

174 FERC ¶ 61,048  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Rio Grande LNG, LLC

Docket No. CP16-454-002

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued January 19, 2021)

1. On April 15, 2020,<sup>1</sup> Rio Grande LNG, LLC's (Rio Grande) proposed a number of design changes to its proposal to site, construct, and operate a liquefied natural gas (LNG) terminal on the Brownsville Shipping Channel in Cameron County, Texas (Rio Grande LNG Terminal).<sup>2</sup> On August 13, 2020, Commission staff approved the requests.<sup>3</sup> On September 8, 2020, Vecinos para el Bienestar de la Comunidad Costera, Save RGV from LNG, the City of Port Isabel, Cynthia and Gilberto Hinojosa, and Sierra Club (collectively, Sierra Club) filed a timely request for rehearing of the Letter Order.
2. Pursuant to *Allegheny Defense Project v. FERC*,<sup>4</sup> the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 19(a) of the Natural Gas Act (NGA),<sup>5</sup> we are modifying the discussion in the

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<sup>1</sup> The design change proposals are summarized in Final Design Supplement 1 of Implementation Plan Volume 6, and supplemented on May 11, 2020, May 20, 2020, June 22, 2020, June 26, 2020, July 1, 2020, July 14, 2020, and August 12, 2020.

<sup>2</sup> *Rio Grande LNG, LLC*, 169 FERC ¶ 61,131 (2019) (Authorization Order), *order on reh'g*, 170 FERC ¶ 61,046 (2020) (Rehearing Order).

<sup>3</sup> August 13, 2020 Letter Approving Design Change Proposals from the Director, Division of LNG Facility Reviews and Inspections, Office of Energy Projects (Letter Order).

<sup>4</sup> 964 F.3d 1 (D.C. Cir. 2020) (en banc).

<sup>5</sup> 15 U.S.C. § 717r(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this

Letter Order and continue to reach the same result in this proceeding, as discussed below.<sup>6</sup>

## **I. Background**

3. On November 22, 2019, the Commission issued an order pursuant to section 3 of the NGA<sup>7</sup> and Part 153 of the Commission's regulations<sup>8</sup> authorizing Rio Grande to site, construct, and operate its Rio Grande LNG Terminal.<sup>9</sup> Sierra Club, among other petitioners, sought rehearing, which the Commission denied on January 23, 2020.<sup>10</sup> On February 20, 2020, Sierra Club filed a petition for review of the Certificate and Rehearing orders in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). The Commission filed its administrative record underlying the Authorization and Rehearing Orders on April 13, 2020.

4. On April 15, 2020,<sup>11</sup> Rio Grande requested that the Commission approve a design change in its implementation plan<sup>12</sup> for the Rio Grande LNG Terminal. Of relevance here, Rio Grande proposed to reduce the Rio Grande LNG Terminal's number of liquefaction trains from six to five and optimize parts of the liquefaction design to increase the liquefaction capacity of the five remaining trains from 4.5 million metric tons per annum (MTPA) to 5.4 MTPA each, while keeping the total export capacity at 27

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chapter.”).

<sup>6</sup> *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Letter Order. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

<sup>7</sup> 15 U.S.C. § 717b.

<sup>8</sup> 18 C.F.R. pt. 153.

<sup>9</sup> Authorization Order, 169 FERC ¶ 61,131.

<sup>10</sup> Rehearing Order, 170 FERC ¶ 61,046.

<sup>11</sup> Rio Grande further supplemented its request on May 11, 2020, May 20, 2020, June 22, 2020, June 26, 2020, July 1, 2020, July 14, 2020, and August 12, 2020. Letter Order at 1.

<sup>12</sup> Implementation Plans include project details and how the developer will implement the required construction procedures and mitigation measures. Authorization Order, 169 FERC ¶ 61,131 at app., Environmental Condition No. 6.

MTPA. As discussed in the Letter Order, Commission staff examined the proposed design changes' impacts to public safety and the environment, concluding that the risks to public safety with the revised design are similar or less than the original design, and the changes would provide several environmental advantages over the design approved in the Authorization Order.<sup>13</sup>

## II. Discussion

### A. The Commission's Authority to Act under Section 19(b) of the Natural Gas Act

5. Sierra Club argues that the Commission lacks subject-matter jurisdiction to consider Rio Grande's design changes and must rescind the Letter Order because petitions for review of the Authorization and Rehearing Orders are pending before the D.C. Circuit and the record has been filed.<sup>14</sup> Sierra Club contends, pursuant to section 19(b) of the NGA, that the Commission retains the power to "modify or set aside" its findings "until the record in a proceeding is filed in a court of appeals," at which point, only that court has jurisdiction to alter the order.<sup>15</sup> Sierra Club argues the Commission had no authority to approve the design changes while the underlying orders await disposition of a pending appeal.<sup>16</sup>

6. We disagree that section 19(b) is a jurisdictional bar to approving the design changes. Under section 19(b) of the NGA, once appeal is sought, "such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part."<sup>17</sup> The Authorization Order and subsequent Rehearing Order are final orders, and nothing in section 19(b) prohibits Rio Grande from initiating changes that do not "modify or set aside" findings in those orders

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<sup>13</sup> Letter Order at 1-2 ("The new design would also result in a reduction in criteria pollutants and greenhouse gas emissions from the [] Terminal and a shortened construction timeline. Also, the proposed noise levels attributable to the LNG Terminal at the nearest noise receptors and the site boundaries would remain unchanged. Lastly, other resource impacts would also remain unchanged or lessened.").

<sup>14</sup> Rehearing Request at 2.

<sup>15</sup> *Id.*

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

<sup>17</sup> 15 U.S.C. § 717r(b).

nor does our authorization of such changes impinge on the D.C. Circuit's authority over those orders.

7. Our authorization of the design changes is consistent with the Commission's authority to oversee the construction of authorized projects.<sup>18</sup> Changes to optimize the engineering design of an LNG terminal to make it more economical, efficient, safe, and reliable is often the focus of finalizing an authorized design.<sup>19</sup> Accordingly, the Authorization Order permitted Rio Grande to make design changes post-authorization provided that the changes were consistent with the Commission's determinations in the Authorization Order.<sup>20</sup> Rio Grande proposed to change some limited liquefaction equipment and change one of its refrigerants to optimize the overall process design, allowing it to eliminate a liquefaction train without affecting the authorized export capacity. The subject design changes do not substantially alter the project's authorized construction and operations, which have yet to begin, and would provide several environmental advantages over the initial design described in the Authorization Order.<sup>21</sup>

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<sup>18</sup> The Commission conditions its LNG authorization orders with the expectation that there will be proposed engineering design changes post-authorization. *See* 15 U.S.C. § 717b(e)(3)A (“[T]he Commission may approve an application described in paragraph (2) [for LNG export], in whole or part, with such modifications and upon such terms and conditions as the Commission find<sup>1</sup> necessary or appropriate.”); *see, e.g.*, Authorization Order, 169 FERC ¶ 61,131 at app., Environmental Condition No. 1 (directing Rio Grande to seek authorization from the Commission for any change in the proposed construction procedures and mitigation measures); Environmental Condition No. 56 (directing Rio Grande to file change logs that list and explain any changes made from the front end engineering design provided in Rio Grande 's application and filings...).

<sup>19</sup> The Commission routinely receives and considers engineering and design changes proposed pursuant to standard condition 1 of LNG authorization orders. *See, e.g., Corpus Christi Liquefaction, LLC*, Docket No. CP12-507-000, Approval to Remove Train 3 Vapor Fence (May 2, 2018) (delegated order)(approving request to remove certain fencing from the Corpus Christi LNG design); *Elba Liquefaction Company, L.L.C.*, Docket No. CP14-103-000, Approval of the Storm Surge Wall Design Modification, (June 15, 2017) (delegated order) (approving storm surge wall design change); *Sabine Pass Liquefaction, LLC*, Docket No. CP11-72-000, Approval for Facility Modifications and Installation of Structural Steel, (May 24, 2013) (delegated order) (approving several design changes to the Sabine Pass LNG facility).

<sup>20</sup> Authorization Order, 169 FERC ¶ 61,131 at app., Environmental Condition Nos. 1, 56.

<sup>21</sup> *See infra* P 14.

8. Sierra Club does not present any evidence that the approved design change fundamentally alters, modifies, or sets aside the findings in the Authorization and Rehearing Orders. Instead, it cites several cases that it claims support its contention that the Commission cannot act on a design change proposal while an appeal is pending.<sup>22</sup> However, none of the cases cited by Sierra Club supports such a prohibition, which would effectively stay projects where appeal is sought by preventing the Commission from allowing minor and routine design and construction changes. Given that the NGA expressly provides that the pendency of an appeal does not automatically operate as a stay of the Commission's order on review, the Commission's approach here reasonably balances the need for ongoing Commission oversight of the construction of the LNG terminal and the reservation of the court's jurisdiction in NGA section 19(b).<sup>23</sup> Moreover, the cases cited by Sierra Club show that, in enacting section 19(b) of the NGA, Congress did not seek to eliminate the Commission's ongoing authority over authorized projects pending appeal.

9. Sierra Club cites *Public Utilities Commission of California v. FERC*, where the Ninth Circuit found that the Commission lacked statutory authority to vacate, or "set aside," several certificate orders while an appeal was pending.<sup>24</sup> Here, the Commission has not "set aside" or "modified" the Authorization Order. The findings in that order were based on the then-existing record before the Commission and remain valid. In the Letter Order, the Commission responded to a new design change proposal based upon new information, submitted by Rio Grande pursuant to the terms of the Authorization Order.<sup>25</sup> And based upon that new record, the Commission permitted the requested design change. In doing so, the Commission did not alter in any manner the Authorization Order's conclusion that Rio Grande's application to site, construct, and operate its LNG Terminal to export 27 MTPA would not be inconsistent with the public interest; design changes to optimize liquefaction efficiencies do not change this finding, and in no way impedes the court's ability to review the Commission's basis for reaching that finding.<sup>26</sup>

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<sup>22</sup> Rehearing Request at 2-4.

<sup>23</sup> See 15 U.S.C. § 717r(c) ("The commencement of proceedings under subsection (b) [judicial review] of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.").

<sup>24</sup> 100 F.3d 1451, 1457 (9th Cir. 1996).

<sup>25</sup> Letter Order at 1 (noting that design change proposal is "consistent with Environmental Condition 1, 56, 64, and 67 of the" Authorization Order).

<sup>26</sup> Authorization Order, 169 FERC ¶ 61,131 at P 22.

10. As the DC Circuit explained in *Alabama Power Co. v. FPC*<sup>27</sup> when construing the substantially similar provision in the Federal Power Act, “[t]he statute disables the Commission, while the appeal is pending, from altering its findings.”<sup>28</sup> The relevant language in section 19(b) is intended “merely to insure that any question as to the validity or propriety of” an order on appeal is “confined to the jurisdiction of the reviewing court exclusively.”<sup>29</sup> Here, the Commission has not altered its findings in the Authorization Order. It has simply responded to a design change proposal based on a new record. We therefore disagree with Sierra Club’s contention that the relevant case law holds that section 19(b) of the NGA prohibits the Commission’s authorization of Rio Grande’s design change.

**B. Supplemental Analysis Pursuant to the National Environmental Policy Act**

11. Sierra Club argues that the National Environmental Policy Act (NEPA) requires the Commission to prepare a supplemental Environmental Impact Statement (EIS),<sup>30</sup> contending that the proposal to omit the sixth train is a “substantial change[] ... relevant to environmental concerns,” and Rio Grande’s determination that it can meet the project purpose of producing 27 MTPA with only five liquefaction trains is “significant” new information relevant to environmental concerns, both of which require preparation of a supplemental EIS.<sup>31</sup> Sierra Club notes that, in analyzing the proposed project’s environmental impacts, the Commission previously rejected an alternative that would use only five trains, and which would shrink the facility footprint to the minimum size needed to accommodate five trains, because a five train alternative could not meet that project purpose.<sup>32</sup> Sierra Club contends that the Commission must now prepare a

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<sup>27</sup> 511 F.2d 383 (D.C. Cir. 1974).

<sup>28</sup> *Id.* at 388. *See also Chamber of Commerce v. SEC*, 443 F.3d at 890, 898 (D.C. Cir. 2006) (rejecting argument that the Securities and Exchange Commission lacked authority to consider modifications of a rule prior to the issuance of the appellate court’s mandate) (*cited in* Rehearing Request at 2-3).

<sup>29</sup> *Dyer v. SEC*, 289 F.2d 242, 244 (8th Cir. 1961) (construing virtually identical language of Public Utility Holding Company Act of 1935).

<sup>30</sup> Rehearing Request at 3-4.

<sup>31</sup> *Id.* at 2 (citing 40 C.F.R. § 1502.9(c)(1) (2020); *Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723, 728-30 (9th Cir. 1995)).

<sup>32</sup> *Id.* at 3.

supplemental NEPA document to revisit whether the five train design can accommodate a smaller facility footprint.<sup>33</sup>

12. The Council on Environmental Quality's regulations provide that supplemental environmental analysis may be necessary where an agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or where there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."<sup>34</sup> To warrant supplemental environmental analysis, new information must be sufficient to show that the remaining federal action will affect the environment in a significant manner or to a significant extent not already considered.<sup>35</sup> The Commission is not required by NEPA to prepare a supplemental environmental analysis because the design change is not a substantial change to the Commission's NGA section 3 authorization that is relevant to environmental concerns and, as explained in the Letter Order, the design change will not significantly affect the environment.<sup>36</sup> Rio Grande proposed to reduce the number of liquefaction trains to be constructed from six to five and change parts of the liquefaction design. These proposals will increase the capacity of the five remaining trains from 4.5 MTPA to 5.4 MTPA each, keeping the total export capacity of 27 MTPA. Based on analysis of the information Rio Grande provided in support of the design change request, Commission staff determined that a supplemental EIS was unnecessary.<sup>37</sup> The design changes will reduce permitted air emissions. Specifically, the design change will decrease nitrous oxides, carbon monoxide, particulate matter, volatile organic compound emissions, hazardous air pollutants, and greenhouse gas emissions,<sup>38</sup> and will slightly decrease sulfur dioxide and

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<sup>33</sup> *Id.*

<sup>34</sup> 40 C.F.R. § 1502.9(c)(1).

<sup>35</sup> *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989).

<sup>36</sup> Letter Order at 1.

<sup>37</sup> July 14, 2020 Rio Grande LNG Response to July 10, 2020, Request for Supplemental Information (providing updated air emissions and noise modeling).

<sup>38</sup> *Compare* Final EIS at 4-262 (2,058.6 tons per year (tpy) of nitrous oxides (NO<sub>x</sub>), 3,142 tpy of carbon monoxide (CO), 381.8 tpy of Particulate Matter (PM) 10, 381.8 tpy of PM<sub>2.5</sub>, 604.4 tpy of Volatile Organic Compounds (VOCs), 54.2 tpy of Hazardous Air Pollutants (HAPs), and 8.1 million tpy of Carbon Dioxide equivalents (CO<sub>2</sub>e)) *with* July 14, 2020 Rio Grande LNG Response to July 10, 2020, Request for Supplemental Information, at Rio Grande Revised PSD Permit and Table 3-1 (1,112 tpy of NO<sub>x</sub>, 1,724 tpy of CO, 258 tpy of PM<sub>10</sub>, 258 tpy of PM<sub>2.5</sub>, 482 tpy of VOCs, 38 tpy of HAPs, 6.4 million tpy of CO<sub>2</sub>e).

sulfuric acid emissions.<sup>39</sup> When these decreased emissions are considered in conjunction with anticipated area emissions, the cumulative air emission impacts would be reduced.<sup>40</sup> The Letter Order also explained that the new design would not negatively impact noise levels or public safety and would not impact or would lessen impacts to other resources; this includes impacts on endangered species and environmental justice communities referenced in the dissent.<sup>41</sup> Thus, because the design change will not result in significant environmental impacts, the Commission is not required to prepare a supplemental EIS.<sup>42</sup>

13. Nonetheless, Sierra Club contends that the design change will retain the original project's layout and footprint to preserve space for the sixth train and will negatively impact wetlands, habitat, and other resources as a result.<sup>43</sup> Sierra Club claims the Commission should consider the new design changes together with a future sixth train because Rio Grande is laying the "literal foundation" for the sixth train.<sup>44</sup>

14. In fact, Rio Grande is not proposing to make any improvements to the area where the sixth liquefaction train was to be located. Although Rio Grande is maintaining the initial outer fence line of the LNG plant, as a result of the design change, it will no longer develop the area for the sixth liquefaction train near the west end of the terminal. The area for the sixth liquefaction train is approximately 846,000 square feet or

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<sup>39</sup> Compare Final EIS at 4-262 (30.2 tpy of sulfur dioxide (SO<sub>2</sub>) and 2.3 tpy of sulfuric acid (H<sub>2</sub>SO<sub>4</sub>)) with July 14, 2020 Rio Grande LNG Response to July 10, 2020, Request for Supplemental Information, at Rio Grande Revised PSD Permit and Revised Emissions Summary Table (30.06 tpy of SO<sub>2</sub> and 2.22 tpy of H<sub>2</sub>SO<sub>4</sub>).

<sup>40</sup> Decreases in NO<sub>x</sub> and VOCs, both ozone precursors, would reduce the Rio Grande terminal's impacts on regional Ozone levels. These large reductions in NO<sub>x</sub> and VOCs from the Rio Grande facility would also reduce the cumulative Ozone levels below those identified in the rehearing order.

<sup>41</sup> Letter Order at 2. We note that in order to evaluate Rio Grande's proposed reduction in air quality and noise impacts due to the design change, FERC staff requested that Rio Grande provide documentation. See July 14, 2020 Rio Grande Response to Commission Staff's July 10, 2020, Request for Supplemental Information.

<sup>42</sup> See *Cal. ex rel. Imperial County Air Pollution Control Dist. v. U.S. Dept. of the Interior*, 767 F.3d 781, 797 (9th Cir. 2014) (noting that the pre-September 14, 2020 CEQ regulations did not dictate the form that an agency must use when deciding whether to prepare a supplemental EIS and courts have endorsed the use of various documents).

<sup>43</sup> Rehearing Request at 3-4.

<sup>44</sup> *Id.* at 4.

approximately twenty acres<sup>45</sup> and Rio Grande will use this area as a laydown yard to store construction equipment and material during construction.<sup>46</sup> These activities will temporarily impact vegetation but, contrary to Sierra Club's claim, the area does not contain and, therefore, the activities do not impact, wetlands.<sup>47</sup> As discussed in the Letter Order, because the fence line will remain the same, there are no greater impacts on habitat or other resources than already authorized, including endangered species.<sup>48</sup> Thus, because the impacts to the area where the sixth liquefaction train was to be located will be minor, no additional NEPA analysis is necessary.

15. That the Commission previously declined to analyze a five-train design does not support Sierra Club's assertion that a supplemental EIS is now required. As discussed in the Rehearing Order, the Commission does not independently design systems, and, as it did in the certificate proceeding and the Letter Order, reviews the design proposed before us.<sup>49</sup>

16. The dissent contends that the Commission should have treated the design change as an amendment to the Authorization Order<sup>50</sup> and also conducted a supplemental Environmental Assessment. Rio Grande's design change is consistent with the Commission's NGA section 3 authorization for the Rio Grande LNG Terminal. The dissent contends that an LNG facility's liquefaction process is a "facility's most salient design element," but at the authorization stage, liquefaction facilities are at a preliminary point of design and the Commission anticipated that Rio Grande could propose many design changes to optimize the liquefaction process while maintaining the project's overall capacity within the project's general footprint.<sup>51</sup> Thus, in the Authorization

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<sup>45</sup> See Rio Grande LNG Project Resource Report 1 at RR 1-27 ("Each liquefaction train will have an approximate footprint of 830 feet x 1,020 feet, or roughly 846,000 square feet.").

<sup>46</sup> July 14, 2020 Rio Grande LNG Response to July 10, 2020, Request for Supplemental Information at 406, Figure 3.

<sup>47</sup> Compare EIS at 2-3 to 2-4 (Figures 2.1.1-1 and 2.1.1-2) with EIS at 4-58 (Figure 4.4.1-1). See EIS at 4-60 (EIS at table 4.4.2-1, footnote c).

<sup>48</sup> Letter Order at 2.

<sup>49</sup> Rehearing Order, 170 FERC ¶ 61,046 at P 25.

<sup>50</sup> Sierra Club does not raise this issue on rehearing; therefore, it is not preserved for judicial review. See 15 U.S.C. § 717r(b).

<sup>51</sup> The Commission has generally treated design changes that increase capacity or impact resources not considered in the original authorization as requests for amendments.

Order, the Commission permitted Commission staff to consider such changes, as contemplated by the Commission's environmental conditions.<sup>52</sup> Accordingly, in the Letter Order, Commission staff appropriately determined that Rio Grande's changes to the liquefaction facilities were permitted under the Authorization Order and could be treated as a design change because there were no capacity changes to the facility,<sup>53</sup> no additional adverse impacts to public safety, no substantial changes to the plant's footprint, no additional air emission impacts, and no additional adverse impacts to the environment. As is typical practice, Commission staff considered the nature of the proposed design change to determine whether it could have potential impacts that would warrant a formal supplemental environmental review. Given that the proposed alterations would not change total capacity, increase public safety impacts, expand the plant's footprint, increase air emissions, or change any conclusions on the other environmental impacts, staff correctly concluded that no further analysis was required.

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*See, e.g., Freeport Lng Dev., L.P.*, 156 FERC ¶ 61,019 (2016) (requesting authorization to increase the LNG terminal's nameplate capacity); *Sabine Pass Liquefaction, LLC*, 146 FERC ¶ 61,117 (2014) (approving requested amendment increasing the LNG terminal's capacity to reflect previously-authorized facilities' capabilities under optimal conditions).

<sup>52</sup> Authorization Order, 169 FERC ¶ 61,131 at Appendix, Environmental Condition Nos. 1, 6, 56.

<sup>53</sup> The dissent contends that Commission completed an Environmental Assessment (EA) in approving an amendment to the Golden Pass LNG Terminal LLC's NGA section 3 authorization despite the lack of any design changes or additional construction. The Commission treated the requested changes there as an amendment requiring an EA because the increase in total export capacity was a change to our original authorization and there was a potential for an increased volume of LNG vessel traffic compared to that previously analyzed for the Golden Pass Export Terminal Project, which could result in additional impacts to endangered and threatened aquatic species. *Golden Pass LNG Terminal LLC*, 174 FERC ¶ 61,053, at P 11 (2021).

The Commission orders:

In response to Sierra Club's request for rehearing, the Letter Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission. Commissioner Glick and Commission Clements are dissenting with a joint separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Rio Grande LNG, LLC

Docket No. CP16-454-002

(Issued January 19, 2021)

GLICK, Commissioner, and CLEMENTS, Commissioner, *dissenting*:

1. We dissent from today's order because it affirms the Commission's failure to adequately review a significant design change at Rio Grande LNG, LLC's (Rio Grande) liquefied natural gas (LNG) facility. In 2019, the Commission issued Rio Grande a certificate under section 3 of the Natural Gas Act (NGA)<sup>1</sup> for an LNG export facility whose core design centered on six natural gas liquefaction trains with a cumulative export capacity of approximately 27 million tonnes per annum.<sup>2</sup> Shortly thereafter, Rio Grande proposed to modify its core design by removing one of the six trains and increasing the maximum export capacity on the remaining five trains so that the total export capacity would not change. Commission staff approved the design change via a delegated letter order, rather than through an amendment proceeding.<sup>3</sup>

2. That approval was flawed for two reasons. First, going from six trains to five while increasing the capacity of the remaining trains by roughly 20% is a significant change that should have required a formal application to amend the certificate. The number of trains at an LNG facility is arguably the facility's most salient design element and should not be changed without the degree of Commission scrutiny and review that accompanies an application to amend the certificate. After all, the Commission has a statutory responsibility to evaluate whether the facility is consistent with the public interest, which it cannot reasonably carry out if it approves sweeping modifications to the facility's design without a full review under section 3.

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<sup>1</sup> 15 U.S.C. § 717b.

<sup>2</sup> *Rio Grande LNG, LLC*, 169 FERC ¶ 61,131 (2019) (Certificate Order); (Glick, Comm'r, dissenting), *order on reh'g*, 170 FERC ¶ 61,046 (2020) (Glick, Comm'r, dissenting).

<sup>3</sup> August 13, 2020 Letter Approving Design Change Proposals from the Director, Division of LNG Facility Reviews and Inspections, Office of Energy Projects (Letter Order).

3. The Commission's counterarguments are unpersuasive. It principally contends that it regularly approves design changes at LNG facilities.<sup>4</sup> Although that is true, the examples it identifies only underscore how anomalous it was to approve a change to the core design of an LNG facility without a formal amendment. For example, the Commission points to instances in which Commission staff approved the removal of fencing around the Corpus Christi LNG facility, the modification to the storm surge wall at the Elba Liquefaction facility, and the installation of structural steel and underground piping at Sabine Pass LNG.<sup>5</sup> None of those changes modified the core design of an LNG facility and, accordingly, they do not support the proposition that the Commission can approve a modification this significant without requiring a formal amendment to the certificate.

4. The Commission's approach in this order is also inconsistent with how it has handled similar situations at other LNG facilities. For example, in another order issued today, the Commission is approving an amendment to the Golden Pass LNG Terminal LLC's section 3 certificate to increase its total export capacity.<sup>6</sup> Although that amendment requires no design changes or additional construction, the Commission still noticed the proposal for comment and prepared a supplemental environmental assessment.<sup>7</sup> And yet, in this order, the Commission is performing *less* analysis for an indisputably *more* significant change at the Rio Grande LNG facility. That is not reasoned decisionmaking.

5. In addition, the Commission points to a pair of conditions included in Rio Grande's Certificate Order to justify its approach in today's order.<sup>8</sup> In particular, it identifies Environmental Condition 1—which allows Rio Grande to request modification to procedures, measures, or conditions of the Certificate Order, so long as the modifications provide an equal or greater level of environmental protection than the original measure—and Environmental Condition 6—which requires Rio Grande to file detailed maps identifying any proposed route realignments or facility relocations, along with detailed environmental documentation to support its variance request.<sup>9</sup> Those

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<sup>4</sup> *Rio Grande LNG, LLC*, 174 FERC ¶ 61,048, at P 7 (2021) (Order).

<sup>5</sup> *Id.* n.19.

<sup>6</sup> *Golden Pass LNG Terminal LLC*, 174 FERC ¶ 61,053 (2021).

<sup>7</sup> *Id.* P 6.

<sup>8</sup> Order, 174 FERC ¶ 61,048 at P 4 n.12, P 7, P 16 n.53.

<sup>9</sup> Certificate Order, 169 FERC ¶ 61,131 at App., Environmental Conditions Nos. 1 & 6.

conditions, it argues, vest Commission staff with the discretion to approve all of Rio Grande's proposed design changes without going through the amendment process.<sup>10</sup>

6. We disagree. Taken to its logical conclusion, the Commission's reading of those conditions would allow the Commission to approve almost any level of modification without an amendment, so long as Rio Grande submits a map and asserts that the environmental impacts of that option are no worse than those associated with the option it approved. We do not believe that the Commission can use environmental conditions to sidestep its obligation to ensure that a modified design of a previously approved LNG facility remains consistent with the public interest.

7. Second, the Commission should have prepared a supplemental National Environmental Policy Act (NEPA) analysis to consider the environmental, reliability, and safety effects of eliminating one train and increasing the export capacity on the remaining five. The Commission also should have taken public comment on that analysis. The Council on Environmental Quality's regulations require a supplemental environmental analysis when an agency makes "substantial changes to the proposed action," or where there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."<sup>11</sup> Changing the number of liquefaction trains and substantially increasing the export capacity of the remaining trains qualifies as a "substantial change," which requires supplemental NEPA analysis.

8. Performing a supplemental NEPA analysis is particularly important here, given the lackluster environmental review that the Commission performed in these proceedings. The Rio Grande facility is one of three LNG export facilities recently approved for a single ship channel in Brownsville, Texas.<sup>12</sup> Siting such significant projects in that area raises serious environmental justice concerns.<sup>13</sup> The Commission, however, has never adequately confronted those concerns, instead taking the untenable still-hard-to-fathom position that the facilities do not raise environmental justice concerns because their impacts fall almost exclusively on environmental justice communities.<sup>14</sup> In addition, the

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<sup>10</sup> Order, 174 FERC ¶ 61,048 at P 16.

<sup>11</sup> 40 C.F.R. § 1502.9(c)(1).

<sup>12</sup> The others are the Annova LNG Common Infrastructure, LLC facility, *Annova LNG Common Infrastructure, LLC*, 169 FERC ¶ 61,132 (2019), and the Texas LNG Brownsville LLC facility, *Texas LNG Brownsville LLC*, 169 FERC ¶ 61,130 (2019).

<sup>13</sup> *Rio Grande LNG, LLC*, 170 FERC ¶ 61,046 (Glick, Comm'r, dissenting at PP 10-14).

<sup>14</sup> *Id.* PP 69-70; *id.* (Glick, Comm'r, dissenting at P 11) (pointing out that the underlying order dismisses environmental justice concerns because "no environmental

Commission has already once had to redo its environmental analysis after failing to identify a potential violation of the National Ambient Air Quality Standards due to these projects.<sup>15</sup> Finally the Brownsville, Texas projects will have a significant adverse effect on endangered species, including the ocelot and jaguarundi.<sup>16</sup> Under those circumstances, it is particularly important to perform a NEPA analysis. Doing so would have allowed the Commission to fully consider the impacts of Rio Grande's proposed design changes on the surrounding environmental justice communities and endangered species and whether, in light of those changes, other steps are appropriate to lessen those impacts.

For these reasons, we respectfully dissent.

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Richard Glick  
Commissioner

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Allison Clements  
Commissioner

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justice communities are 'disproportionately affected' by the Project since almost all the communities affected—96 percent of the relevant census tracts—are either low-income or minority communities. In other words, the Commission concludes that because the Project basically affects only low-income or minority populations, its effects do not fall disproportionately on those communities.”) (citations omitted).

<sup>15</sup> *Id.* P 55.

<sup>16</sup> *Id.* (Glick, Comm'r, dissenting at P 16) (discussing how “the cumulative effects of the Brownsville LNG facilities will have a significant adverse impact on endangered species, including the ocelot, the jaguarundi, and the aplomado falcon”).