *Appalachian Voices*, 2019 WL 847199, *2; *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016); *Sierra Club v. FERC*, 672 F. App'x 38, (D.C. Cir. 2016); *see also Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt.*, 377 F. Supp. 3d 1223, 1239-41 (D. Colo. 2019) (upholding the agency's decision to not use the Social Cost of Carbon); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 77-79 (D.D.C. 2019) (upholding the agency's decision to not use the Social Cost of Carbon); *High Country Conservation Advocates v. U.S. Forest Serv.*, 333 F. Supp. 3d 1107, 1132 (D. Colo. 2018) ("[T]he *High Country* decision did not mandate that the Agencies apply the social cost of carbon protocol in their decisions; the court merely found arbitrary the Agencies' failure to do so without explanation.").

[16] 2019 Order Dissent P 18.

[17] Interagency Working Group on the Social Cost of Greenhouse Gases, *Technical Support Document – Technical Update of the Social Cost of Carbon for Regulatory impact Analysis – Under Executive Order 12866* at 1 (Aug. 2016), https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf *(continued ...)*

On closer inspection, however, the Social Cost of Carbon and its calculated outputs are not so simple to interpret or evaluate.[18] When the Social Cost of Carbon estimates that one metric ton of CO_2 costs $12 (the 2020 cost for a discount rate of 5 percent),[19] agency decision-makers and the public have no objective basis or benchmark to determine whether that cost is significant. Bare numbers standing alone simply *cannot* ascribe significance.

B. The Commission has no authority or objective basis to establish its own framework

9. Some argue that the lack of externally established targets does not relieve the Commission from establishing a framework or targets on its own. Some have suggested that the Commission can make up its own framework, citing the Commission's framework for determining return on equity (ROE) as an example. However, they overlook the fact that Congress designated the EPA, not the Commission, with exclusive authority to determine the amount of emissions that are harmful to the environment. In addition, there are no available resources or agency expertise upon which the Commission could reasonably base a framework or target.

10. As I explain below, Congress enacted the Clean Air Act to establish an all-encompassing regulatory program, supervised by the U.S. Environmental Protection Agency (EPA) to deal comprehensively with interstate air pollution. Section 111 of the Clean Air Act directs the Administrator of the EPA to identify stationary sources that "in his judgment cause[], or contribute[] significantly to, air pollution which may reasonably

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(2016 Technical Support Document).

[18] In fact, the website for the Climate Framework for Uncertainty Negotiation and Distribution (FUND) – one of the three integrated assessment models that the Social Cost of Carbon uses – states "[m]odels are often quite useless in unexperienced hands, and sometimes misleading. No one is smart enough to master in a short period what took someone else years to develop. Not-understood models are irrelevant, half-understood models are treacherous, and mis-understood models dangerous." FUND-Climate Framework for Uncertainty, Negotiation and Distribution, http://www.fund-model.org/ (LAST VISITED Nov. 18, 2019).

[19] *See* 2016 Technical Support Document at 4. The Social Cost of Carbon produces wide-ranging dollar values based upon a chosen discount rate, and the assumptions made. The Interagency Working Group on Social Cost of Greenhouse Gases estimated in 2016 that the Social Cost of one ton of carbon dioxide for the year 2020 ranged from $12 to $123. *Id.*

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be anticipated to endanger public health or welfare"[20] and to establish standards of performance for the identified stationary sources.[21] Thus, the EPA has exclusive authority for determining whether emissions from pipeline facilities will have a significant effect on the environment and for establishing an emissions control regime.

11. Further, the Commission is not positioned to unilaterally establish a standard for determining whether GHG emissions will significantly affect the environment when there is neither federal guidance nor an accepted scientific consensus on these matters.[22] This inability to find an acceptable methodology is not for a lack of trying. The Commission reviews the climate science, state and national targets, and climate models that could inform its decision-making.[23]

12. Moreover, assessing the significance of project effects on climate change is unlike the Commission's determination of ROE. Establishing ROE has been one of the core functions of the Commission since its inception under the FPA as the Federal Power Commission.[24] And, setting ROE has been an activity of state public utility

[20] 42 U.S.C. § 7411(b)(1)(A) (2018).

[21] *Id.* § 7411(b)(1)(B).

[22] The Council on Environmental Quality's 2019 Draft Greenhouse Gas Guidance states, "[a]gencies need not undertake new research or analysis of potential climate effects and may rely on available information and relevant scientific literature." CEQ, *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 Fed. Reg. 30,097, 30,098 (June 26, 2019); *see also* CEQ FINAL GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON CONSIDERATION OF GREENHOUSE GAS EMISSIONS AND THE EFFECTS OF CLIMATE CHANGE IN NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS at 22 (Aug. 1, 2016) ("agencies need not undertake new research or analysis of potential climate change impacts in the proposed action area, but may instead summarize and incorporate by reference the relevant scientific literature"), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf.

[23] *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at P 36; *see also WildEarth Guardians*, 738 F.3d 298, 309 (D.C. Cir. 2013) ("Because current science does not allow for the specificity demanded by the Appellants, the BLM was not required to identify specific effects on the climate in order to prepare an adequate EIS.").

[24] *Hope*, 320 U.S. 591 (1944); *FPC v. Nat. Gas Pipeline Co. of America*, 315 U.S. 575 (1942).

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commissions, even before the creation of the Federal Power Commission.[25] The Commission's methodology is also founded in established economic theory.[26] In contrast, assessing the significance of GHG emissions is not one of the Commission's core missions and there is no suitable methodology for making such determination.

13. It has been argued that the Commission can establish its own methodology for determining significance, pointing out that the Commission has determined the significance of wetlands, vegetation, wildlife, and migratory bird populations using its own expertise and without generally accepted significance criteria or a standard methodology.

14. I disagree. As an initial matter, it is important to note that when the Commission states it has no suitable methodology for determining the significance of GHG emissions, the Commission means that it has no objective basis for making such finding. The Commission's findings regarding significance for wetlands, vegetation, wildlife, and migratory bird populations have an objective basis. For example for general impacts to wetlands, the Commission determined the wetlands in the existing area by referencing Texas LNG's wetland delineations, which were conducted in accordance with the U.S. Army Corps of Engineers' ("Corps") *Wetland Delineation Manual* and the *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coast Plain Region*.[27] The Commission determined the Project's effect on existing wetlands by determining the total acreage of wetlands permanently affected by the project, and the wetland avoidance and mitigation measures Texas LNG will implement.[28] Based on this information, the Commission made a reasoned finding that the Project will not have a significant impact on wetlands. Similarly, the Commission conducted an objective evaluation of impacts on vegetation, wildlife, and migratory bird populations.

15. In contrast, the Commission has no reasoned basis to determine whether a project

[25] *See, e.g., Willcox v. Consol. Gas Co.*, 212 U.S. 19, 41 (1909) (finding New York State must provide "a fair return upon the reasonable value of the property at the time it is being used for the public.").

[26] *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 166 FERC ¶ 61,207 (2019) (describing the Commission's use of the Discounted Cash Flow model that was originally developed in the 1950s as a method for investors to estimate the value of securities).

[27] Texas LNG Project Final EIS at 4-30 to 4-31.

[28] *Id.* 4-31 to 4-37.

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has a significant effect on climate change. To assess a project's effect on climate change, the Commission can only quantify the amount of project emissions. Unlike the total acreage of permanently impacts wetlands, that calculated number cannot inform the Commission on the specific physical climate change effects caused by the project, e.g., increase of sea level rise, effect on weather patterns, or effect on ocean acidification. Nor are there acceptable scientific models that the Commission may use to attribute every ton of GHG emissions to a physical climate change effect.

16. Without adequate support or a reasoned target, the Commission cannot ascribe significance to particular amounts of GHG emissions. To do so would not only exceed our agency's authority, but would risk reversal upon judicial review. Courts require agencies to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made."[29] Simply put, stating that an amount of GHG emissions appears significant without any objective support fails to meet the agency's obligations under the Administrative Procedure Act (APA).

II. The NGA does not contemplate the Commission establishing mitigation for GHG emissions from LNG Facilities

17. There have also been contentions that the Commission should require the mitigation of GHG emissions related to the authorized facilities.[30] I understand these suggestions as proposing a carbon emissions fee, offsets or tax (similar to the Corps' compensatory wetland mitigation program), technology requirements (such as scrubbers), or emission caps. Some argue that the Commission can require such mitigation under NGA section 3(e)(3)(A), which provides "the Commission may approve an application . . . in whole or in part, with such modifications and upon such terms and conditions the Commission find necessary or appropriate."[31]

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[29] *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C Cir. 2006) (quoting *Ariz. Cattle Growers' Ass'n v. FWS*, 273 F.3d 1229, 1235-36 (9th Cir. 2001)); *see also American Rivers v. FERC*, 895 F.3d 32, 51 (D.C. Cir. 2018) (" . . . the Commission's NEPA analysis was woefully light on reliable data and reasoned analysis and heavy on unsubstantiated inferences and *non sequiturs*") (italics in original); *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agr.*, 681 F.2d 1172, 1179 (9th Cir. 1982) ("The EA provides no foundation for the inference that a valid comparison may be drawn between the sheep's reaction to hikers and their reaction to large, noisy ten-wheel ore trucks.").

[30] 2019 Order Dissent P 19.

[31] 15 U.S.C. § 717b(e)(3)(A) (2018).

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18. I disagree. The Commission cannot interpret NGA section 3(e)(3)(A) to allow the Commission to unilaterally establish measures to mitigate GHG emissions because Congress, through the Clean Air Act, assigned the EPA and the States exclusive authority to establish such measures. Congress designated the EPA as the expert agency "best suited to serve as primary regulator of greenhouse gas emissions," [32] not the Commission.

19. The Clean Air Act establishes an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution.[33] Congress entrusted the Administrator of the EPA with significant discretion to determine appropriate emissions measures. Congress delegated the Administrator the authority to determine whether pipelines and other stationary sources endanger public health and welfare; section 111 of the Clean Air Act directs the Administrator of the EPA "to publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in *his judgment* it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare"[34] and to establish standards of performance for the identified stationary sources.[35] The Clean Air Act requires the Administrator to conduct complex balancing when determining a standard of performance, taking into consideration what is technologically achievable and the cost to achieve that standard.[36]

20. In addition, the Clean Air Act allows the Administrator to "distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards."[37] The Act also permits the Administrator, with the consent of the Governor of the State in which the source is to be located, to waive its requirements "to encourage the use of an innovative technological system or systems of continuous emission reduction."[38]

21. Congress also intended that states would have a role in establishing measures to

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[32] *American Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410, 428 (2011).

[33] *See id.* at 419.

[34] 42 U.S.C. § 7411(b)(1)(A) (2018) (emphasis added).

[35] *Id.* § 7411(b)(1)(B).

[36] *Id.* § 7411(a)(1).

[37] *Id.* § 7411(a)(2).

[38] *Id.* § 7411(j)(1)(A).

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mitigate emissions from stationary sources. Section 111(f) notes that "[b]efore promulgating any regulations . . . or listing any category of major stationary sources . . . the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies."[39]

22. Thus, the text of the Clean Air Act demonstrates it is improbable that NGA section 3(e)(3)(A) allows the Commission to establish GHG emission standards or mitigation measures out of whole cloth. To argue otherwise would defeat the significant discretion and complex balancing that the Clean Air Act entrusts in the EPA Administrator, and would eliminate the role of the States.

23. Furthermore, to argue that the Commission may use its NGA conditioning authority to establish GHG emission mitigation—a field in which the Commission has no expertise—and address climate change—an issue that has been subject to profound debate across our nation for decades—is an extraordinary leap. The Supreme Court's "major rules" canon advises that agency rules on issues that have vast economic and political significance must be treated "with a measure of skepticism" and require Congress to provide clear authorization.[40] The Court has articulated this canon because Congress does not "hide elephants in mouseholes"[41] and "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[42]

24. Courts would undoubtedly treat with skepticism any attempt by the Commission

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[39] *Id.* § 7411(f)(3).

[40] *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *Brown & Williamson,* 529 U.S. at 160 ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *see also Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006) (finding regulation regarding issue of profound debate suspect).

[41] *Whitman v. American Trucking Ass.,* 531 U.S. 457, 468 (2001).

[42] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 12, 159 (quoting Justice Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: PART I*, 65 STAN. L. REV. 901, 1004 (2013) ("Major policy questions, major economic questions, major political questions, preemption questions are all the same. Drafters don't intend to leave them unresolved.")

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to establish out of whole cloth measures to mitigate GHG emissions. Congress has introduced climate change bills since at least 1977,[43] over four decades ago. Over the last 15 years, Congress has introduced and failed to pass 70 legislative bills to reduce GHG emissions—29 of those were carbon emission fees or taxes.[44] For the Commission to suddenly declare such power resides in the long-extant NGA and that Congress's efforts were superfluous strains credibility. Requiring pipelines to pay a carbon emissions fee or tax, or to invest in GHG mitigation would be a major rule, and Congress has made no indication that the Commission has such authority.

25. Some may make the argument that the Commission can require mitigation without establishing a standard. I disagree. Establishing mitigation measures requires determining how much mitigation is required – i.e., setting a limit, or establishing a standard, that quantifies the amount of GHG emissions that will adversely affect the environment. Some may also argue that the Commission has unilaterally established mitigation in other contexts, including wetlands, soil conservation, and noise. These examples, however, are distinguishable. Congress did not exclusively assign the authority to establish avoidance or restoration measures for mitigating effects on wetlands or soil to a specific agency. The Corps and the EPA developed a wetlands mitigation bank program pursuant to section 404 of the Clean Water Act.[45] Congress endorsed such mitigation.[46] As for noise, the Clean Air Act assigns the EPA Administrator authority over determining the level of noise that amounts to a public nuisance and requires federal agencies to consult with the EPA when its actions exceed the public nuisance standard.[47] The Commission complies with the Clean Air Act by

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[43] National Climate Program Act, S. 1980, 95th Cong. (1977).

[44] CONGRESSIONAL RESEARCH SERVICE, MARKET-BASED GREENHOUSE GAS EMISSION REDUCTION LEGISLATION: 108TH THROUGH 116TH CONGRESSES at 3 (Oct. 23, 2019), https://fas.org/sgp/crs/misc/R45472.pdfhttps://fas.org/sgp/crs/misc/R45472.pdf. Likewise, the CEQ issued guidance on the consideration of GHG emissions in 2010, 2014, 2016, and 2019. None of those documents require, let alone recommend, that an agency establish a carbon emissions fee or tax.

[45] 33 U.S.C. § 1344 (2018).

[46] *See* Water Resources Development Act, Pub. L. 110-114, § 2036(c), 121 Stat. 1041, 1094 (2007); National Defense Authorization Act, Pub. L. 108-136, § 314, 117 Stat. 1392, 1430 (2004); Transportation Equity Act for the 21st Century, Pub. L. 105-178, § 103 (b)(6)(M), 112 Stat. 107, 133 (1998); Water Resources Development Act of 1990, Pub. L. 101-640, § (a)(18)(C), 104 Stat. 4604, 4609 (1990).

[47] 42 U.S.C. § 7641(c) ("In any case where any Federal department or agency is *(continued ...)*

requiring project noise levels in certain areas to not exceed 55 dBA Ldn, as required by EPA's guidelines.[48]

26. Accordingly, there is no support that the Commission can use its NGA section 3 authority to establish measures to mitigate GHG emissions from LNG facilities.

III. Conclusion

27. In sum, the Commission has no objective basis for determining whether GHG emissions are significant that would satisfy the Commission's APA obligations. Nor does the Commission have the ability to establish measures to mitigate GHG emissions. Pursuant to the Clean Air Act, Congress exclusively assigned authority to regulate emissions to the EPA and the States.

28. I recognize that some believe the Commission should do more to address climate change. The Commission, an energy agency with a limited statutory authority, is not the appropriate authority to establish a new regulatory regime.

For these reasons, I respectfully concur.

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Bernard L. McNamee

carrying out or sponsoring any activity resulting in noise which the Administrator determines amounts to a public nuisance or is otherwise objectionable, such department or agency shall consult with the Administrator to determine possible means of abating such noise.").

[48] *See Williams Gas Pipelines Cent., Inc.*, 93 FERC ¶ 61,159, at 61,531-52 (2000).