UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Jordan Cove Energy Project, L.P.	)	Docket No. CP13-483-000
Pacific Connector Gas Pipeline, LP	)	Docket No. CP13-492-000

REQUEST FOR REHEARING OF JORDAN COVE ENERGY PROJECT, L.P. AND PACIFIC CONNECTOR GAS PIPELINE, LP

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"),[1] and Section 19 of the Natural Gas Act ("NGA"),[2] Jordan Cove Energy Project, L.P. ("JCEP") and Pacific Connector Gas Pipeline, LP ("PCGP," and collectively "Applicants") request rehearing of the Commission's order issued in this proceeding on March 11, 2016 ("March 11 Order").[3] The March 11 Order denied JCEP's application for authorization under Section 3 of the NGA to construct and operate a liquefied natural gas ("LNG") production and export facility and PCGP's application for authorization under Section 7 of the NGA for authorization to construct and operate a natural gas pipeline.[4]

STATEMENT OF ISSUES

1. The Commission should reverse its decision in the March 11 Order and issue the requested authorizations because recently executed agreements demonstrate need for the Project. These agreements evidence a change in the facts that served as the Commission's sole basis for rejecting JCEP's and PCGP's applications, which warrants

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[1] 18 C.F.R. § 385.713 (2015).
[2] 15 U.S.C. § 717r (2012).
[3] *Jordan Cove Energy Project, L.P., et al.*, 154 FERC ¶ 61,190 (2016).
[4] The pipeline and the export facility will be referred to collectively herein as the "Project."

the Commission accepting such agreements into the record and revising its analysis accordingly.[5]

2. The Commission should either issue the requested authorizations, subject to conditions, or keep the record open to receive further evidence, rather than rejecting the applications simply because conditions in the industry, of which the Commission as an expert agency can take notice, have caused the execution of pipeline precedent agreements to be delayed.[6]

3. The Commission should issue the requested authorizations because the Final Environmental Impact Statement ("FEIS") found the Project to have no significant adverse environmental impacts and identified significant positive economic and fiscal effects of the Project, and the Department of Energy ("DOE") found the Project to have regional and national economic benefits, which together outweigh the unquantified risk that the power of eminent domain might be needed to obtain some portion of the required right of way.[7]

4. The Commission should utilize methods available to it of ensuring that the Project will not go forward without sufficient customer agreements in place, such as by conditioning the exercise of the power of eminent domain on the execution of precedent agreements, rather than rejecting the applications. The Commission has previously conditioned the exercise of the power of eminent domain in orders granting certificates of public convenience and necessity and should do so here.[8]

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[5] *See Turtle Bayou Gas Storage Co., LLC*, 139 FERC ¶ 61,033 at P 14 (2012) (submitting evidence of customer commitments, such as precedent agreements, could be cause to reconsider denial of certificate for lack of market support).

[6] *McLeod v. INS*, 802 F.2d 89, 93 n.4 (3d Cir. 1986) ("official notice . . . allows an administrative agency to take notice of . . . facts that are within the agency's area of expertise."); *see also Kaczmarczyk v. INS*, 933 F.2d 588 (7th Cir. 1991) ("In exercising official notice, administrative agencies may consider commonly acknowledged facts."). The Commission had an obligation to consider such facts in the March 11 Order and so should consider them on rehearing. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 534 (D.C. Cir. 1983) (finding that a regulatory agency has a "duty to examine its key assumptions as part of its affirmative 'burden of promulgating and explaining a non-arbitrary, non-capricious [order]'" whether or not raised previously); *cf. Oklahoma Dep't of Envtl. Quality v. EPA*, 740 F.3d 185, 192 (D.C. Cir. 2014) (agency "must justify [key] assumption[s] even if no one objects to [them] during the comment period").

[7] *See* FEIS at p. 5-1, Docket Nos. CP13-483, *et al.* (issued Sep. 30, 2015); *Jordan Cove Energy Project, L.P.*, FE Docket No. 12-32-LNG, Order Conditionally Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Jordan Cove LNG Terminal in Coos Bay, Oregon to Non-Free Trade Agreement Nations at 141 (DOE/FE Order No. 3413) (issued Mar. 24, 2014) ("DOE Order").

[8] *See Mid-Atlantic Express, LLC, et al.*, 126 FERC ¶ 61,019 at Environmental Condition 55 (2009), *order on reh'g*, 129 FERC ¶ 61,245 at P 21 (2009) (conditioning use of eminent domain on approval of site-

5. The Commission should not have directed the Applicants to file new applications, which would likely take years to process, in order to submit evidence regarding customers' contractual commitments, rather than keeping the record open in this proceeding in order to receive such evidence.[9]

I. THE COMMISSION MUST TAKE INTO ACCOUNT EVENTS SUBSEQUENT TO THE MARCH 11 ORDER THAT EVIDENCE NEED FOR THE PROJECT

In the time since the March 11 Order, five agreements have been reached which demonstrate the need for the Project. In light of these developments, the Commission should authorize the Project.

On March 22, 2016, JCEP finalized the key commercial terms with JERA Co., Inc. ("JERA") for the sale of at least 1.5 million tons per annum of natural gas liquefaction capacity for an initial term of 20 years, subject to customary conditions including the execution of a detailed liquefaction tolling agreement.[10] JERA is a joint venture of Tokyo Electric Power Company, Incorporated ("TEPCO") and Chubu Electric Power Co., Inc. ("Chubu") that was formed on April 30, 2015. The purpose of JERA is to ensure "the

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specific construction plans); *Transcontinental Gas Pipe Line Corp.*, 124 FERC ¶ 61,160 (2008), *order granting reh'g on other grounds*, 125 FERC ¶ 61,086 (2008), *order granting clarification*, 125 FERC ¶ 61,249 at Environmental Condition 17 (2008) (conditioning Transco's exercise of eminent domain on review and approval of site-specific residential construction plans by the Director of the Office of Energy Projects). The Commission's assertion that it does not have the authority to do so is based on an incorrect interpretation of Section 7 of the NGA and is inconsistent with prior Commission decisions. *See* 15 U.S.C. § 717f (2012); *Conn. Dep't of Income Maint. v. Heckler*, 471 U.S. 524, 530 n.15 (1985) ("courts should give effect, if possible, to every word that Congress has used in a statute"); *see also Williams Gas Processing – Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) ("we require [an agency] to supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored") (quoting *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004); *PG&E Gas Transmission v. FERC*, 315 F.3d 383, 388-90 (D.C. Cir. 2003) (vacating and remanding orders in which the Commission "utterly failed to confront" and distinguish applicable precedent); *Wis. Cent. Ltd. v. Surface Transp. Bd*., 112 F.3d 881, 887 (7th Cir. 1997) ("[I]f the Commission departs from one of its own precedents, it is obligated to articulate a reasoned justification for doing so . . . .").

[9] *See, e.g., Williams Gas Processing-Gulf Coast Co., L.P., et al.*, 475 F.3d at 326; *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006).

[10] Press Release, Veresen Inc. (Mar. 22, 2016), *available at* http://veresen.mwnewsroom.com/files/fc/fc6b2b99-8f40-46aa-96e1-46dbe00d461d.pdf.

stable supply of energy on an internationally competitive basis."[11] This mission includes the joint procurement of LNG. TEPCO and Chubu are the first and third largest electric utilities in Japan, which is the largest LNG market in the world.[12] Once TEPCO's and Chubu's fuel procurement is consolidated into JERA in July 2016, it will become the world's largest purchaser of LNG.[13]

It is important for the Commission to understand that the agreement between JCEP and JERA ("JERA Agreement") was not executed and announced in March because of the Commission's March 11 Order, but rather notwithstanding the March 11 Order. The negotiations had been in progress since the very formation of JERA; indeed JCEP had been in negotiations with JERA's members even prior to the formation of JERA. The signing ceremony and announcement had already been scheduled for the third week in March when the Applicants, and the market, received the disappointing news of the Commission's decision. The Applicants are very grateful for the support reflected in JERA's decision to continue with the signing even after receiving the March 11 Order.

On April 8, 2016, JCEP reached preliminary agreement with ITOCHU Corporation ("ITOCHU") with respect to certain key commercial terms for the purchase by ITOCHU of an additional 1.5 million tons per annum of natural gas liquefaction capacity for an initial term of 20 years.[14] The agreement ("ITOCHU Agreement") is subject to the negotiation of a mutually acceptable, definitive liquefaction tolling

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[11] Press Release, JERA Co., Inc. (Apr. 30, 2015), *available at* http://www.jera.co.jp/english/information/20150430_01.html.

[12] *World LNG Report - 2015 Edition*, International Gas Union at 11, *available at* http://www.igu.org/sites/default/files/node-page-field_file/IGU-World%20LNG%20Report-2015%20Edition.pdf (noting that Japan is the world's single largest LNG market).

[13] *Veresen Concludes Key Terms with JERA for Jordan Cove Liquefaction Capacity*, Business Wire (Mar. 22, 2016), *available at* http://www.businesswire.com/news/home/20160322005054/en/Veresen-Concludes-Key-Terms-JERA-Jordan-Cove.

[14] *Veresen and ITOCHU Agree Key Terms for Jordan Cove Liquefaction Capacity*, Veresen Inc. (Apr. 8, 2016), available at http://veresen.mwnewsroom.com/Files/1f/1ff8e5f9-4f7f-45bf-b7f9-0b1b4290a1e3.pdf.

agreement, which JCEP and ITOCHU will continue to work together to conclude. With approximately 130 bases in 65 countries, ITOCHU engages in domestic trading, import/export, and overseas trading of various products such as textiles, machinery, metals, minerals, energy, chemicals, food, information and communications technology, realty, general products, insurance, logistics services, construction, and finance, as well as business investments in Japan and overseas. ITOCHU's Energy Division handles trading of general energy-related products, including crude oil, petroleum products, liquefied petroleum gas, LNG, natural gas, and electricity as well as promoting related projects. The Energy Division also promotes exploration, development and production of oil and gas projects.

On April 8, 2016, PCGP and Macquarie Energy LLC ("Macquarie") executed a precedent agreement for 215,000 dekatherms per day ("Dth/d") of firm transportation service (the "Macquarie PA"). Macquarie is a global marketer and trader of energy products, including natural gas. Macquarie is the fourth largest natural gas marketer in the US, and the largest non-producer marketer.[15] Macquarie does not intend to subscribe for liquefaction services from JCEP but is instead taking capacity on PCGP in order to serve as an aggregator of natural gas supplies for JCEP liquefaction service customers. Macquarie was previously a shipper on the import pipeline that was approved by the Commission in Docket Nos. CP07-441-000, *et al*.

On April 4, 2016, PCGP and Avista Corporation ("Avista") executed a precedent agreement for 10,000 Dth/d of firm transportation service (the "Avista PA"). Avista is a combined electric-gas utility that serves over 600,000 customers in Oregon, Washington

[15] *Financial solutions for the global energy industry*, Macquarie Energy Capital at 5 (Jan. 2014), *available at* http://static.macquarie.com/dafiles/Internet/mgl/com/energy/furniture/pdf/SF/energy_capital_brochure.pdf?v=4.

and Idaho with a service territory covering 30,000 square miles and a population of 1.5 million.[16] The proposed route of PCGP lies in the heart of Avista's southern Oregon service territory.

Avista services residential, commercial and industrial customers between Oakland, Oregon and Grants Pass, Oregon with natural gas transported on Northwest Pipeline LLC's Grants Pass Lateral. Avista also services residential, commercial and industrial customers between the greater Medford, Oregon area and Klamath Falls, Oregon with natural gas from the Medford Lateral operated by Gas Transmission Northwest LLC ("GTN"). Both the Grants Pass Lateral and the Medford Lateral are fully contracted with no additional capacity available with which to serve new loads.

PCGP will have 40,000 Dth/d of capacity to deliver gas into the Grants Pass Lateral near Roseburg which can flow south into Grants Pass on the currently fully-contracted pipeline. This substantial new quantity of capacity will enable significant economic development in the region by attracting new industries and providing additional natural gas to existing industrial, commercial and residential users throughout southern Oregon.

PCGP crosses Avista's service territory and can provide a source of natural gas for smaller communities with no currently accessible source of natural gas such as Merrill, Butte Falls, Milo, and other unincorporated communities that are currently being served with propane or even wood-burning stoves. PCGP is committed to serving local communities located along the pipeline and has agreed to install taps for natural gas deliveries to these smaller communities.

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[16] *About Us*, Avista Corp. (2016), *available at* http://www.avistacorp.com/about/Pages/aboutus.aspx.

On April 8, PCGP and JCEP executed a precedent agreement for 592,354 Dth/d of firm transportation service (the "JCEP PA"). The timing of the execution of the JCEP PA was driven by the March 11 Order. It has been the expectation of JCEP that it would be a shipper on PCGP. JCEP has intended to utilize a portion of the terminal's LNG production capacity in order to produce LNG for sale by JCEP, either at the outlet of the terminal or delivered to a foreign import terminal. In addition to reserving PCGP capacity to support the sale of LNG by JCEP, JCEP is willing to serve as an aggregator and gas supplier to liquefaction service customers who would prefer a gas supply delivered to the plant inlet. An affiliate of JCEP has obtained National Energy Board approval for the export of gas from Canada, and DOE approval for the import of gas into the United States.[17] Another affiliate of JCEP is the 50% owner of Ruby Pipeline LLC ("Ruby"). JCEP and its affiliates stand ready to assemble whatever combination of gas supplies and transportation services are necessary to facilitate the sale of liquefaction services.

While JCEP had intended to enter into a precedent agreement with PCGP to reserve pipeline capacity, it was previously contemplated that JCEP's precedent agreement would be among the last of the precedent agreements executed, after the preference of liquefaction customers for aggregation service or direct contracting with PCGP had been finalized. However, in light of the March 11 Order, and the execution of the JERA Agreement and ITOCHU Agreement, JCEP is prepared to underwrite a substantial portion of the capacity of PCGP. The JCEP PA reserves both the capacity required for JCEP to support its own sales of LNG as well as capacity that JCEP can use

[17] *Jordan Cove LNG L.P.*, FE Docket No. 12-32-LNG, Order Granting Long-Term Multi-Contract Authorization to Import Natural Gas from Canada to the Proposed Jordan Cove LNG Terminal in the Port of Coos Bay, Oregon (DOE/FE Order No. 3412) (issued Mar. 18, 2014); *Jordan Cove LNG L.P.*, File OF-EI-Gas_GL-J705-2013-01 01, NEB Reasons for Decision (issued Feb. 20, 2014).

as an aggregator for JERA and ITOCHU. In the event that JERA or ITOCHU prefer to contract with PCGP directly, JCEP will relinquish capacity committed to JCEP under the JCEP PA.

The Macquarie PA, Avista PA and JCEP PA have been submitted to the Commission under seal. Together, Macquarie, Avista, and JCEP have contracted for 817,354 Dth/d of transportation capacity, which represents 77 percent of the capacity of PCGP.[18] The March 11 Order notes that while "the submittal of precedent agreements is no longer required, they are still significant evidence of need or demand for a project."[19] These agreements evidence the willingness of customers to stand behind the Project and are sufficient to support approval of the Project.

While the Commission does not always accept new evidence on rehearing, it should do so if the evidence is "based on matters not available for consideration by the Commission at the time of the final decision or order."[20] The precedent agreements meet the Commission's standard for the submission of new evidence on rehearing. These agreements had not been executed at the time the Commission issued the March 11 Order. Thus, they are new matters that were not available for consideration at the time of the final decision. On rehearing in *Turtle Bayou*, the Commission noted that "potential customer commitments . . . such as precedent agreements" could support reconsideration of an order denying a certificate for lack of market support.[21] Because the Commission's only basis for rejecting the requested authorizations in this proceeding was a lack of demonstrated

[18] PCGP has 1,060,000 Dth/d of capacity to Clark's Branch, which includes Avista's delivery point, and 1,020,000 Dth/d of capacity to the JCEP terminal.

[19] March 11 Order at P 36.

[20] 18 C.F.R. § 385.713(c)(3).

[21] *Turtle Bayou Gas Storage Co., LLC*, 139 FERC at P 14. The Commission suggested customer commitments could even cause the Commission to reconsider its order after the statutory deadline for requesting rehearing had passed.

market support, the submission of such market support with this request for rehearing goes to the central matter at issue. Just as the Commission would have accepted a late pleading if it included new evidence in *Turtle Bayou*, the Commission should accept the evidence offered by the Applicants in connection with this timely request for rehearing.

In other circumstances, the Commission has restricted the submission of new evidence on rehearing in part because the submission of new evidence is "disruptive to the administrative process" and creates a moving target for parties seeking a final decision.[22] However, the need for finality is lessened in this instance because the Commission's denial was without prejudice to refiling. Thus, the Commission has already acknowledged that further proceedings and additional evidence may be considered and that the Project may be approved in the future. Accepting additional evidence at this time does not deprive any party of finality. Accordingly, the Commission should accept the new evidence of market support for the Project.

The agreements executed since the March 11 Order are sufficient evidence of market need to support the approval of the PCGP and JCEP applications.

II. THE COMMISSION SHOULD NOT HAVE REJECTED THE APPLICATIONS SIMPLY BECAUSE PRECEDENT AGREEMENTS HAD NOT YET BEEN EXECUTED

The fact that the Applicants had not provided more evidence of customer commitment to the Project as of the date of the March 11 Order reflects circumstances in the global LNG market, and should not be taken as an indication that the Project does not have market support. The Commission should have taken into account such market

[22] *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048 at P 250 (2016); *Texas Eastern Transmission, LP et al.*, 141 FERC ¶ 61,043 at P 19 (2012) (citing *Westar Energy, Inc.*, 134 FERC ¶ 61,176 (2011)), *appeal dismissed*, *NO Gas Pipeline v. FERC*, 756 F.3d 764 (D.C. Cir. 2014).

conditions and should not have rejected the applications simply because precedent agreements had not yet been executed.

LNG supply projects have extremely long gestation periods. In the United States, the period between initial conception and actual delivery can be nearly a decade. Sponsors must secure a site, begin contacts with stakeholders and perform early stages of engineering and environmental review before they are even permitted to commence pre-filing. The FERC approval process can require three years or more.[23] In the case of projects that require new LNG storage tanks, which have highly specialized metallurgy, construction routinely requires 42 to 60 months. Customers generally recognize that financing cannot be obtained and construction cannot be completed in less than five years, but are reluctant to sign agreements much farther out in advance of their requirements for fear of misjudging future markets. None of the LNG export projects that the Commission has approved had LNG tolling or offtake agreements in place at the time the regulatory process commenced. Project sponsors must start the regulatory process, and must incur considerable project development costs, well before having commercial agreements. For example, the Project had incurred $300 million in development costs as of the end of 2015.

The March 11 Order recounts a series of requests during 2014 and 2015 from the Commission staff for information regarding the status of agreements between JCEP and prospective liquefaction service customers, agreements between PCGP and transportation

[23] Corpus Christi Liquefaction, the only LNG export project approved by the Commission not proposed to be built in conjunction with an existing LNG import terminal, was before the Commission for over 37 months. *Corpus Christi Liquefaction, LLC, et al.*, 149 FERC ¶ 61,283 (2014). Liquefaction projects in conjunction with the existing Lake Charles and Freeport LNG import terminals were each before the Commission for more than 42 months. *Trunkline Gas Co., et al.*, 153 FERC ¶ 61,300 (2015); *Freeport LNG Development, L.P., et al.*, 148 FERC ¶ 61,076 (2014), *reh'g denied*, 149 FERC ¶ 61,119 (2014).

service customers, and any open season PCGP might have been planning to conduct.[24] Ultimately the Commission found the responses to those requests to be unsatisfactory, and based on that fact the Commission denied PCGP's application.[25] The Commission then denied JCEP's application solely on the basis that it had denied PCGP's application.

The Commission must recognize that JCEP is competing in a global LNG market. The history of the Applicants' responses to the Commission's requests for information regarding the negotiation of agreements for liquefaction and transportation services should be viewed in the light of the events that were occurring in the LNG market at the time.[26] Perhaps the most important development in the market was the change in expectations regarding the rate of growth of the global economy. While the global economy is still projected to grow at a rate of 3.4 percent in 2016 and 3.6 percent in 2017, this represents a sharp decline from prior expectations regarding rates of growth.[27]

At the same time as expectations for global economic growth were being downgraded, oil prices began a steep decline.[28] Of course, these are not unrelated

[24] March 11 Order at PP 15-18.

[25] *Id.* at PP 41-42.

[26] An agency may take official notice of facts not included in the record but not reasonably in dispute, just as a court may take judicial notice of such facts. The scope of official notice, however, is broader than judicial notice. *McLeod v. INS*, 802 F.2d 89, 93 n.4 (3d Cir. 1986) ("Both doctrines allow adjudicators to take notice of commonly acknowledged facts, but official notice also allows an administrative agency to take notice of . . . facts that are within the agency's area of expertise."); *see also Kaczmarczyk v. INS*, 933 F.2d 588 (7th Cir. 1991) ("In exercising official notice, administrative agencies may consider commonly acknowledged facts."). Official notice is only subject to invalidation if "substantial prejudice" is shown to result. *U.S. v. Pierce Auto Lines*, 327 U.S. 515, 530 (1946) (finding that "the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result"); *Air Products & Chemicals, Inc., v. FERC*, 650 F.2d 687, 697 (5th Cir. 1981).

[27] *World Economic Outlook Update, Subdued Demand, Diminished Prospects*, International Monetary Fund at 2 (Jan. 19, 2016), *available at* https://www.imf.org/external / pubs/ ft/weo/ 2016/ update/ 01/ pdf/0116.pdf.

[28] *Petroleum & Other Liquids Data*, U.S. Energy Information Administration, *available at* http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=rwtc&f=M (WTI Crude Oil price per barrel dropped from $105.79 in June of 2014 to $37.19 in December of 2015); *see also Short-Term Energy Outlook*, U.S. Energy Information Administration (Mar. 8, 2016), *available at* https://www.eia.gov/forecasts/steo/report/prices.cfm (stating that the WTI Crude Oil price per barrel dropped from $93.17 in 2014 to $48.67 in 2015 and to $34.04 in 2016).

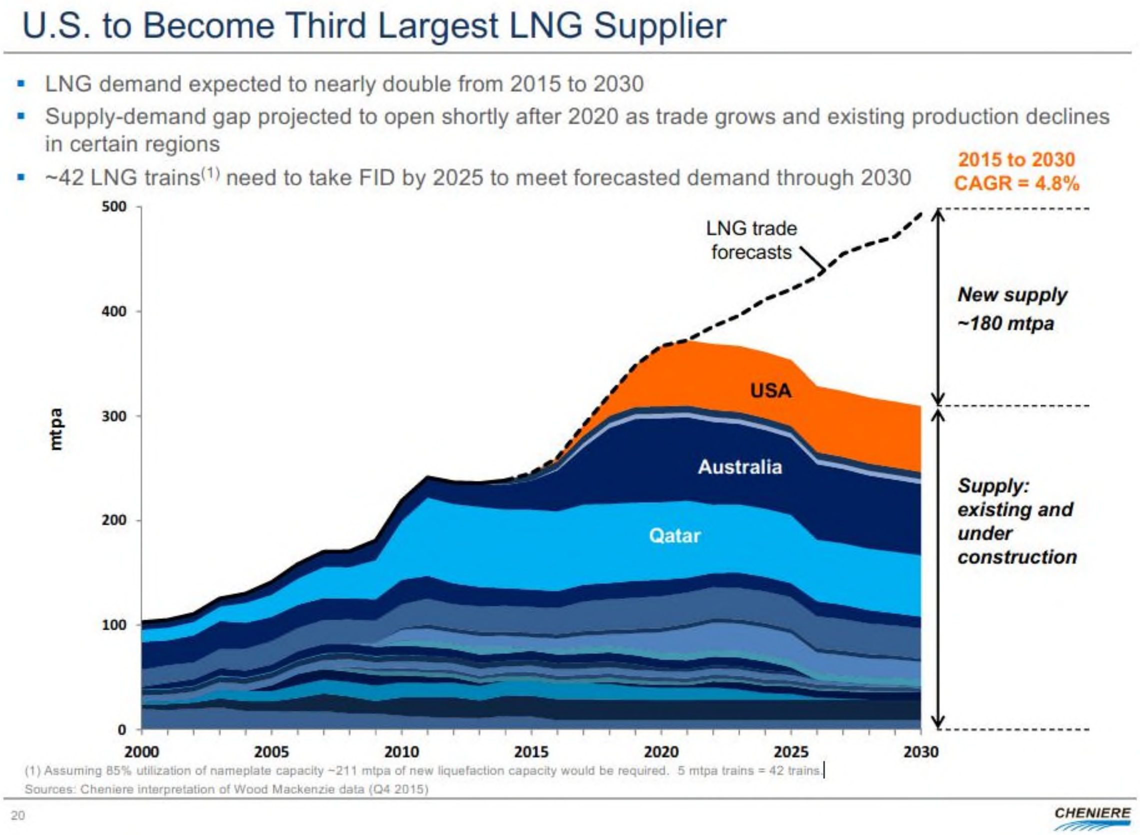
phenomena. Because oil prices have historically been the most common benchmark for LNG prices, expectations for future LNG prices began to deteriorate.

Finally, beginning in early 2014, the dates on which major tranches of new LNG production capacity would come on line came into clearer focus. It became apparent that major new investments in LNG production capacity in Australia and the US Gulf Coast would be placed in service more or less contemporaneously.[29] These projects were faced with demand that was growing more slowly than anticipated at the time those investments were first undertaken. This meant that it would take the LNG market longer to absorb the output of these new projects than had previously been projected.

The world LNG market still requires the development of additional LNG production capacity, but not as much as previously thought, and not on quite the same timetable. The consensus is that final investment decisions will need to be taken soon for several LNG projects in order to address a supply shortfall opening up in the 2021-2022 time frame. For example, Cheniere Energy, a leader in the US LNG export industry, has projected that the current supply overhang will be absorbed by 2020. The graph below, which was included in a presentation by Cheniere in February at the 2016 Credit Suisse Energy Summit, shows that declining LNG production from certain sources, along with

[29] *World LNG Report - 2014 Edition*, International Gas Union at 17, *available at* http://www.igu.org/sites/default/files/node-page-field_file/IGU%20-%20World%20LNG%20Report%20-%202014%20Edition.pdf (noting Australia, with seven projects under construction, would become "the predominant source of new liquefaction" with the US "expected to see the largest growth" other than Australia); Andrew Topf, *U.S. and Australia Chasing Qatar for LNG Supremacy*, OilPrice.com (Oct. 7, 2014), *available at* http://oilprice.com/Energy/Natural-Gas/U.S.-and-Australia-Chasing-Qatar-for-LNG-Supremacy.html (noting three Australian and four US LNG export facilities due to be online before the end of 2017 with four more to follow in 2018).

increasing LNG demand, will combine to create a supply gap beginning "shortly after" 2020.[30]



Similarly, McKinsey & Company, one of the most respected consulting firms in the energy industry, published an analysis in June 2015 of the state of the LNG industry that acknowledged the current supply overhang but concluded that the market needs to take final investments decisions on a further 20 million tons per annum of capacity in the next two and one-half years in order to bring it to market by 2023.[31] McKinsey's report includes the following table:

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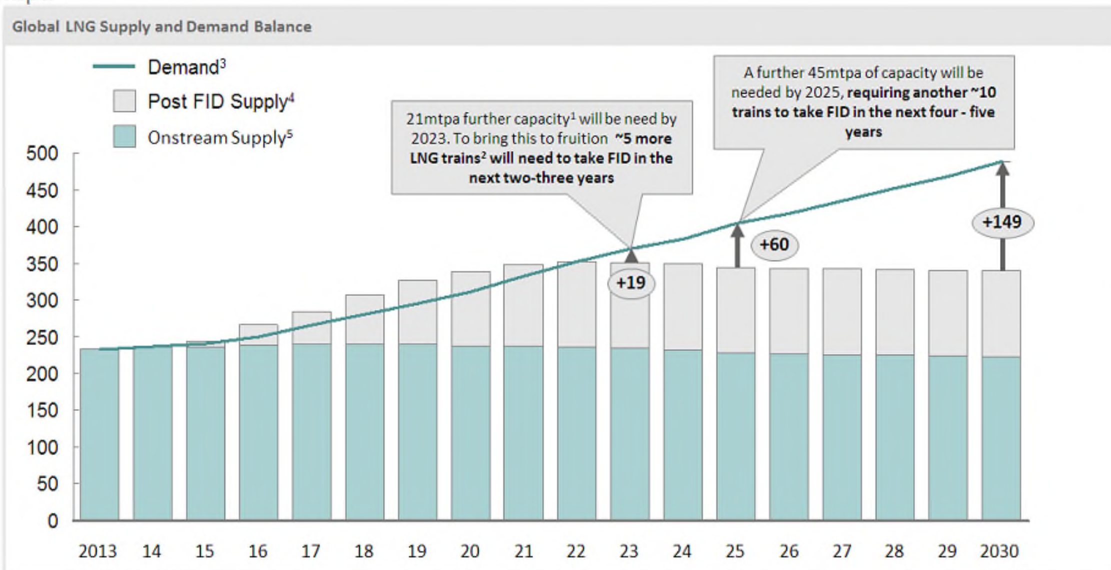
[30] *2016 Credit Suisse Energy Summit*, Cheniere Energy, Inc. at 20, *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=101667&p=irol-presentations.

[31] Kerri Maddock, Peter Lambert, *Despite low oil prices and a weak medium-term outlook, LNG has a bright future*, McKinsey Solutions (June 2015), *available at* https://www.mckinseyenergyinsights.com/insights/positive-outlook-for-lng.aspx.

Over the next 4-5 years, the LNG market needs ~15 LNG trains to take FID to avoid a tight market in the mid-2020s

mtpa



1 Assuming new capacity runs at 90% capacity
2 Assuming a train capacity of 4.5mtpa
3 Demand here does not equal consumption. Assumes no additional demand from Europe from 2013 levels, however for the market to remain balanced LNG will find a hope, largely in Europe, but also with price sensitive buyers with access capacity, like in India, Brazil and the Middle East
4 Assumes supply is 90% of name place capacity (50% in year one)
5 Bottom up supply forecast from production of fields supply existing facilities

SOURCE: BP Statistical Review, Energy Insights' Global Gas Model & Global Energy Perspective Model

Energy Insights

While there is an opportunity looming for LNG to be delivered starting in the 2021-2022 time frame, the number of LNG projects that have been on drawing boards around the world is in excess of what is required to meet that need. By 2014 it had become a buyer's market. LNG buyers, who as recently as 2013 had been stampeding to sign up for LNG supply, were now in a position to pick and choose among projects, and to be deliberate in their consideration of their alternatives.

The result of this comparative analysis by the major LNG buyers has been a winnowing of the many LNG projects that have been proposed and delays in customers committing to any specific project. For example, several of the LNG projects coming on line in Australia have experienced large cost overruns due to the failure to anticipate the impact of LNG plant construction on labor rates.[32] This has dampened the market's enthusiasm for additional capacity in Australia. As a result, a number of developments planned for Australia have been cancelled or delayed.[33] Plans to develop very promising new gas finds offshore of East Africa to support LNG production have been delayed due in part to the challenges of developing LNG capability in frontier areas.[34] A number of Canadian LNG export projects have been cancelled, shelved or at least delayed.[35] Many of these were predicated on greenfield pipelines of several hundred miles, as well as less developed supply areas.[36]

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[32] Jude Celemente, *The U.S. and Australian Race to Export Liquefied Natural Gas*, Forbes (Jan. 31, 2016), *available at* http://www.forbes.com/sites/judeclemente/2016/01/31/the-u-s-and-australian-race-to-export-liquefied-natural-gas/#2301fc9a26a6 ("Escalating labor costs have been a key factor in Australia's drastic LNG cost overruns"); Mike Corkhill, *LNG project costs and the luck of the draw*, LNG World Shipping (Jan. 5, 2016), *available at* http://www.lngworldshipping.com/news/view,lng-project-costs-and-the-luck-of-the-draw_41276.htm ("All the Australian projects have fallen victim to cost overruns").

[33] Stanley Reed, *Australian Energy Giant Woodside Delays Large Offshore L.N.G. Project*, New York Times (Mar. 23, 2016), *available at* http://www.nytimes.com/2016/03/24/business/energy-environment/woodside-browse-lng-project.html (describing indefinite delay of Browse LNG project); *Australia's Wheatstone Offshore Gas Project Delayed*, Maritime Executive (Feb. 2, 2016), *available at* http://www.maritime-executive.com/article/australias-wheatstone-offshore-gas-project-delayed (noting delay in delivery of first exports until middle of 2017); Angela Macdonald-Smith, *Shell shelves Arrow LNG project in Queensland*, The Sydney Morning Herald (Jan. 30, 2015), *available at* http://www.smh.com.au/business/shell-shelves-arrow-lng-project-in-queensland-20150129-131sqe.html.

[34] *Mitsui Delays FID On Mozambique LNG Project*, Reuters (Nov. 6, 2015), *available at* http://af.reuters.com/article/commoditiesNews/idAFL3N1311B820151106 (describing three-month delay in final investment decision); Emma McAleavey, *Mozambique's onshore LNG struggling*, Energy Global (Nov. 18, 2014), *available at* http://www.energyglobal.com/downstream/gas-processing/18112014/Mozambique-LNG-projects-1638/ (noting one-year delay in LNG production from Afungi complex); Kennedy Senelwa, *Counting down in Tanzania*, Global LNG Monitor, Issue 396 at 4 (Nov. 26, 2015) (noting slow and uncertain development of LNG export project).

[35] *IEA: Canada's LNG outlook darkens*, Global LNG Monitor, Issue 372 at 6 (June 11, 2015) (stating Kitimat LNG, LNG Canada, Pacific Northwest LNG, Prince Rupert LNG, and Triton LNG all had delayed final investment decisions); Bren Jang and Shawn McCarthy, *LNG Canada delay marks new blow to B.C. hopes*, The Globe and Mail (Feb. 4, 2016), *available at* http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/shell-delaying-lng-canada-joint-venture-in-northern-bc/article28551269/ (citing delay in LNG Canada project and that "[t]he weak state of the oil and gas industry is casting doubt on all 20 proposals to export LNG from British Columbia").

[36] For example, the Westcoast Connector Gas Transmission pipeline proposed to serve the Prince Rupert LNG facility is approximately 528 miles; the Pacific Northern Gas Transmission Pipeline proposed to serve LNG terminals in Kitimat, B.C. is approximately 326 miles; the Pacific Trail Pipeline proposed to serve the Kitimat LNG facility is approximately 300 miles; and the Coastal GasLink Pipeline proposed to serve the LNG Canada facility is approximately 416 miles. *LNG Projects in B.C.*, Ministry of Natural Gas Development of British Columbia, *available at* https://engage.gov.bc.ca/lnginbc/lng-projects/.

In this competitive LNG market US projects have had advantages due to a deep labor supply, infrastructure that can support construction of complex projects, an existing pipeline network, and producing basins that have well-established characteristics.

Among US projects JCEP has had a number of competitive advantages. In the competition to supply the major LNG markets in the Far East, JCEP has the advantage of being much closer than sources on the US Gulf Coast. An LNG tanker voyage to Japan from the US Pacific Coast requires less than half of the time that is required to reach the same destination from the Gulf Coast. Half as many vessels would be required to deliver a given quantity of LNG from JCEP to Japan than would be required to deliver that quantity of LNG from a Gulf coast project to Japan. At a capital cost of more than $225 million for the typical LNG tanker, the savings in shipping costs alone can more than offset other advantages enjoyed by some of the Gulf Coast projects, such as the preexistence of LNG facilities originally constructed for import purposes. Furthermore, shipments from the Gulf Coast are subject to costs, delays and risks associated with the transit of the Panama Canal and the threat of hurricanes. Particularly for large buyers who may have already committed to taking a portion of their LNG supply from the Gulf Coast, acquiring LNG from the US Pacific Coast represents a diversification of risk.

JCEP also represents a diversification of risk for large buyers of LNG from the US because it provides access to different supply basins than those to which Gulf Coast projects provide access. The Project can leverage off of the existing GTN and Ruby systems to provide access to prolific and well understood reserves in the Western Canadian Sedimentary Basin and the Rockies.

JCEP also enjoys advantages over other projects on the US Pacific Coast because of the degree of state and local support for the Project. Generally speaking, Washington, Oregon and California have been viewed as areas that are somewhat less familiar with, and possibly less hospitable to, the development of natural gas infrastructure than, for example, Texas and Louisiana. As a result, they are considered more challenging places to develop an LNG export project. However, after familiarizing themselves with the Project, state and local officials in Oregon, and particularly in the counties where the pipeline and LNG terminal will be located, have come to recognize the benefits of the Project, which are discussed in Section III below. The Oregon Coastal Caucus, a bi-partisan group of state legislators representing Coos Bay and the coastal areas of Oregon, has shown continued support of the project due to its economic impacts and its potential to revive the economy of the region.[37] Boost Southwest Oregon, formed by community leaders and local elected officials along with more than 1,200 individuals, [38] echoes the Oregon Coastal Caucus's support.[39] Foreign buyers had been concerned that an LNG export project simply could not be permitted on the US Pacific Coast. Therefore, it was a major milestone for the marketing of the Project that the Commission issued a "clean" FEIS in September 2015.

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[37] Letter to FERC of Oregon State Representative Caddy McKeown, *et al.* (submitted Apr. 11, 2013), *available at* http://boostsouthwestoregon.org/wp-content/uploads/2013/04/4-11-Coastal-Caucus-Letter-to-FERC.pdf (outlining the economic impacts of the project, including "the significant number of short term construction jobs that will be created, the long-term family-wage jobs that will be sustained [and] the significant tax revenues that will be derived from the facility"). This letter was submitted to the FERC commissioners, but is not available in the docket as it was submitted before JCEP's certificate application.

[38] Boost Southwest Oregon includes former Mayor Keith Tymchuck of Reedsport, Coos Bay City Councilwoman Jennifer Groth and members of the Oregon Coastal Caucus – Oregon State Senators Jeff Kruse, Arnie Roblan and Doug Whitsett, and former Oregon State Senators Ken Messerle and Joanne Verger and Oregon State Representatives Deborah Boone, David Gomberg, Wayne Krieger, and Caddy McKeown.

[39] Comment of Boost Southwest Oregon, Docket Nos. CP13-483-000, *et al.* (submitted Feb. 13, 2015) (highlighting that the Project will create jobs, benefit the International Port of Coos Bay, fund the Community Enhancement Plan, and create the first LNG Fire Training Center on the US Pacific Coast).

While the Project's expectations regarding the timing of the execution of commercial agreements kept getting adjusted throughout 2014 and 2015, and the Project had not been able to announce a customer commitment prior to last month, the Project is nonetheless competitively placed to capture a portion of the opportunity to supply LNG in the 2021-2022 time frame. Prior to the JERA and ITOCHU announcements, JCEP was not in a position to share the identity of its anchor customers with the Commission because JERA and ITOCHU insisted on the utmost confidentiality throughout the negotiations, in accordance with confidentiality agreements with both firms. Neither would have permitted a disclosure of its interest in the Project until the key commercial terms were agreed.

The primary focus of the marketing of JCEP's services continues to be on the Japanese and South Korean markets. JCEP has been in negotiations with other Japanese utilities and South Korean companies and with trading companies who supply LNG to Asian markets, including Japanese utilities. As with the JERA and ITOCHU negotiations, these discussions are, at the customers' insistence, subject to strict confidentiality. However, JCEP expects that JERA and ITOCHU will function as bellwethers for other similarly situated customers. The JERA and ITOCHU signings have increased the momentum toward a level of contracting that will permit the sponsors of the Project to commit to construction.

The Commission has repeatedly asked PCGP whether it has held an open season for transportation service. The Commission cited the failure to have held an open season "which might (or might not) have resulted in 'expressions of interest' the company could have claimed as indicia of demand" as a basis for denying PCGP's application.[40] Standard open season procedures would have been ineffective to substantiate demand in this context. A typical FERC-jurisdictional pipeline can establish a firm deadline for customers to sign precedent agreements or relinquish the opportunity to obtain service. In this case, where the pipeline is merely incidental to an LNG project that is competing in a global market, customers would not have responded to a firm deadline. All of JCEP's customers and prospective customers recognize that a commitment to liquefaction service implies a commitment to a corresponding amount of pipeline transportation service, either directly with PCGP or indirectly through an aggregator. But they would feel no compulsion to comply with a pipeline open season deadline for formalizing that commitment. They would also be reluctant to participate in any non-binding open season due to confidentiality concerns. PCGP will hold an open season after it has executed precedent agreements with all of the anchor shippers, primarily to ensure that all requirements for service have been identified. The form of PCGP's open season package has been submitted in conjunction with the precedent agreements.

The length of the regulatory process is such that project sponsors must embark upon it, and must expend hundreds of millions of dollars in development funds, prior to obtaining contractual commitments from customers. In the earlier period of the Commission's experience with LNG export projects, customer commitments were generally obtained at or before the time that the Commission completed its FEIS. Under the circumstances of the last two years, however, the market changed and the timetable for commercial agreements shifted. The market will not always conform to the Commission's

[40] March 11 Order at P 39.

schedule. If the Commission adopts a new policy of denying applications that have not finalized commercial agreements at the time the Commission has completed its FEIS and is ready to issue an order, massive regulatory risk will be introduced, and the competitive advantages that would otherwise be enjoyed by the US LNG industry would be squandered. The Commission should not adopt such a policy but should instead adjust its procedures to the conditions in the market that the Commission regulates.[41]

III. IN PERFORMING ITS BALANCING TEST, THE COMMISSION GAVE EXCESSIVE WEIGHT TO THE LIMITED RISK OF EMINENT DOMAIN PROCEEDINGS WHEN COMPARED TO PROJECT BENEFITS

The March 11 Order relies upon a balancing test of public benefits against adverse consequences in reaching its determination that PCGP's application should be denied. The Commission misapplied this balancing test. The March 11 Order overestimated potential negative effects. When considering project benefits the March 11 Order mistakenly equated public benefits with commercial need, and ignored other benefits of the Project recognized in the FEIS and in the DOE's order approving the export of LNG by JCEP.

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[41] The March 11 Order's requirement of executed pipeline precedent agreements at the time it authorizes the pipeline serving an LNG export facility departs from Commission precedent without explanation. Contrary to the characterization of its past practice in the March 11 Order, the Commission has approved LNG terminal supply pipelines without executed precedent agreements in place at the time of approval. *Cheniere Creole Trail Pipeline, L.P.*, 142 FERC ¶ 61,137 at P 13 (2013), *reh'g denied*, 145 FERC ¶ 61,074 (2013) ("Creole Trail *plans* to execute a binding precedent agreement with Sabine Liquefaction . . . upon Sabine Liquefaction reaching a final investment decision with respect to Phase I of the Sabine Pass Liquefaction Project"). Creole Trail subsequently executed an agreement with its affiliate, Sabine Liquefaction. The March 11 Order also cited the first Creole Trail expansion as not requiring new right of way or easements but failed to address the second Creole Trail expansion, which required significant new right of way in connection with the construction of a 48.5-mile extension and 38.4 miles of looping. *Cheniere Creole Trail Pipeline, L.P.*, 151 FERC ¶ 61,012 at P 36 (2015) (citing co-location or installation adjacent to existing road or pipeline right of way for 78 percent of the distance as sufficiently minimizing project impacts on landowners). This second Creole Trail project, like the first, was not supported by executed precedent agreements at the time it was approved. *Id.* at P 16, n.43 (2015) ("To date, Creole Trail has not executed a precedent agreement with a shipper to use the Creole Trail Expansion Project facilities in Zone 1 or Zone 2 authorized by this order.").

When considering adverse impacts, the March 11 Order focuses entirely on the possibility that PCGP might have to exercise eminent domain authority in order to acquire some portion of the right of way. The March 11 Order does not focus on environmental impacts. In fact, the FEIS concludes that, with implementation of the mitigation measures set forth in the FEIS, the environmental impacts of the Project will not be significant.[42] Despite 31 months of effort creating the FEIS, the March 11 Order makes no reference to the FEIS when discussing the impacts of the Project. Instead the March 11 Order focuses on a perception of an inordinate risk of the utilization of condemnation authority. While the March 11 Order states that the Commission must weigh the quantum of "interests adversely affected," in fact the March 11 Order did not examine the actual level of risk that condemnation will be required to any substantial extent.

The March 11 Order's assertion that PCGP "has obtained easements for only 5 percent and 3 percent respectively of its necessary permanent and construction right of way" has no bearing on the likelihood that PCGP will be able to obtain right of way through mutually acceptable agreements with landowners.[43] A pipeline to supply an LNG export facility is different from a typical stand-alone interstate pipeline project, particularly with respect to construction timing. The LNG production facility will not begin commissioning, and so the pipeline will not be required to begin to flow gas, until four years or more after the Commission's order. The construction period for a pipeline is so much less than the construction period for liquefaction facilities that PCGP will not need to have completed its right of way acquisition until after the commencement of construction of the terminal. This is much different from the timetable for a typical stand

42 FEIS at p. 5-1.
43 March 11 Order at P 18.

alone pipeline, which would be expected to begin construction much sooner after the Commission order authorizing it. As a result, to date there has been little need to expend development funds to acquire right of way; it makes more sense to expend development funds on critical path items such as engineering and permitting and to expend funds on right of way acquisition only once Project financing has been obtained.[44] The land rights that PCGP has acquired to date are the result of a limited land acquisition program, which focused narrowly on critical crossing and surface facility parcels. There is no need at this point for PCGP to have begun a broader effort to acquire, or to obtain options on the remainder of the right of way.

Once acquisition of PCGP's right of way begins in earnest, it is unlikely to require extensive use of the power of eminent domain due to the pattern of land uses along the right of way. PCGP's pipeline route, which was refined through the pre-filing and certificate application process, has minimized the permanent impacts to landowners. As a result of these efforts, out of 231.8 miles of land crossed by the pipeline, only two tenths of one mile, or less than one tenth of one percent, is residential.[45] Only two miles, or less than one percent, are "residential areas, commercial areas, and industrial areas combined."[46] In over 230 miles of right of way there are just ten residences within 50 feet of the right of way.[47] PCGP has achieved this limited impact by utilizing public lands, co-locating with other communication and utility corridors, and routing through agricultural, commercial timber, and range lands where the existing land uses can resume after pipeline construction is complete. In contrast to the Commission's assessment of other recent

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44 As a result, it was arbitrary and capricious for the Commission to rely on this reasoning to reject the application. *Cf. City of Vernon, Cal. v. FERC*, 845 F.2d 1042, 1048 (D.C. Cir. 1988).

45 FEIS at Table 4.1.2.2-1.

46 *Id.* at p. 4-12.

47 *Id.* at Table 4.1.2.2-1, p. 4-10.

pipeline projects, the March 11 Order failed to note the extensive measures taken by PCGP to minimize landowner impacts, including use of the Commission's pre-filing procedures, consideration of twelve major route alternatives, and adoption of 79 route deviations made as part of the FEIS process.[48] Indeed, PCGP was willing to adopt additional route deviations that it had developed in cooperation with landowners, but in some cases the FEIS declined to adopt these on the grounds that endangered species and other factors were considered more important than minimizing landowner impacts.[49] The Commission regularly cites efforts such those as PCGP has made as mitigating impacts on landowners, but the March 11 Order did not do so.[50]

Furthermore, the March 11 Order eliminates the opportunity for PCGP to propose further reductions in landowner impacts in its implementation plan. PCGP has continued to refine the pipeline route to lessen environmental impacts and optimize the construction footprint. PCGP has been able to reduce the number of affected landowners, parcels, and total acres of disturbance by obtaining entry permission, performing onsite verification of usable workspace, and completing surveys of over 90 percent of the total pipeline length. Several landowner-requested reroutes have been finalized. These reroutes, which: (i) avoid existing or future residences, an observatory, and several coho salmon-bearing

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48 *Id.* at § 3.4.

49 *Id.* at p. 3.39.

50 *See, e.g., Florida Southeast Connection, LLC, et al.*, 154 FERC ¶ 61,080 at P 71 (2016) (citing pre-filing and route variations as "sufficient steps to minimize adverse economic impacts on landowners and surrounding communities"); *Constitution Pipeline Company, LLC, et al.*, 149 FERC ¶ 61,199 at P 26 (2014), *reh'g denied*, 154 FERC ¶ 61,046 (2016) (citing pre-filing and incorporation of changes to the pipeline route as sufficient, in part, to overcome pipelines inability to obtain easements "with many landowners"). The Commission's failure to explain this departure from precedent was without explanation. *Williams Gas Processing – Gulf Coast Co., L.P.*, 475 F.3d at 326 ("we require [an agency] to supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored") (quoting *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004); *PG&E Gas Transmission v. FERC*, 315 F.3d 383, 388-90 (D.C. Cir. 2003) (vacating and remanding orders in which the Commission "utterly failed to confront" and distinguish applicable precedent); *Wis. Cent. Ltd. v. Surface Transp. Bd.*, 112 F.3d 881, 887 (7th Cir. 1997) ("[I]f the Commission departs from one of its own precedents, it is obligated to articulate a reasoned justification for doing so. . . .").

streams; (ii) reduce visual impact, timber clearing, and crop damage; (iii) improve restoration and reforestation success; and (iv) incorporate the Shasta View Irrigation District Alternative Route mandated by FERC in the FEIS, would have been included in PCGP's proposed implementation plan to be approved by the FERC Staff prior to construction.

In addition to the extensive efforts that PCGP has made, and would continue to make, to minimize landowner impacts, the dominant patterns of land ownership and land use that will be traversed by the PCGP right of way suggest that condemnation will be limited. First of all, 74.5 miles of the total right of way is public land.[51] Of the remaining 157.3 miles of right of way that is in private hands, approximately 61 miles, is held by timber companies. These are sophisticated entities that are familiar with utility easements and with whom PCGP expects to be able to reach mutually acceptable agreements in all or virtually all cases. Indeed, the second and third largest owners of timber land along the right of way have affirmatively supported the Project. As the FEIS concludes, timber operations will not be significantly affected by the pipeline.[52] Much of remainder of the privately owned right of way is agricultural or range land.[53] The FEIS finds that in virtually all cases the effects of the pipeline on these lands will be temporary and the land can be returned to its original use following construction.[54]

The March 11 Order appears to be under the mistaken impression that many more landowners are potentially subject to condemnation than is in fact the case. The March 11 Order states that the privately owned parts of the right of way are held by 630 landowners,

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51 FEIS at Table 4.1.2.1-1

52 *Id.* at p. 4-20.

53 *Id.* at Table 4.1.2.2-1.

54 *Id.* at pp. 4-12, 4-15.

apparently in misplaced reliance upon a statement in a letter submitted by a representative of six landowners.[55] In fact, the number of landowners that hold the privately owned portions of the right of way, defined expansively to include permanent right of way, construction right of way, and temporary extra work areas, is fewer than half that.[56]

As detailed above, the total number of landowners whose property will be traversed by PCGP, and the subset of those landowners that will likely be subject to condemnation, is very small. If the sole adverse effect with which the Commission is concerned is the use of eminent domain authority, and the extent to which eminent domain authority is to be used is a factor, the Commission should look to the likely number of instances in which eminent domain authority will actually be required.[57] The record in this proceeding suggests that many fewer landowners will be subject to condemnation proceedings than is typical for a pipeline project of comparable length.

The March 11 Order balances the possibility—unquantified—that PCGP might have to use eminent domain authority against the public benefits of the Project. However, when discussing its balancing test, the Commission seems to have equated public benefits with commercial need despite the *Certificate Policy Statement*'s clear guidance that public benefits extend well beyond mere commercial need.[58]

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[55] March 11 Order at P 38.

[56] The ownership of the lands on which the right of way will be located changes over time with acquisitions, dispositions and subdivision. As of the date of this request for rehearing, the total number of private owners of land on which the right of way is proposed to be located is 287.

[57] In the primary case cited in the March 11 Order, the project developers appeared likely to use eminent domain authority "to acquire all of the subsurface mineral rights necessary" to construct a natural gas storage cavern, which is far different from PCGP's situation. *Turtle Bayou Gas Storage Company, LLC*, 135 FERC at P 22.

[58] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128 (2000), *order on clarification*, 92 FERC ¶ 61,094 (2000) (providing that "public benefits" can include "any public benefit the applicant may identify").

The March 11 Order's balancing of potential use of eminent domain on the one hand, against the lack of demonstrated commercial need on the other hand, is inappropriate because these are mutually exclusive scenarios.[59] If there is no market need there will be no service agreements, and without service agreements there will be no project. This is a $7.5 billion investment.[60] Such things are not built on speculation.[61] None of the LNG export facilities approved by the Commission has commenced construction without commercial underpinning. Without customer commitments the Project's sponsors will not invest billions in equity and lenders will not supply billions in debt. Furthermore, any Commission order approving the Project would presumably include the condition—so far included in every Commission order approving a pipeline in connection with an LNG export project, save one—that construction may not commence until service agreements have been executed.[62] In addition, as discussed in Section IV

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[59] In fact, it was arbitrary and capricious for the Commission to draw that false equation, and to fail to consider or give weight to the other public benefits shown in the record, including the "substantial evidence of economic and other public benefits" that supported DOE's export authorization under NGA Section 3. *See California Dep't of Water Res. v. FERC*, 341 F.3d 906, 910 (9th Cir. 2003) (order is arbitrary and capricious where Commission did not "consider[] all of the relevant factors in reaching its decision"); *cf. Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1051 (D.C. Cir. 1999) (vacating rule where agency's cost-benefit analysis was incomplete, by excluding certain benefits), *vacated on other grounds sub nom. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001).

[60] Materials on file with the Commission estimate the engineering, procurement and construction ("EPC") cost of PCGP at $1.74 billion. FEIS at p. 5-19. The EPC cost of JCEP has been estimated at $5.3 billion. Press Release, Veresen Inc. at 6 (Mar. 5, 2014), *available at* http://www.vereseninc.com/wp-content/uploads/2014/03/Veresen-Announces-2013-Q4-and-Year-End-Results-March-5-14-final.pdf.

[61] *Compare Turtle Bayou Storage Company, LLC*, 135 FERC ¶ 61,233 (2011).

[62] *See, e.g., Trunkline Gas Co., et al.*, 153 FERC ¶ 61,300 at Ordering Paragraph B(4) (2015) (conditioning the certificate on Trunkline's execution, prior to construction, of a firm service agreement equal to the level of service and in accordance with the terms of service represented in its precedent agreement); *Dominion Cove Point LNG, LP*, 148 FERC ¶ 61,244 at P 18 (2014) (service agreements executed prior to order); *Cameron LNG, LLC*, 147 FERC ¶ 61,230 at Ordering Paragraph M (2014) (requiring Cameron Interstate to execute firm contracts for service equivalent to the levels of service represented in its filed precedent agreements prior to construction); *Corpus Christi Liquefaction, LLC, et al.*, 149 FERC ¶ 61,283 at Ordering Paragraph D(3) (2014) (conditioning the certificate on execution of firm contracts equal to the level of service and in accordance with the terms of service represented in its precedent agreement prior to commencement of construction); *but see*, *Sabine Pass Liquefaction Expansion, LLC, et al.*, 151 FERC ¶ 61,012 (2015) (no condition to execute service agreements in instance even though

below, the Commission also could have conditioned the exercise of eminent domain authority on the submission of precedent agreements. Thus, if there is no market need, there is no project, and if there is no project, there are no adverse consequences.

What the Commission should be weighing against adverse consequences (which only occur if the Project goes forward) is the public benefit that will occur if the Project goes forward. If the Project goes forward, it will be on the basis of customer contractual commitments, which will be indicative of need for gas transportation and gas liquefaction services. Furthermore, the Project has benefits that go beyond satisfying a need for transportation and liquefaction services. The Project represents by far the largest investment proposed for Southern Oregon. Coos County, whose economy has been battered by the decline in the timber industry, has an unemployment rate that is significantly higher than the national average.[63] Shipments from the Port of Coos Bay, once one of the busiest on the US Pacific Coast, have fallen from more than 300 vessels per year in the port's heyday, to around 60 today.[64] As the FEIS indicates, the Project would bring up to 2,100 construction jobs to Southern Oregon.[65] During the operational phase JCEP would provide 145 permanent positions at an annual salary that is more than double the median household income for Coos County.[66] The impact of these investments on the tax base is staggering. In Coos County alone the annual payments that will be

"To date, Creole Trail has not executed a precedent agreement with a shipper to use the Creole Trail Expansion Project facilities in Zone 1 or Zone 2 authorized by this order.").

[63] The Coos County unemployment rate is currently 6.2% while the unemployment rate for the United States is 4.9%. *Local Area Unemployment Statistics*, Oregon Employment Department (retrieved Mar. 28, 2016), *available at* https://www.qualityinfo.org/ed-uesti/?at=1&t1=0000000000, 4104000011~unemprate~y~2000~2016.

[64] FEIS at p. 4-867.

[65] *Id.* at p. 4-815.

[66] *Id.* at p. 4-817.

made by the Project throughout the operating period are equal to approximately 60% of the county's current revenues from taxes of all kinds.[67]

In addition to the direct effects of the investment in Oregon, the Project will have more indirect effects on investment and employment in the production areas that can be accessed through the GTN and Ruby pipeline systems and elsewhere. Even if such effects on the economies of gas-producing areas cannot be specifically identified or precisely measured, the expectation of such effects explains the staunch support for the Project from the Congressional delegations of Colorado, Utah, and Wyoming.[68] The Congressional delegations of Kansas and Missouri support the Project because of the technical and engineering jobs it will support in their states.[69]

In addition to the state and local benefits identified in the Commission's FEIS, the DOE in its order authorizing the export of LNG by JCEP to countries that do not have free trade agreements with the US found that the record in that proceeding contained substantial evidence of regional economic benefits, which included job creation, increased economic activity and increased tax revenues.[70] The DOE also indicated that the export of LNG by JCEP would have broader economic benefits including increased real household income and increased real gross domestic product, attributable in part to wealth transfers from overseas.[71] The DOE also cited the National Export Initiative, established by

[67] *Id.* at p. 4-823.

[68] Comment of Senator John Barrasso, M.D., Representative Cynthia Lummis, Senator Cory Gardner, Representative Scott Tipton, Senator Michael B. Enzi, Representative Dough Lamborn, Senator Orrin G. Hatch, Representative Mike Coffman, Senator Mike Lee, Representative Rob Bishop, Representative Chris Stewart, Representative Jason Chaffetz, Representative Ken Buck, and Representative Mia Love, Docket Nos. CP13-483-000, *et al.* (submitted Jan. 13, 2015).

[69] Comment of Senator Pat Roberts, Senator Jerry Moran, and Representative Kevin Yoder, Docket Nos. CP13-483-000, *et al.* (submitted Mar. 31, 2015); Comment of Senator Roy Blunt, Docket Nos. CP13-483-000, *et al.* (submitted Mar. 20, 2015).

[70] DOE Order at 137-138.

[71] *Id.* at 47-48, 141.

Executive Order, which sets an Administration goal to "improve conditions that directly affect the private sector's ability to export" and "to enhance and coordinate Federal efforts to facilitate the creation of jobs in the United State through the promotion of exports."[72]

Against this massive investment and the associated regional and national economic benefits, the Commission has weighed the uncertain possible use of condemnation authority with respect to a fairly small group of private landowners on whose property the pipeline right of way might be located. The March 11 Order has given veto power to a few handfuls of landowners over a project that the DOE's order and the Commission's own FEIS indicate will have major and widely distributed public benefits.

IV. THE COMMISSION SHOULD NOT HAVE REJECTED THE APPLICATIONS WHEN IT HAD OTHER PROCEDURAL TOOLS AT ITS DISPOSAL TO ELIMINATE THE REMOTE RISK THAT THE PROJECT WOULD PROCEED WITHOUT CUSTOMER AGREEMENTS

A. FERC can condition use of eminent domain authority on PCGP's demonstration of market support.

The Commission has the authority to condition PCGP's use of eminent domain power under the NGA on a confirmation of sufficient market support for the Project. The Commission has broad power to condition certificates of public convenience and necessity. NGA Section 7(e) grants to the Commission "the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."[73] The power of a certificate holder to acquire property "by exercise of the right of eminent domain" under NGA Section 7(h) is one of "the rights granted thereunder." Accordingly,

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72 *Id.* at 141-142.
73 15 U.S.C. § 717f.

the Commission has the statutory authority to condition a certificate holder's use of eminent domain.

The Commission routinely includes conditions in certificate orders on a variety of topics. In such instances, the "conditions [] must be satisfied by an applicant or others before the grant of a certificate can be effectuated."[74] For example, almost all recent certificate orders require that the pipeline have executed firm service agreements prior to commencing construction.[75] Under all of these conditions, the pipeline cannot begin construction of the pipeline until the requisite conditions are met.

The Commission has included conditions in certificate orders regarding eminent domain authority numerous times. For example, in one instance involving Mid-Atlantic Express, the certificate order included a condition that the pipeline "shall not exercise eminent domain authority granted under NGA section 7(h) to acquire permanent rights-of-way on [certain] properties until the required site-specific residential construction plans have been reviewed and approved in writing by the Director of [the Office of Energy Projects ("OEP")]."[76] The Commission also limited Transcontinental Gas Pipe Line

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[74] *Millennium Pipeline Co. LP, et al.*, 100 FERC ¶ 61,277 at P 228 (2002).

[75] Every pipeline but one approved in conjunction with an LNG export terminal either includes this condition or had already executed service agreements prior to obtaining certificate authorization. *See, e.g., Trunkline Gas Co., et al.*, 153 FERC ¶ 61,300 at Ordering Paragraph B(4) (2015) (conditioning the certificate on Trunkline's execution, prior to construction, of a firm service agreement equal to the level of service and in accordance with the terms of service represented in its precedent agreement); *Dominion Cove Point LNG, LP*, 148 FERC ¶ 61,244 at P 18 (2014) (service agreements executed prior to order); *Cameron LNG, LLC*, 147 FERC ¶ 61,230 at Ordering Paragraph M (2014) (requiring Cameron Interstate to execute firm contracts for service equivalent to the levels of service represented in its filed precedent agreements prior to construction); *Corpus Christi Liquefaction, LLC, et al.*, 149 FERC ¶ 61,283 at Ordering Paragraph D(3) (2014) (conditioning the certificate on execution of firm contracts equal to the level of service and in accordance with the terms of service represented in its precedent agreement prior to commencement of construction); *but see, Sabine Pass Liquefaction Expansion, LLC, et al.*, 151 FERC ¶ 61,012 (2015) (no condition to execute service agreements in instance even though "To date, Creole Trail has not executed a precedent agreement with a shipper to use the Creole Trail Expansion Project facilities in Zone 1 or Zone 2 authorized by this order.").

[76] *Mid-Atlantic Express, LLC, et al.*, 126 FERC ¶ 61,019 at Environmental Condition 55 (2009), *order on reh'g*, 129 FERC ¶ 61,245 at P 21 (2009).

Corporation ("Transco") from exercising eminent domain authority until the Director of OEP approved site-specific plans.[77] On rehearing, the Commission explained that a certificate gives condemnation authority unless restricted by the Commission. The restrictions imposed on Transco provided landowners additional rights they otherwise would not have had following the issuance of a certificate.[78] The Commission sometimes limits eminent domain authority to ensure that pipelines do not acquire more land than is needed for the project as well.[79]

The Court of Appeals has found that conditions imposed by the Commission are effective to limit the exercise of eminent domain authority. The Fourth Circuit found that an attempt by Mid-Atlantic Express to obtain a preliminary injunction allowing pre-acquisition entry onto some of the affected properties was inappropriate because "Mid-Atlantic did not have the authority to condemn property" under the conditional language in the certificate order.[80] Thus the Commission has conditioned the exercise of eminent domain authority, and the Court of Appeals has upheld such conditions as effective to prevent condemnation proceedings until the specified conditions have been satisfied.

In this case the Commission could have exercised its statutory authority to prohibit the initiation of condemnation proceedings until PCGP had submitted executed precedent agreements to the Director of OEP.

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[77] *Transcontinental Gas Pipe Line Corp.*, 124 FERC ¶ 61,160 (2008), *order granting clarification*, 125 FERC ¶ 61,249 (2008), *reh'g denied*, 126 FERC ¶ 61,097 (2009).

[78] *Transcontinental Gas Pipe Line Corp.*, 126 FERC at PP 46-68.

[79] *See, e.g.*, *ETC Tiger Pipeline, LLC*, 131 FERC ¶ 61,010 at P 100 (2010) (only permitting a 50-foot-wide permanent right-of-way); *Gulf South Pipeline Co., L.P.*, 119 FERC ¶ 61,281 at P 52 (2007) (limiting Gulf South's eminent domain authority to acquiring permanent rights-of-way less than 50 feet in width); *Transcontinental Gas Pipe Line Corp.*, 93 FERC ¶ 61,241, p. 61,792 (2000), *order denying reh'g*, 94 FERC ¶ 61,128 (2001), *order denying clarification*, 95 FERC ¶ 61,116 (2001) (prohibiting use of eminent domain with respect to later phases of a project when only two phases were approved).

[80] *Mid Atlantic Express, LLC v. Baltimore Co., Md.*, 410 F. App'x. 653, 657 (4th Cir. 2011).

B. FERC can stay its order and reopen the record to receive additional evidence of demand.

Alternatively, the Commission can re-open the record if it believes that the Applicants have still not provided adequate evidence of market support. The Commission may reopen the record in a proceeding when there is "good cause" due to "changes in conditions of fact or of law or by the public interest."[81] "Good cause" "consist[s] of extraordinary circumstances . . . a change in circumstances that is more than just material, but goes to the very heart of the case."[82] The Commission's sole basis for rejecting PCGP's application was a lack of market support. The Commission's sole basis for rejecting JCEP's application was that the Commission had rejected PCGP's application. Now that JCEP and PCGP have presented evidence of market support, with the prospect of more to follow, the basis for the Commission's decision has changed. New evidence that changes the facts regarding the sole basis for the March 11 Order strikes at the "very heart" of this proceeding.

Similar to the Commission's general policy against accepting new evidence on rehearing, resistance to reopening the record is rooted in the need for finality of an administrative proceeding.[83] As discussed above, however, the policy of administrative finality is not relevant in this case because the decision was without prejudice to the filing of a new application. Staying the order denying the applications and reopening the record places the parties in a similar position to what they would occupy if new applications were filed, but without the delay and wasted resources associated with a new application. Commission rules and policy support reopening the record in this proceeding to receive

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[81] 18 C.F.R. § 385.716 (2015).

[82] *Enbridge Pipelines (KPC)*, 100 FERC ¶ 61,260 at P 382 (2002) (declining to reopen record for events occurring after the test period of a pipeline rate case).

[83] *CMS Midland, Inc.*, 56 FERC ¶ 61, 177, p. 61,624 (1991), *reh'g denied*, 56 FERC ¶ 61,361 (1991).

additional evidence of market need as it becomes available if the Commission elects not to approve the applications upon rehearing.

The Applicants intend to continue to seek customers while this request for rehearing is pending. However, with the cloud of the March 11 Order hanging over the Project, this may be difficult. If the Commission were to stay the March 11 Order and re-open the record, the Applicants anticipate that the remaining customers could be obtained within six months.

V. FILING A NEW APPLICATION IS NOT A VIABLE ALTERNATIVE

The March 11 Order, which denies PCGP's application solely because PCGP has not submitted sufficient evidence of market need, and denies JCEP's application solely because the Commission has denied PCGP's application, suggests that JCEP and PCGP can submit "a new application to construct and/or operate LNG export facilities or natural gas transportation facilities should the companies show a market need for these services in the future." Requiring the applicants to go to the back of the line because the market has not produced contracts on the timetable envisioned by the Commission is not an efficient or commercially feasible approach.

The sponsors of JCEP and PCGP had expended approximately $300 million on project development through the end of 2015, and continue to spend substantial sums on development. The Applicants have been actively engaged in the FERC's process for over three years. The Commission's staff has worked 31 months and expended considerable resources compiling an FEIS.

The March 11 Order suggests that to address one specific deficiency in the record to date, the parties should be forced to repeat the entire process. There can be no suggestion that, having been through it once, the process will be more efficient and less time consuming the second time around. The Commission is subject to a mandatory pre-filing process under NGA Section 3A, which means that even if the Applicants wanted to submit the exact same applications they would have to wait a minimum of six months before doing so.[84] And having submitted those applications, there is no reason to believe that the Commission's processing would go any more quickly. Although the FEIS acknowledges that the PCGP proposal was "basically the same" as had been made and approved by the Commission in Docket No. CP07-441-001, and that the route of PCGP was "relatively unchanged,"[85] and that the prior FEIS could therefore be relied upon in this proceeding, the process of compiling the second FEIS still took 31 months.[86]

JCEP is attractive to the Japanese utility market in part because, if the customers make a contractual commitment to the Project promptly, the Project can deliver LNG in the required time frame. If the Project were required to endure a further lengthy Commission process, meeting the requirements of the market in the required time frame would not be possible. Furthermore, if the Commission on rehearing were to sustain its decision to reject the applications because precedent agreements had not been executed as of March 11, that decision would revive concerns in the global LNG industry regarding regulatory risk in the United States which would make it very difficult for JCEP, and perhaps other LNG projects in the US, to market liquefaction services.

VI. RELIEF REQUESTED

The Commission should grant rehearing and should grant the applications of JCEP and PCGP.

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84 15 U.S.C. § 717b-1.

85 FEIS at pp. 1-10-11.

86 *Id.* at p. 1-4.

Alternatively, the Commission should grant rehearing and should grant the applications of JCEP and PCGP, subject to a condition that would prevent the initiation of condemnation proceedings until executed precedent agreements are submitted to the Commission staff.

Alternatively, the Commission should grant rehearing, stay the March 11 Order, and re-open the record for a six-month period to receive additional evidence of customer support.

Respectfully submitted,

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April 8, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon each person designated on the Official Service List compiled by the Secretary in this proceeding.

Dated at Washington, DC this 8th day of April, 2016.

*/s/ Victoria R. Galvez*____________
Victoria R. Galvez
Attorney for Jordan Cove Energy Project, L.P.

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