

**ORAL ARGUMENT HAS NOT BEEN SCHEDULED**

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Nos. 21-1122 & 21-1157 (consolidated)

In the  
**United States Court of Appeals**  
**For the District of Columbia Circuit**

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NEW FORTRESS ENERGY, INC,  
*Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,  
*Respondent.*

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On Petition for Review of Orders of the Federal Energy Regulatory Commission

**MOTION OF EL PUENTE DE WILLIAMSBURG, INC.- ENLACE LATINO DE ACCIÓN CLIMÁTICA; UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO; COMITÉ DIÁLOGO AMBIENTAL, INC.; COMITÉ YABUCOEÑO PRO- CALIDAD DE VIDA, INC.; ALIANZA COMUNITARIA AMBIENTALISTA DEL SURESTE, INC.; SIERRA CLUB PUERTO RICO, INC.; MAYAGÜEZANOS POR LA SALUD Y EL AMBIENTE, INC., COALICIÓN DE ORGANIZACIONES ANTI-INCINERACIÓN, INC.; AMIGOS DEL RÍO GUAYNABO, INC.; CAMPAMENTO CONTRA LAS CENIZAS EN PEÑUELAS, INC., FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS**

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the Amici Curiae certifies the following:

**(A) Parties and Amici.** Except for the following, all parties, intervenors, and amici appearing in proceedings before the Federal Energy Regulatory Commission and this Court are, to the best of my knowledge, listed in the Certificate as to Parties, Rulings and Related Cases filed by counsel for Petitioner New Fortress Energy, Inc., on December 1, 2021:

- Earthjustice, Raghu Murthy, Laura B. Arroyo, Jordan Luebke, Lorena I. Vélez Miranda, Rolando Emmanuelli Jiménez, Jessica Méndez Colberg, Ruth Santiago, and Pedro Saade, are counsel to movant *Amici Curiae* in support of Respondents in Nos. 21-1122 & 21-1157 (consolidated).

**(B) Rulings Under Review.** References to the rulings at issue appear in the Brief for Petitioner New Fortress Energy, Inc.

**(C) Related Cases.** The Amici Curiae are unaware of any related cases in this Court or any other court.

Dated: February 8, 2022

*/s/ Raghu Murthy*

\_\_\_\_\_

Raghu Murthy

*Counsel for Amici Curiae*

**CIRCUIT RULE 29(a)(4)(E) STATEMENT**

Pursuant to D.C. Circuit Rule 29(a)(4)(E), counsel for Amici Curiae certifies that:

- Counsel for Amici Curiae authored this brief in whole and without participation by other parties or their counsel;
- No party or their counsel contributed money that was intended to fund preparing or submitting this brief; and
- No person other than the amicus curiae, its members, or its counsel— contributed money that was intended to fund preparing or submitting this brief.

Dated: February 8, 2022

*/s/ Raghu Murthy*

\_\_\_\_\_

Raghu Murthy

*Counsel for Amici Curiae*

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for amici curiae states that no party to this brief, including counsel Earthjustice, is a publicly held corporation, issues stock, or has a parent corporation.

Dated: February 8, 2022

*/s/ Raghuram Murthy*

\_\_\_\_\_

Raghuram Murthy

*Counsel for Amici Curiae*

## MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Federal Rule of Civil Procedure and Circuit Rule 29(b), El Puente de Williamsburg, Inc.- Enlace Latino de Acción Climática; Unión de Trabajadores de la Industria Eléctrica y Riego; Comité Diálogo Ambiental, Inc.; Comité Yabucoño Pro- Calidad de Vida, Inc.; Alianza Comunitaria Ambientalista del Sureste, Inc.; Sierra Club Puerto Rico, Inc.; Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti-Incineración, Inc.; Amigos del Río Guaynabo, Inc.; and Campamento Contra las Cenizas en Peñuelas, Inc. (collectively, the Amici Curiae), respectfully request leave to file the following brief in Support of Respondent Federal Energy Regulatory Commission in the above-captioned matter. In support of that motion, Amici would show the following:

1. The Amici Curiae—Puerto Rican environmental, community, and labor non-profit organizations focused on promoting community safety, environmental health, and renewable energy—have compelling interests in this appeal. Each filed a Joint Protest and sought to intervene in the administrative case before the Commission from which this appeal arose. Although the Commission had not sought interventions in that docket, it found good cause to grant the Amici Curiae’s intervention, and later credited the Amici Curiae’s

filings for “provid[ing] information that has assisted in [the Commission’s] decision-making process” in the Order on Show Cause.

2. The Federal Energy Regulatory Commission’s (Commission”) Order asserting jurisdiction over the New Fortress Energy liquefied gas import terminal reached the appropriate conclusion, in spite of precedent that contradict the unambiguous text of the Natural Gas Act, by reading an otherwise non-existent limitation on the Commission’s broad authority over liquefied natural gas import terminals to only those that connect to a gas pipeline.

3. This mistaken interpretation has caused a lack of clarity about the boundaries of the Commission’s jurisdiction over projects which is ripe for exploitation by industry. Such is the case of the New Fortress LNG import terminal here at issue, in which construction and operation of jurisdictional facilities has taken place without the federally mandated regulatory and community oversight processes contemplated by the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321–4347.

4. Amici respectfully ask Court to affirm the Commission’s Order, but also to rectify the flawed test which has led to this situation, clarifying the Commission’s broad statutory responsibility to regulate LNG import and

export terminals, and bringing its interpretation back in line with the unambiguous mandate of the Natural Gas Act.

For the foregoing reasons, the Amici Curiae respectfully requests leave to file the enclosed amicus brief in support of Respondent Federal Energy Regulatory Commission, and urging affirmance.

Respectfully submitted on February 8, 2022.

*/s/ RAGHU MURTHY\**

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 8, 2022, I filed the foregoing Motion of El Puente de Williamsburg, Inc.- Enlace Latino de Acción Climática; Unión de Trabajadores de la Industria Eléctrica y Riego; Comité Diálogo Ambiental, Inc.; Comité Yabucoño Pro- Calidad de Vida, Inc.; Alianza Comunitaria Ambientalista del Sureste, Inc.; Sierra Club Puerto Rico, Inc.; Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti-Incineración, Inc.; Amigos del Río Guaynabo, Inc.; and Campamento Contra las Cenizas en Peñuelas, Inc. (collectively, the *Amici Curiae*) for Leave to File *Amicus Curiae* Brief in Support of Respondent and Rule 26.1 Disclosure Statement through the Court's CM/ECF system, which will send a notice of filing to all registered CM/ECF users.

Dated: February 8, 2022

/s/ Raghu Murthy

Raghu Murthy

*Counsel for Amici Curiae*

**ORAL ARGUMENT HAS NOT BEEN SCHEDULED**

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v.

FEDERAL ENERGY REGULATORY COMMISSION,  
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On Petition for Review of Orders of the Federal Energy Regulatory Commission

**FINAL BRIEF OF EL PUENTE DE WILLIAMSBURG, INC.- ENLACE LATINO DE ACCIÓN CLIMÁTICA; UNIÓN DE TRABAJADORES DE LA INDUSTRIA ELÉCTRICA Y RIEGO; COMITÉ DIÁLOGO AMBIENTAL, INC.; COMITÉ YABUCOÑO PRO- CALIDAD DE VIDA, INC.; ALIANZA COMUNITARIA AMBIENTALISTA DEL SURESTE, INC.; SIERRA CLUB PUERTO RICO, INC.; MAYAGÜEZANOS POR LA SALUD Y EL AMBIENTE, INC., COALICIÓN DE ORGANIZACIONES ANTI-INCINERACIÓN, INC.; AMIGOS DEL RÍO GUAYNABO, INC.; CAMPAMENTO CONTRA LAS CENIZAS EN PEÑUELAS, INC., AS AMICI CURIAE IN SUPPORT OF RESPONDENT AND AFFIRMANCE**

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/S/ RAGHU MURTHY\*

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Dated: February 8, 2022

*Counsel for Amici Curiae*

*\*An admitted member of this Court.*

**CERTIFICATE OF COUNSEL AS TO PARTIES,  
RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1) and Federal Rule of Appellate Procedure 26.1, counsel for Amici Curiae Earthjustice certify as follows:

- A. Parties and Amici.** All parties, intervenors, and amici appearing in this Court are listed or referenced in the Certificate as to Parties, Rulings, and Related Cases filed by New Fortress Energy, Inc. in their Opening Brief on December 1, 2021.
- B. Rulings Under Review.** Petitioner New Fortress Energy Inc. seeks review of the following Federal Energy Regulatory Commission decisions:
1. “Order on Show Cause” in *New Fortress Energy LLC*, 174 FERC ¶ 61,207, FERC Docket No. CP20-466-000 (Mar. 19, 2021) (R. 21), JA \_\_; and
  2. “Order Addressing Arguments Raised on Rehearing,” in *New Fortress Energy LLC*, 176 FERC ¶ 61,031, FERC Docket No. CP20-466-001 (July 15, 2021) (R. 31), JA \_\_.
- C. Related Cases.** The case now pending before this Court was not previously before this Court or any Court other than the Federal Energy Regulatory Commission.

Dated: February 8, 2022

/s/ Raghu Murthy  
Raghu Murthy

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## GLOSSARY

Act	Natural Gas Act, 15 U.S.C. §§ 717-717z
Commission	Respondent Federal Energy Regulatory Commission
Initial Order	<i>New Fortress Energy, LLC</i> , 174 FERC ¶ 61,207 (2021) (R. 23), JA __.
Joint Protest	Joint Protest and Motion to Intervene of Comité Pro Seguridad y el Ambiente del Barrio Sabana et al, <i>New Fortress Energy LLC</i> , CP20-466-000 (filed July 31, 2020) (R. 4) JA __.
LNG	Liquefied natural gas
LNG Terminal	New Fortress Energy, Inc.’s liquefied natural gas import terminal in San Juan, Puerto Rico
New Fortress	Petitioner New Fortress Energy, Inc.
Order to Show Cause	Order to Show Cause re New Fortress Energy under CP20-466, <i>New Fortress Energy, LLC</i> , 171 FERC ¶ 61,230 (June 8, 2020), (R.1), JA __.
Pet. Brief	Petitioner New Fortress Energy, Inc.’s Opening Brief, <i>New Fortress Energy Inc., v. Federal Energy Regulatory Commission</i> , Nos. 21-112 & 21-1157 (filed Dec. 1, 2021)
PREPA	Puerto Rico Electric Power Authority
Rehearing Order	<i>New Fortress Energy LLC</i> , 176 FERC ¶ 61,031, P 14 (2021), (R. 31), JA __.

Resp. Brief

Respondent Federal Energy Regulatory Commission's  
Brief, *New Fortress Energy Inc., v. Federal Energy  
Regulatory Commission*, Nos. 21-1122 & 21-1157 (filed  
Feb. 1, 2022)

**CERTIFICATE OF COUNSEL REGARDING AUTHORITY**  
**TO FILE AND SEPARATE BRIEFING**

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), Counsel for amici curiae may file a brief accompanied by a motion for leave of court. Pursuant to D.C. Circuit Rule 29(d), counsel for Amici Curiae El Puente de Williamsburg, Inc.- Enlace Latino de Acción Climática; Unión de Trabajadores de la Industria Eléctrica y Riego; Comité Diálogo Ambiental, Inc.; Comité Yabucoño Pro-Calidad de Vida, Inc.; Alianza Comunitaria Ambientalista del Sureste, Inc.; Sierra Club Puerto Rico, Inc.; Mayagüezanos por la Salud y el Ambiente, Inc., Coalición de Organizaciones Anti-Incineración, Inc.; Amigos del Río Guaynabo, Inc.; and Campamento Contra las Cenizas en Peñuelas, Inc., certifies that no separate *amicus* has appeared in this matter as of the date of the filing of this brief.

Dated: February 8, 2022

/s/ Raghu Murthy  
Raghu Murthy

**BRIEF IN SUPPORT OF AFFIRMANCE OF THE FEDERAL ENERGY  
REGULATORY COMMISSION'S ORDER FINDING JURISDICTION**

Pursuant to the Court's July 29, 2021, order, and D.C. Cir. R. 28, 29, and 32, the Amici submit this Brief in Support of Affirmance of the Federal Energy Regulatory Commission's Order Finding Jurisdiction over the New Fortress Energy San Juan liquefied natural gas terminal in Puerto Rico. The Amici are represented in this matter by Earthjustice, an environmental advocacy organization. Any communications regarding this matter may be directed to the Northeast Regional Office of Earthjustice in Earthjustice at 48 Wall Street, 15th Floor New York, NY 10005, (212)-823-4991, and [rmurthy@earthjustice.org](mailto:rmurthy@earthjustice.org)

Pursuant to the Court's July 29, 2021, order, and D.C. Cir. R. 28, 29, and 32, the Amici submit this Brief in Support of Affirmance of the Federal Energy Regulatory Commission's Order Finding Jurisdiction over the New Fortress Energy San Juan liquefied natural gas terminal in Puerto Rico. The Amici are represented in this matter by Earthjustice, an environmental advocacy organization. Any communications regarding this matter may be directed to the Northeast Regional Office of Earthjustice in Earthjustice at 48 Wall Street, 19th Floor New York, NY 10005, (212)-823-4991, and [rmurthy@earthjustice.org](mailto:rmurthy@earthjustice.org).

## **STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE**

The Amici Curiae have compelling interests in this appeal. Each filed protests and sought to intervene in the administrative case giving rise to this appeal before the Federal Energy Regulatory Commission (Commission). Although the Commission had not sought interventions in that docket, it found good cause to grant the Amici Curiae's intervention. Initial Order, P 7-8. The Amici Curiae's participation in that docket resulted in a more robust record, so much so that the Commission specifically credited the Amici Curiae's filings for "provid[ing] information that has assisted in [the Commission's] decision-making process" in the Order on Show Cause. *Id.* P 7.

The Amici Curiae listed below are environmental, community, and labor non-profit organizations focused on promoting community safety, environmental health, and renewable energy. These groups are comprised of members who live in Puerto Rico and who have been directly affected by the Liquefied Natural Gas ("LNG") Terminal, including people who live and work in the neighborhoods adjacent to the LNG Terminal. The LNG Terminal exposes these nearby residents, workers, and the Amici Curiae to environmental and safety risks. The Amici Curiae have been subjected to the LNG Terminal's numerous and as-yet unevaluated safety and environmental impacts.

The particular identities and interests of the Amici Curiae are set out below:

- i. El Puente de Williamsburg, Inc. – Enlace Latino de Acción Climática is a group of Puerto Rican residents concerned about the impacts of climate change on the archipelago. El Puente promotes multisector discussions on the predictable effects of climate change scenarios; generates discussions of mitigation and adaptation alternatives and their viability for Puerto Rico; and determines optimal parameters for planning for climate change, sea level rise, food security, water availability, and the impacts of power generation on climate change. The New Fortress LNG terminal directly contradicts the goals and concerns of El Puente by furthering Puerto Rico's energy grid's reliance on fossil fuels, which El Puente and the people of Puerto Rico have actively rallied against. Moreover, some El Puente members are residents of the communities closest to the New Fortress LNG facilities, including the Sabana and Emilia Barrios of the Municipality of Guaynabo. Barrio Sabana neighbors Puerto Nuevo Bay, opposite the site of the New Fortress LNG Terminal, leaving their homes and families within 500 meters of the terminal's operations. The risks of an accident occurring at the terminal are of grave concern to the residents of the Barrio Sabana and El Puente members. These risks are exacerbated

- by the presence of the nearby PUMA Energy Dock and its pipeline system and the Cataño Oil Dock. Imposing an additional hydrocarbon operation in this space compounds the cumulative threat to the safety and well-being of residents of the Barrio Sabana.
- ii. Unión de Trabajadores de la Industria Eléctrica y Riego (UTIER) was founded in the early 1940's and is one of four major labor unions that represent Puerto Rico Electric Power Authority's (PREPA) employees, including workers at the San Juan Power Plant, adjacent to the New Fortress LNG terminal, revaporization, trucking and other industrial installations. Its members are currently responsible for the operation of PREPA's power plants. UTIER's job is to protect and defend PREPA's workers, as well as negotiate collective bargaining agreements on their behalf. UTIER also represents PREPA retirees. Furthermore, UTIER is cognizant and supportive of the Puerto Rico Energy Public Policy Act, Act No. 17-2019 provision which established a 100% renewable energy goal by 2050. The New Fortress LNG Terminal and other industrial installations adversely impact the health, welfare, and safety of UTIER's membership. The New Fortress LNG Terminal impairs PREPA's capacity to comply with the Renewable Portfolio Standard. Therefore, UTIER's

interests are directly affected by the LNG terminal. Moreover, UTIER's members are also PREPA ratepayers.

- iii. Sierra Club Puerto Rico, Inc. (Sierra Club PR) is a local chapter of the biggest, oldest, and most influential environmental organization in the United States. Some of Sierra Club PR's members are residents of the communities closest to the New Fortress LNG facilities. Founded in 1892, the Sierra Club has more than three million members and followers, all inspired by the marvels of nature. Sierra Club's mission is to explore, enjoy, and protect natural treasures. Sierra Club's Puerto Rico chapter was founded in 2005. Since its beginning, the chapter has collaborated with different communities and community-based organizations to protect natural areas, promote public policies that protect the public health and environment, mobilize communities to resist pollution projects such as a proposed methane gas pipeline and waste incinerators, and many other environmental victories. After Hurricane Maria, the chapter has been helping develop sustainable and self-sufficient projects in communities around the island. Sierra Club PR directly opposes the new development of fossil fuel-based energy production. The New Fortress LNG terminal is antithetical to the mission of the Sierra Club. Moreover, some Sierra Club members are residents of the communities closest to the New Fortress

LNG facilities, including the Sabana and Emilia Barrios of the Municipality of Guaynabo. Barrio Sabana neighbors Puerto Nuevo Bay, opposite the site of the New Fortress LNG Terminal, leaving their homes and families within 500 meters of the terminal's operations. The risks of an accident occurring at the terminal are of grave concern to the residents of the Barrio Sabana and the Sierra Club. These risks are exacerbated by the presence of the nearby PUMA Energy Dock and its pipeline system and the Cataño Oil Dock. Imposing an additional hydrocarbon operation in this space compounds the cumulative threat to the safety and well-being of residents of the Barrio Sabana.

- iv. Comité Diálogo Ambiental, Inc. is a community environmental group composed of residents of the Municipality of Salinas and the Guayama Region. The organization promotes the general welfare of the communities it serves through education and citizen capacity building. It is focused on the adverse impacts of human activities on the ecological balance of natural systems and the importance of restoring the environment. Comité Diálogo Ambiental works to promote conditions under which humans and the environment can exist in harmony to fulfill economic, social, and other needs of present and future generations. The New Fortress LNG terminal

presents a threat to the goals and mission of the organization, as it poses a major cumulative threat to the local ecological balance.

- v. Comité Yabucoeño Pro-Calidad de Vida, Inc. is a non-profit community-based group that ensures Yabucoa residents enjoy economic, environmental, and social development. This organization views effective commitment of diverse civic groups, religious organizations, and educational institutions as a key factor in developing and promoting solutions to the Yabucoa community's environmental, economic, and social problems. The New Fortress LNG terminal poses a threat to its mission by undermining the stated desires of the community in which it is operating by ignoring public opposition to new fossil fuel development in Puerto Rico.
- vi. Alianza Comunitaria Ambientalista del Sureste, Inc. is a non-profit environmental organization whose members are from Humacao, Yabucoa, Las Piedras, Caguas, and Patillas. It was created in response to the disposal of coal ash in the Humacao landfill. This organization raises awareness in the communities of Humacao and neighboring towns of the health impacts from coal combustion and coal ash. Also offers talks and conferences on renewable energy, seed harvesting, and the public debt of Puerto Rico. The organization has dedicated time and resources to moving Puerto Rico away

- from reliance on fossil fuels; however, the New Fortress LNG terminal further complicates these efforts by increasing the reliance of Puerto Ricans on fossil fuels for their energy needs.
- vii. Mayagüezanos por la Salud y el Ambiente, Inc. is a community and environmental organization offering educational, organizational, research, and participatory services aimed at the defense of natural resources, mainly in the western area of Puerto Rico. The organization is a co-manager of the Caño Boquilla Natural Reserve. It focuses on the Reserve, renewable energy, and the quality and protection of coastal waters and the rivers that nourish them. The New Fortress LNG terminal puts all these interests at risk through operating without proper oversight or community input.
- viii. Coalición de Organizaciones Anti Incineración, Inc. is a coalition of citizens and more than 35 organizations concerned about waste incinerators in Puerto Rico, especially the solid waste incinerator proposed by Energy Answer Arecibo, LLC, in Arecibo. Some of its members are residents of the communities closest to the New Fortress LNG terminal. This organization promotes clean energy and opposes the generation of energy with incineration. The New Fortress LNG terminal contradicts their goals by operating an LNG terminal which provides fossil fuels to the nearby incineration-based energy producer.

- ix. Amigos del Río Guaynabo, Inc. is an environmental and community organization created for the defense of the natural resources of Puerto Rico, particularly in the form of water resources and the New Fortress LNG terminal directly poses a threat to these water resources of the island by transporting LNG via container ships in an already heavily trafficked region of Puerto Rico.
- x. Campamento Contra las Cenizas en Peñuelas, Inc. is a community and environmental non-profit organization dedicated to the fight against combustion residue from fossil fuel energy generation. Its mission is to raise community awareness about the dangers of fossil-fuel based energy generation and the urgency of ending Puerto Rico's reliance on fossil fuels, such as coal, petroleum, and methane, as soon as possible. The New Fortress LNG terminal furthers Puerto Rico's reliance of fossil fuel energy generation, thus undermining the work of Campamento Contra las Cenizas en Peñuelas, Inc.

#### **STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS**

Pursuant to Fed. R. App. P. 29(c), Amici Curiae state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than Amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

## **SUMMARY OF ARGUMENT**

We urge the Court to affirm the determination of the Federal Energy Regulatory Commission (Commission”) that the New Fortress Energy liquefied gas import terminal in San Juan is subject to the Commission's jurisdiction. Additionally, we ask the Court to consider rectifying the test by which the Commission currently evaluates its jurisdiction over liquefied gas terminals—specifically, the Commission’s interpretation of the Natural Gas Act (Act) that regards a terminal’s connection to a pipeline as a jurisdictional threshold. This interpretation, which contradicts the plain language of the Act, is arbitrary, capricious, and otherwise not in accordance with the law.

New Fortress exploited a lack of clarity over the pipeline requirement to build an uneconomic, unreliable, and polluting liquefied natural gas terminal in the midst of several environmental justice communities. Further, it did so without any community input and without the comprehensive, rigorous environmental and safety reviews that the Commission would have conducted, prior to construction, under the National Environmental Policy Act. The current test for jurisdiction over LNG Terminals failed to protect the impacted communities. This debacle demonstrates the need for this Court to affirm Commission jurisdiction over facilities like the New Fortress LNG Terminal, and to clarify the test for Commission jurisdiction to ensure that other similar facilities do not escape Commission review.

## ARGUMENT

The Court should affirm that the Commission properly asserted Natural Gas Act jurisdiction over New Fortress' San Juan LNG Terminal. This finding flows from the plain meaning of the Act, which is the controlling authority over LNG Terminals and Commission jurisdiction thereof. Section 2(11) of the Act defines an LNG Terminal as including “all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country...” The LNG Terminal at matter in this case is an onshore LNG import terminal that is used to receive, gasify, and transport imported gas. Most of that gas is transported, via a short pipeline, to the LNG Terminal's primary customer: the San Juan Power Plant. For the reasons detailed below, the LNG Terminal fits squarely within the Commission's jurisdiction under the Act.

**I. BECAUSE NEW FORTRESS' LNG TERMINAL “RECEIVES” IMPORTED LNG VIA BULK WATERBORNE VESSEL, “UNLOADS,” “GASIF[IES]” AND “TRANSPORTS” THAT FUEL, IT IS SUBJECT TO THE COMMISSION’S NATURAL GAS ACT AUTHORITY INDEPENDENT OF ANY CONNECTION TO A “PIPELINE.”**

While the Court here could rightly find that the Commission has jurisdiction over New Fortress Energy, Inc.'s (“New Fortress”) liquified natural gas terminal for the reasons provided in the Commission's orders and the Commission's response

brief,<sup>1</sup> the Court could also find that the Commission has jurisdiction solely based upon a plain reading of the Natural Gas Act. Even a cursory review of the relevant statutory text reveals that there is no limitation whatsoever in the Act limiting the Commission's authority to over only those facilities that are connected via a pipeline. Any Commission ruling which reads such facially incompatible restrictions into the Act's mandate to regulate as "LNG terminals ... *all* natural gas facilities ... that are used to receive, unload, load, store, [or] transport ... natural gas," 15 U.S.C. § 717a(11) (emphasis added), violates the "unambiguously expressed intent of Congress" and must be reversed. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). By clarifying that jurisdiction under the Act does not turn on the presence of a pipeline, the Court could appropriately affirm the Commission's jurisdictional decision while avoiding the entire morass over whether the New Fortress facility utilizes a "pipeline" or not, instead basing its decision on the clear authority provided in the Act.<sup>2</sup>

In the context of LNG facilities, there is no question that section 3 of the Act applies to non-pipeline means of transporting natural gas. Here, pursuant to section 3, the Act broadly defines "LNG terminals" to include "all natural gas facilities...

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<sup>1</sup> See Resp. Brief at 44-56.

<sup>2</sup> See also Rehearing Order, P 2 (R. 31) (Chairman Glick and Comm'r Clements concurring) ("If we simply construed the actual text of the statute, we would not need to engage in this tortured analysis regarding what constitutes a pipeline").

that are used to receive, unload, load, store, [or] transport ... natural gas”). 15 U.S.C. § 717a(11). This is necessarily distinct from the Commission’s jurisdiction over “transportation facilities” pursuant to a separate designation of authority under section 7 of the Act. 15 U.S.C. § 717f(a). As noted by former FERC Commissioner Norman Bay, “[t]he former [section 3 authority] is clearly broader than the latter [section 7 authority], and had Congress intended a more limited approach it could have used the language of section 7 in section 3.” *Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163 (2014) (Bay, concurring in part and dissenting in part), *see also Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020) (“[T]his Court may not narrow a provision’s reach by inserting words Congress chose to omit.”): *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) (plurality opinion) (The Court’s “duty [is] to respect not only what Congress wrote but, as importantly, what it didn’t write”). It is therefore well within FERC’s mandate under section 3 of the Act to exercise jurisdiction over those LNG terminals that have similar characteristics to the New Fortress facility, whether or not there exists a pipeline.

The Court here should reject attempts to “graft concepts developed under section 7 of the Act,” (a pipeline requirement), to section 3 proceedings. *Pivotal LNG, Inc.*, 151 FERC ¶ 61,006, 61,059 (2015) (Bay Commission, dissenting at P 5). There is little doubt that Congress purposefully made clear that “there is a distinction between domestic transportation or sales — which are only jurisdictional if they are

interstate in character — and foreign imports or exports, all of which are covered.”

*Id.* (citing 15 U.S.C. § 717(b)).

Indeed, Chairman Glick and Commissioner Clements have recently, and forcefully, argued this exact point, contending that “[n]owhere does the statute say that a facility must be connected to a pipeline to qualify as an LNG terminal and, thus, come within the Commission’s jurisdiction under section 3.” Initial Order, P 3, (Glick, Chairman and Clements, Comm’r, concurring). Furthermore, the Commissioners also agreed that the Commission ought to “revisit Shell to ensure that we are carrying out our statutory responsibilities under the letter of the law.” *Id.* The commissioners repeated this argument in their response to New Fortress’s rehearing request, where the commissioners again reiterated that there is no language in “section 3 of the Natural Gas Act (NGA)112 or section 2(11), which defines ‘LNG terminal,’ that says or implies that a facility must be connected to a pipeline to fall within our jurisdiction under the NGA.” Rehearing Order, P 1 (Glick, Chairman and Clements, Comm’r, *concurring*).

Additionally, neither FERC’s administrative history nor the Act’s legislative history provide support for the notion that the existence of a pipeline is a key jurisdictional litmus test for FERC oversight of section 3 facilities. In 1970, the Commission issued a proposed rulemaking asserting jurisdiction over LNG transported via truck, train, and boat. 35 Fed. Reg. 2076 (1970). However, after

public comments challenged the Commission's jurisdiction over transportation of LNG through any means other than a pipeline, the Commission issued an Order Terminating the Proposed Rulemaking. *See* 49 F.P.C. 1078, 1973 WL 13672 (1973).

The Commission based its reasoning over fifty years ago on the alleged goal of the relevant legislation, as exemplified by the record of the debates from Congress. Specifically, the stated goal of the legislation was declared to be to “[give] the Federal Power Commission [(now the Federal Energy Regulatory Commission)] the power to fix the cost of transportation of natural gas shipped in interstate commerce and the wholesale price which may be charged for it at the consuming centers.” 81 Cong. Rec. 6726 (1937), [https://www.govinfo.gov/app/collection/crecb/crecb/Volume%20081%20\(1937\)](https://www.govinfo.gov/app/collection/crecb/crecb/Volume%20081%20(1937)). However, the legislative history as cited in the Order Terminating Proposed Rulemaking does not suggest the necessity of pipelines as a threshold for exercising the Commission's jurisdiction under the Act. *Id.* at 6720-33. Instead, legislators spoke in very general terms, such as “transportation” and “sale.” *Id.*

For this reason, the Court should correct the Commission's prior interpretation of the Act that unduly limits the scope of the Act's applicability exclusively to LNG terminals with a pipeline, by rejecting the branch of mistaken decisions perpetuating that interpretation. *See, e.g., Shell U.S. Gas & Power, LLC*, 148 FERC ¶ 61,163 (2014); *Emera CNG, LLC*, 148 FERC ¶ 61,219 (2014); *Pivotal LNG, Inc.*, 148 FERC

¶ 61,164 (2014). Consequently, this Court should affirm that New Fortress’ San Juan LNG Terminal is jurisdictional without reaching the pipeline issue, since the Terminal “receive[s], unload[s], . . . transport[s], [and] gasif[ies]. . . natural gas that is imported to the United States from a foreign country” via bulk waterborne vessel. 15 U.S.C. § 717a(11). Indeed, any other interpretation introduces a liquified-natural-gas-terminal-sized loophole into the Commission’s jurisdictional oversight.

**II. THE COMMISSION PROPERLY FOUND JURISDICTION OVER NEW FORTRESS’ TERMINAL BECAUSE IT CONNECTS TO A PIPELINE EVEN UNDER SHELL, WHICH DEFINES A “PIPELINE” BY ITS FUNCTION, NOT PHYSICAL ATTRIBUTES.**

Although the Commission’s holding in *Shell* plainly contradicts the text of the Natural Gas Act, even if this Court does not repudiate that interpretation, the Commission’s Order on Show Cause still properly recognized Section 3 authority over New Fortress’ San Juan LNG Terminal. If this Court is not moved to disturb *Shell* and the requirement it imposes—absent from the text of the Act—that jurisdiction over a liquefied gas import or export terminal requires a pipeline, the New Fortress terminal remains within the Commission’s authority, as it connects to a pipeline that satisfies *Shell*’s jurisdictional trigger.<sup>3</sup>

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<sup>3</sup> Commission precedent has further narrowed the definition of an “LNG Terminal” to operations that are located on or near the coast, have onshore facilities or equipment dedicated specifically to the import/export of liquefied natural gas, and are served by ocean-going bulk natural gas carriers. *See e.g., Pivotal LNG, Inc.*, 148 FERC ¶ 61,164 (2014) *The Gas Co., LLC*, 142 FERC ¶ 61,036 (2013). The New Fortress San Juan Terminal satisfies each of these conditions.

While *Shell* turned on a functional analysis of the pipeline at issue in that case, New Fortress erroneously contorts *Shell* and other Commission jurisprudence to derive an arbitrary series of physical attributes it believes determine when a pipeline is a “pipeline.”<sup>4</sup> As explained below, this Court should reject this unsupported reading and affirm the Commission.

This case presents the opposite scenario. Most of the gas imported to New Fortress’ LNG Terminal are transported via a short pipeline to the San Juan Power Plant. Joint Protest at 10, (R. 4), JA \_\_. New Fortress is contractually obligated to import and deliver 600,000 to 850,000 gallons of liquefied natural gas daily to fuel that power plant. *Id.* While nearly all the fuel at issue in the *Shell* Terminal was delivered by truck, train, or ship, only a small percentage of fuel imported by New Fortress is delivered by truck to end users. Here, New Fortress’ provision, by pipeline, to the San Juan Power Plant is the main event—completely unlike the “minimal amounts” of waste gas that would be transported via pipe in *Shell*. Therefore, the Commission’s jurisdictional analysis correctly identified the pipeline carrying the majority of New Fortress’ fuel.

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<sup>4</sup> See Pet. Brief 56-58; Motion for Leave to Answer and Answer of New Fortress Energy LLC to the July 31, 2020 Joint Protest and Motion to Intervene by the coalition of special interest groups in Puerto Rico 4-6, *New Fortress Energy, LLC*, CP20-466-000 (filed Aug. 14, 2020), (R. 5).

In sum, there is no plausible argument that the transport of natural gas, via pipeline, into the San Juan Power Plant is not the primary purpose of the terminal. As stated above, New Fortress's San Juan LNG Terminal serves primarily one customer: the San Juan Power Plant. It is undisputed in the record that the terminal imports and vaporizes 600,000 – 850,000 gallons of LNG daily for transportation via pipeline to the San Juan Power Plant. Accordingly, because the primary purpose of the New Fortress terminal is to import and transport natural gas, through a pipeline, to a customer, the terminal remains jurisdictional even under *Shell's* unduly narrow test.

### **III. THE PIPELINE REQUIREMENT IN THE SHELL TEST HARMS COMMUNITIES FACED WITH POTENTIAL IMPACTS FROM LNG TERMINAL PROPOSALS.**

The Commission's March 19, 2021 order, finding that the New Fortress LNG Terminal does fall under Commission jurisdiction, "acknowledge[d] that the Commission's precedent regarding its jurisdiction over LNG facilities is not easily extrapolated from one facility to another." Initial Order, P 14. In both the March 19, 2021 and July 15, 2021 Orders from the Commission, Commissioners Glick and Clements issued separate concurrences, explaining that Shell's pipeline requirement was at least in part responsible for that confusion: "We reiterate that the Commission should revisit Shell to ensure that we are carrying out our statutory responsibilities

and to provide clarity and certainty to all parties.” Rehearing Order, P 1 (Glick, Chairman and Clements, Comm’r concurring).

We agree that Shell’s pipeline requirement does not provide clarity to the communities that are considering whether to house an LNG terminal. New Fortress improperly exploited that uncertainty to evade Commission review of its LNG Terminal under the National Environmental Policy Act. This Court and the Commission have both recently demanded that facilities like the New Fortress LNG Terminal must undergo stricter greenhouse gas emissions analyses and environmental justice analyses—but no such analyses were completed before this LNG Terminal was constructed in the center of several environmental justice communities.<sup>5</sup> New Fortress also took advantage of the Shell decision’s less-than-clear mandate to cut off any community input regarding this facility. Indeed, an investigative report commissioned by the Puerto Rico Legislature determined that New Fortress refused to allow any community input:

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<sup>5</sup> The closest home to the LNG terminal is less than a quarter of a mile away. Within just half a mile of New Fortress Energy’s LNG terminal lies the Sabana community, with 1,646 residents. Nearly 40% of Sabana’s residents live below the poverty line, almost a quarter of its residents are above the age of 60, and another fifth are younger than 18. The Metropolitan Detention Center is located within the same half-mile radius, adding about 1,072 incarcerated persons in the shadow of the New Fortress LNG terminal. New Fortress Energy thus has subjected a population of at least 2,700 people living in an already burdened community to new dangers without community input or a thorough review of safety and environmental risks, as required by the National Environmental Policy Act. Joint Protest at 51-52, (R. 4), JA \_\_.

From the available information, it appears that New Fortress built the gas terminal without holding public hearings, or issuing a Land Use Consultation and without any citizen or municipal participation. Nor was there prior preparation of an Environmental Impact Statement available to the public, the Legislature or specialized public agencies.

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The safety and environmental risks of the New Fortress project have caused great concern in community, religious and environmental organizations. Thus, leaders and religious organizations of various denominations have spoken out on the matter and they even sent a letter to the federal authorities about it.<sup>6</sup>

It was that letter that brought the New Fortress LNG Terminal to the Commission's attention, leading the Commission to issue the June 2020 Order to Show Cause to New Fortress. As highlighted below, that proceeding provided ample evidence of the LNG Terminal's inconsistency with the public interest.

First, New Fortress promised Puerto Rico ratepayers savings up to \$285M in annual savings by switching the San Juan Power Plant from diesel to gas.<sup>7</sup> In March 2021, the Puerto Rico Electric Power Authority acknowledged that to date, customers had saved less than \$4M.<sup>8</sup>

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<sup>6</sup> Puerto Rico House of Representatives, H.R. Res. No.170 at 2, 19th Leg. Assem. (PR2021), <http://www.tucamarapr.org/dnncamara/Documents/Measures/6ac3d208-ea6f-40b8-a418-a332dc8b88ac.pdf> (translated from the original Spanish). A true and accurate copy of the Resolution is attached as Exhibit B to Non-Governmental Organizations' Motion For Leave to Respond to New Fortress Energy's October 1, 2020 Letter And Commissioners' Inquiries At The January 21st Commissioners' Meeting, New Fortress Energy LLC, CP20-466-000, (2021), (R. 16), JA \_\_\_.

<sup>7</sup> Joint Protest at 28, (R. 4), JA \_\_\_.

<sup>8</sup> Puerto Rico Electric Power Authority March 16, 2021 Response to Data Request. (R. 19), JA \_\_\_.

New Fortress also promised that the LNG Terminal would improve grid reliability, but it has done the opposite. San Juan Power Plant’s turbines have suffered repeated outages due to New Fortress’ failure to deliver gas at the proper pressure level and frequently New Fortress has failed to deliver gas at all.<sup>9</sup> On days when grid reliability is critical, the Power Authority runs the San Juan Power Plant units on diesel, rather than gas.<sup>10</sup> When storms approach and PREPA is at its greatest need for fuel, New Fortress cannot deliver.<sup>11</sup> For all of these reasons, the Power Authority has decided that it can only provide the “best service” at the San Juan units by using diesel rather than gas from New Fortress.<sup>12</sup>

Finally, the investigation conducted by the Puerto Rico Legislature also found that New Fortress had ignored a prior study rejecting the use of this site for an LNG Terminal, due to safety concerns.<sup>13</sup> Because New Fortress evaded Commission review, the company was able to lease this location for LNG Terminal construction “without any formalities or prior evaluation.”<sup>14</sup>

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<sup>9</sup> Non-Governmental Organizations’ September 24, 2020 Motion For Leave To Sur-Reply to the Answer Of New Fortress Energy Inc. to The Reply of the Joint Movants at 4-5, (R. 10), JA \_\_\_.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

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

<sup>13</sup> Puerto Rico House of Representatives Resolution, *supra* n. 6, (R. 16), JA \_\_\_.

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

New Fortress evaded Commission review<sup>15</sup> of this polluting, unaffordable, unreliable LNG Terminal, and now attempts to justify its evasion with irrelevant arguments about pipeline size, cobbled from dicta in the Shell decision.

The ability of the federal government to conduct oversight in order to prevent catastrophe has been enshrined in the National Environmental Protection Act since the 1970s. The environmental and safety reviews conducted before this LNG Terminal was built failed to satisfy the National Environmental Policy Act. Without this protection, unsavory actors in the industry can operate in darkness. This creates risk that people will be hurt, and communities will not have a say in what is going on in their backyard. To prevent that, in previous cases, this court has stopped construction and operation of facilities when reviews failed to satisfy NEPA. *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 80 (D.D.C. 2010) (partially vacating permit and remanding to agency for NEPA violation); *Humane Soc’y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007), citing *Am. Bioscience, Inc. v.*

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<sup>15</sup> The National Environmental Protection Act (NEPA) requires federal agencies to consider direct, indirect, and cumulative impacts of any federal projects, including the siting and construction of facilities that are requesting federal permits, like the New Fortress LNG Terminal. National Environmental Protection Act, 42 U.S.C. §§ 4321–4347. If New Fortress had properly applied for Commission approval before siting and constructing the terminal, the Commission would have been required under NEPA to consider the impacts to the environment and local communities **before** siting and construction began. If the proper process had been followed, there would also have been a required notice-and-comment period, in which the community would have been able to express its concerns.

*Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (“[V]acating a rule or action promulgated in violation of NEPA is the standard remedy.”); *Pub. Emps. for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016) (reviewing cases and finding vacatur is the standard remedy).

Enjoining construction and operation of non-compliance facilities is critical not only to protect nearby communities, but also to ensure the underlying goals of the NEPA process are met. *Diné Citizens Against Ruining Our Env’t v. U.S. Office of Surface Mining Reclamation and Enf’t*, 2015 WL 1593995, at \*3 (D. Colo., April 6, 2015) (stating that allowing a non-compliant project to “continue unabated” would further “endanger public health and the environment” and that, “[a]bsent some limitation on [the company’s] ability to continue its operation... compliance with NEPA would become a mere bureaucratic formality.”). Furthermore, the Commission should be instructed to assess punitive fines against New Fortress Energy for its the blatant disregard of safety measures, regulatory procedures, and the rule of law. New Fortress Energy has actively undermined the purpose of the Federal Energy Regulatory Commission and the Natural Gas Act for profit. It has done so in full awareness of the risks and dangers to the surrounding communities and the environmental impact they would cause.

For the reasons detailed above, this court should confirm that the New Fortress LNG Terminal falls under Commission jurisdiction. This court should also clarify

the test for Commission jurisdiction to ensure that other similar facilities do not escape Commission review. We finally ask this court to consider whether the Commission's decision to allow New Fortress to continue operating the LNG Terminal, unabated and without penalty, puts nearby communities, and the NEPA process itself, at risk.

### **CONCLUSION**

In summary, the Amici request that the court affirm the Federal Energy Regulatory Commission's Order Finding Jurisdiction over the New Fortress Energy San Juan LNG Terminal. Amici further ask the Court to reconsider the current test for Commission jurisdiction over LNG Terminals. Finally, because unabated, unpenalized operation of the New Fortress LNG Terminal puts nearby communities at risk and undermines the procedures required by the National Environmental Policy Act, Amici request that the Court consider instructing the Commission to end operation of the New Fortress LNG Terminal, until the NEPA process is complete, and to consider penalties for New Fortress' conduct.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because it contains 5,279 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) as it has been prepared in Microsoft Word 365 using 14-point Times New Roman typeface and is double-spaced (except for headings, footnotes, and block quotations).

Dated: February 8, 2022

/s/ Raghu Murthy  
Raghu Murthy

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8<sup>th</sup> day of February, 2022, I electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit via the CM/ECF System the foregoing Amicus Brief. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Dated: February 8, 2022

/s/ Raghu Murthy  
Raghu Murthy