



October 23, 2020

Kimberly D. Bose  
Federal Energy Regulatory Commission  
Office of the Secretary  
888 1<sup>st</sup> Street NE  
Washington, DC 20428

**Re: Bradford County Real Estate Partners, LLC, FERC Docket No. CP20-524-000  
Protest in Opposition to Petition for Declaratory Order**

Dear Ms. Bose,

The Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper (collectively, “DRN”) submit this protest in opposition to Bradford County Real Estate Partners, LLC’s (“BCREP’s”) Petition for Declaratory Order Disclaiming Jurisdiction and Motion for Expedited Action (“Petition” or “BCREP Petition”) submitted to the Federal Energy Regulatory Commission (“FERC” or the “Commission”) on September 18, 2020. In its Petition, BCREP asks the Commission to ignore Congress’s command in the Natural Gas Act (“NGA”),<sup>1</sup> and look the other way while BCREP and its affiliates transport natural gas in interstate commerce and export natural gas in foreign commerce without a certificate of public convenience and necessity, and contrary to the public interest. The Commission should deny BCREP’s petition and hold that construction and operation of “a natural gas liquefaction and truck and rail loading facility”<sup>2</sup> in Wyalusing Township, Bradford County, Pennsylvania (the “Facility”) as proposed is subject to the Commission’s jurisdiction under the NGA.

Congress enacted the Natural Gas Act in 1938, declaring that “Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.”<sup>3</sup> The NGA applies to, among other things, “the transportation of natural gas in interstate commerce . . . and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such

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<sup>1</sup> 15 U.S.C. §§ 717–717z.

<sup>2</sup> Petition for Declaratory Order Disclaiming Jurisdiction and Motion for Expedited Action, Accession No. 20200918-5180, Bradford County Real Estate Partners LLC, FERC Docket No. CP20-524-000 (Sept. 18, 2020) at 1 (hereinafter “BCREP Petition”).

<sup>3</sup> 15 U.S.C. § 717(a).

importation or exportation.”<sup>4</sup> Section 3 of the NGA governs the exportation and importation of natural gas, and LNG terminals used to export and/or import natural gas.<sup>5</sup> While the United States Department of Energy (“DOE”) has jurisdiction over export and import authorizations,<sup>6</sup> the Commission has “the exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”<sup>7</sup> Section 7 of the NGA grants the Commission jurisdiction over the transportation in interstate commerce of natural gas and the construction, acquisition, operation and abandonment of facilities used to transport gas in interstate commerce.<sup>8</sup>

In its Petition, BCREP describes an untested strategy of producing and liquefying natural gas in Pennsylvania, then transporting the liquefied natural gas (“LNG”) by railcar and truck to an export facility in New Jersey, then transloading the LNG from the railcars and trucks to waterborne vessels bound for domestic consumers and foreign countries. BCREP invites the Commission to disclaim jurisdiction over this project, despite that it involves both the transportation of natural gas in interstate commerce *and* the exportation of natural gas in foreign commerce. The Commission must act in the public interest, and in accordance with the plain language of the NGA and decline BCREP’s invitation. In fact, as we see from documents only secured by the Delaware Riverkeeper Network through litigation to enforce a Freedom of Information Act request that BCREP’s affiliates didn’t just invite but in fact coaxed the Commission in closed door meetings.<sup>9</sup>

**I. FERC Docket Numbers CP20-522 and CP20-524 Should Be Consolidated So That the Commission Is Provided a Comprehensive Understanding of the Project’s Purpose and Scale.**

BCREP filed this Petition mere days after its affiliate, Delaware River Partners, LLC (“DRP”), filed a similar petition seeking the same relief—a declaratory order disclaiming jurisdiction.<sup>10</sup> In that petition, DRP describes a LNG export facility in Gibbstown, New Jersey, (the “DRP Facility”) which is yet another link in the chain through which these entities seek to transport natural gas in interstate commerce and export natural gas in foreign commerce. Because a comprehensive understanding of the entire operation is necessary for the Commission’s decision whether to exercise jurisdiction under Section 3 and/or Section 7 of the NGA, these dockets should be consolidated. In addition, a new Notice should be issued by the Commission, so that interested parties, particularly those who may be impacted by the truck and rail operations throughout Pennsylvania and New Jersey, have a chance to intervene and/or protest the consolidated petitions. In addition, given that the DRP Facility

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<sup>4</sup> 15 U.S.C. § 717(b).

<sup>5</sup> 15 U.S.C. § 717b.

<sup>6</sup> 15 U.S.C. § 717b(a).

<sup>7</sup> 15 U.S.C. § 717b(e).

<sup>8</sup> 15 U.S.C. § 717f.

<sup>9</sup> See Petition for Declaratory Order Disclaiming Jurisdiction and Motion for Expedited Action at Attachment A, Accession No. 20200911-5331, Delaware River Partners LLC, FERC Docket No. CP20-522-000 (Sept. 11, 2020) (hereinafter, “DRP Petition”) (attached hereto as Exhibit B).

<sup>10</sup> See DRP Petition.

is a known and integral destination of the gas to be transported, the environmental impacts of those operations are a clearly mandatory part of the Commission's review of this project.

## **II. BCREP's Facility is a Novel and Creative Attempt to Evade FERC Jurisdiction that Must be Thwarted by the Commission.**

The NGA entrusts the Commission with broad jurisdictional authority over natural gas facilities, such as the one proposed by BCREP. Specifically, the NGA broadly states that "Federal regulation in matters relating to the transportation of natural gas and the sale thereof in . . . foreign commerce is necessary in the public interest,"<sup>11</sup> that its provisions "shall apply to the . . . importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation"<sup>12</sup> and that "no person shall export any natural gas from the United States to a foreign country . . . without first having secured an order of the Commission authorizing it to do so."<sup>13</sup> The United States Department of Energy ("DOE") authorizes the export of natural gas as a commodity, while the Commission has the authority to "apply terms and conditions as necessary and appropriate to ensure that the proposed siting, construction, and operation [of facilities used to export gas] are not inconsistent with the public interest."<sup>14</sup>

In an attempt to exploit the meaning and true purpose of the NGA, BCREP is proposing a "loop-hole" to the Commission's Section 3 jurisdictional authority that would limit and undermine the Commission's ability to oversee the siting, construction, expansion, and operations over natural gas facilities used in the export of natural gas. The Commission should not allow operators, such as BCREP, to use innovation in order to exploit a system that was made to protect the public.

BCREP describes its proposed operations in the petition as follows. The Facility would receive natural gas via a FERC-jurisdictional pipeline, and would produce an average of 3.6 million gallons of LNG per day.<sup>15</sup> This LNG would be loaded into either DOT-113C120W tankcars pursuant to a special permit from the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), International Standards Organization ("ISO") containers to be loaded onto flatbed railcars, or into ISO-tanker trucks.<sup>16</sup> The sole offtaker of LNG from the Facility would be New Fortress Energy Inc. ("New Fortress"), BCREP's parent company.<sup>17</sup> New Fortress would "transport the LNG from the Facility by non-pipeline modes of transportation, *i.e.*, truck and rail, for delivery to marine vessels" at the Gibbstown Facility, or at other ports for export or to end users in the United States.<sup>18</sup> BCREP asserts that none of the LNG from the Facility would be regasified and introduced into a domestic downstream

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<sup>11</sup> 15 U.S.C. § 717(a).

<sup>12</sup> 15 U.S.C. § 717(b).

<sup>13</sup> 15 U.S.C. § 717b(a).

<sup>14</sup> *NET Mexico Pipeline Partners, LLC*, 145 FERC ¶ 61,112 at P 13 (2013).

<sup>15</sup> BCREP Petition at 3.

<sup>16</sup> *Id.* at 3-4.

<sup>17</sup> BCREP Petition at 2, 3.

<sup>18</sup> *Id.* at 3.

pipeline, unless it was “ultimately regasified for delivery into a [local distribution company’s (“LDC’s”)] pipeline in order to serve the LDC’s peaking needs.”<sup>19</sup>

BCREP also describes the Gibbstown Facility as a “LNG transloading facility” that “will include the necessary facilities to receive LNG by rail and load the LNG onto ocean-going bulk LNG carriers.”<sup>20</sup> The DRP Facility would also include “facilities to receive LNG in ISO containers by truck or rail and facilities to load the ISO containers onto waterborne cargo vessels for export or delivery to domestic markets.”<sup>21</sup>

The Facility proposed by BCREP is an example of a new type of facility that is not following the industry standard. Historically, natural gas has been predominantly exported through pipeline systems to onshore or coastal facilities, where they undergo several processes, including liquefaction, before being transported by ocean-going vessel to their final destination. Here, BCREP and its affiliates propose a large-scale operation where they conduct the liquefaction process in one state and transport the LNG by rail and truck to another state in which it will undergo several processes before being stored and/or exported via vessel to Puerto Rico or an international location.

BCREP claims that the Facility is not subject to the Commission’s jurisdiction because “it does not meet the definition of an ‘LNG terminal’”<sup>22</sup> However, as former Commissioner Bay has explained, the NGA requires the Commission to exercise jurisdiction over “the siting, construction, operation, and maintenance of export facilities in order to ensure that any authorized exports will serve the public interest.”<sup>23</sup>

As technology progresses, new and different types of facilities will appear and need to be evaluated for jurisdictional purposes. The Commission has previously stated that “jurisdictional determinations concerning LNG projects are made on a case-by-case basis.”<sup>24</sup> As such, the Commission should individually evaluate whether it has Section 3 jurisdiction over the BCREP facility.

### **III. The Commission Should Apply the Plain Language of the Natural Gas Act to the BCREP Facility and Exercise its Jurisdiction Under Section 3.**

BCREP claims that because its Facility “is located in north-central Pennsylvania, far inland from any port that an ocean-going bulk-carrier LNG tanker could reach,” it is beyond the Commission’s NGA Section 3 jurisdiction.<sup>25</sup> This geographical distinction alone is

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<sup>19</sup> *Id.* at 4.

<sup>20</sup> BCREP Petition at 3–4.

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Emera CNG, Inc.*, 148 FERC ¶ 61,219 (2014) (Bay, Comm’r, dissenting).

<sup>24</sup> *Marathon Oil Company et al.*, 53 FPC 2164, 2173 (1975).

<sup>25</sup> BCREP Petition at 7.

insufficient to evade the Commission’s jurisdiction over facilities involved in the “exportation of natural gas in foreign commerce.”<sup>26</sup>

The NGA provides that “Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest,”<sup>27</sup> and that the NGA “shall apply to . . . the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation . . . .”<sup>28</sup> Specifically, Section 3 of the NGA prohibits the export or import of natural gas “without having first secured an order of the Commission authorizing it to do so.”<sup>29</sup>

The administration of Section 3 is shared by DOE and the Commission.<sup>30</sup> DOE has delegated to the Commission the authority to “[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports . . . .”<sup>31</sup> This language does not limit FERC’s authority over facilities used for importing and/or exporting natural gas to facilities that “directly load or unload” LNG vessels.<sup>32</sup>

In support of its arguments, BCREP cites two prior Commission decisions, *Pivotal LNG, Inc.* (“*Pivotal II*”)<sup>33</sup> and *Emera CNG, LLC*.<sup>34</sup> Those decisions improperly limited the Commission’s jurisdiction based on the assumption that the NGA was meant only to regulate pipeline-based infrastructure, and a decision not to thwart projects seemingly designed to circumvent Section 3. As then-Commissioner Norman Bay recognized in his dissenting opinions to both decisions, the language of the NGA does not support the imposition of the Commission’s assumptions about its Section 7 jurisdictional reach upon the range of facilities that may be subject to Section 3.<sup>35</sup> Instead, he reasoned, the Commission should look to the purpose of the NGA in Section 1(a), the scope of the NGA in Section 1(b), and the language of Section 3, which governs the Commission’s authority over natural gas export facilities.<sup>36</sup>

Continuing to apply the faulty reasoning in *Emera* and *Pivotal II* would embolden operators, such as BCREP, to find innovative ways, outside of the industry standard, to construct and operate natural gas facilities in order to evade the reach of the NGA. The Commission must follow congressional directives when interpreting the jurisdictional

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<sup>26</sup> 15 U.S.C. § 717(b).

<sup>27</sup> 15 U.S.C. § 717(a).

<sup>28</sup> 15 U.S.C. § 717(b).

<sup>29</sup> 15 U.S.C. § 717b(a).

<sup>30</sup> See, e.g., *NET Mex. Pipeline Partners, LLC*, 145 FERC ¶ 61,112, P 13 (2013).

<sup>31</sup> DOE Delegation Order No. 00-004.00A, at ¶ 1.21.A.

<sup>32</sup> See BCREP Petition at 5.

<sup>33</sup> 151 FERC ¶ 61,006 (2015).

<sup>34</sup> 148 FERC ¶ 61,219 (2014).

<sup>35</sup> See *Emera*, 148 FERC ¶ 61,219 (2014) (Bay, Commissioner, dissenting); see also *Pivotal II*, 151 FERC ¶ 61,006 (2015).

<sup>36</sup> *Id.*

standard set out in Section 3 of the NGA. A plain reading of the statute, as Congress intended, makes clear that the Commission has broad and ample Section 3 jurisdiction over the Facility.

BCREP seeks to narrow the Commission's Section 3 jurisdiction by highlighting the facilities over which the Commission has previously declined to exercise jurisdiction and freezing time as of the date BCREP filed its petition.<sup>37</sup> While precedent is informative and relevant, it cannot be the end-all be-all in a rapidly shifting and spreading industry. According to BCREP's logic, the Commission can no longer evaluate facilities on a "case-by-case" basis,<sup>38</sup> and now must only look retrospectively at the facilities it exercised jurisdiction over in the past. To the contrary, the fact that the Commission has not yet "asserted Section 3 jurisdiction over an LNG facility that cannot *directly* load or unload . . . LNG vessels"<sup>39</sup> does not mean that it is prohibited from doing so in the future.

Even if the connection between the Facility and the ocean-going vessel must be "direct," directness is established here by the arrangement by which LNG from the Facility will reach the point of export in Gibbstown. As explained in Section IV of this Protest, *infra*, the Facility is directly connected to the Gibbstown Facility via a "virtual pipeline." The exclusive arrangement among the New Fortress entities plus the consistent high-volume flow of LNG from Wyalusing to Gibbstown clearly illustrates that these entities have essentially created a 135-mile-long export facility. The Gibbstown Facility is not incidentally receiving some of its LNG from the Facility, nor is the Facility incidentally producing some LNG that will end up at the Gibbstown Facility. They are two ends of the same project, owned by affiliated entities and created to serve each other. Indeed, "[t]he timeline for production at the Facility is expected to be aligned with the timetable for completion of construction at the Gibbstown Facility."<sup>40</sup> Thus, the connection between the Facility and the ocean-going vessels at the Gibbstown Facility is sufficiently direct for the Commission to exercise jurisdiction under Section 3.

In sum, the scope of the Commission's Section 3 jurisdiction is broad, and includes facilities constructed and operated for the purpose of importing or exporting natural gas. Even if a "directness" requirement were to be imposed on Section 3, the Facility meets that test because of its clear, consistent, and exclusive connection with the Gibbstown Facility.

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<sup>37</sup> BCREP Petition at 5–7.

<sup>38</sup> *Marathon Oil Company et al.*, 53 FPC 2164, 2173 (1975).

<sup>39</sup> BCREP Petition at 5 (emphasis added).

<sup>40</sup> BCREP Petition at 4–5.

#### **IV. If the Commission Declines to Exercise Jurisdiction Based on Section 3 of the NGA, it Should Exercise Section 7 Jurisdiction Because the Facility is a Link in the Interstate Transportation Chain.**

Section 7 of the NGA requires a natural-gas company<sup>41</sup> apply for a certificate of public convenience and necessity prior to “engag[ing] in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertak[ing] the construction or extension of any facilities therefor, or acquir[ing] or operat[ing] any such facilities or extensions thereof . . . .”<sup>42</sup> The “jurisdiction of the Commission” is defined in Section 1(b) of the NGA as: “the transportation of natural gas in interstate commerce, . . . the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and . . . natural-gas companies engaged in such transportation or sale, and . . . the importation or exportation of natural gas in foreign commerce and . . . persons engaged in such importation and exportation . . . .”<sup>43</sup> “Interstate commerce,” in turn, “means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.”<sup>44</sup>

Because the Facility would be a link in the transportation of natural gas in interstate commerce, the Commission has the authority to exercise jurisdiction over the Facility. BCREP describes in its Petition that the Facility will receive natural gas from a FERC-jurisdictional pipeline in Pennsylvania, liquefy the gas, and then send it out by non-pipeline modes of transportation to a specifically identified destination: the Gibbstown Facility in New Jersey.<sup>45</sup> Because the Facility would transport natural gas from Pennsylvania to New Jersey, it is a “facility” for the “transportation of natural gas in interstate commerce.”<sup>46</sup> Thus, based on the plain language of the NGA, prior to the construction of the Facility, BCREP is required to obtain a certificate of public convenience and necessity.<sup>47</sup>

BCREP argues that, based on past decisions of the Commission, “Section 7 jurisdiction is limited to transportation of natural gas in its gaseous or liquefied state by pipeline only and that this ‘jurisdiction does not extend to deliveries of natural gas by truck, train, or barge.’”<sup>48</sup> However, the Commission has made clear in past decisions that “[a]ny lack of jurisdiction on the Commission’s part in the . . . regulation of LNG . . . would seriously weaken the statutory scheme by which Congress intended the Commission to regulate the interstate movement of natural gas.”<sup>49</sup> The Commission has also recognized that “the NGA is remedial

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<sup>41</sup> “Natural-gas company” is defined in the NGA as “a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.” 15 U.S.C. § 717a(7).

<sup>42</sup> 15 U.S.C. § 717f(c)(1)(A).

<sup>43</sup> 15 U.S.C. § 717(b).

<sup>44</sup> 15 U.S.C. § 717a(7).

<sup>45</sup> BCREP Petition at 3.

<sup>46</sup> 15 U.S.C. § 717(b).

<sup>47</sup> *Id.*

<sup>48</sup> DRP Petition at 14 (quoting *Gulf Oil Ltd. P’ship*, 148 FERC ¶ 61,029 at P 8 (2014)).

<sup>49</sup> *Air Products and Chemicals, Inc.*, 58 FERC ¶ 61,199 (1992) (quoting *Distrigas Corporation*, 47 FPC 752, 759 (1972)).

in nature and Congress could not have intended to permit a transportation innovation essentially unknown in 1938 to defeat the statutory scheme devised. Thus, the Commission has explained that the interstate transportation of natural gas is a continuum that cannot be ‘broken’ by a party liquefying and transporting gas as LNG as a means of circumventing the NGA.”<sup>50</sup>

Here, BCREP and its affiliates do exactly that by liquefying the natural gas in Wyalusing, Pennsylvania and transporting it via a “virtual pipeline” of trucks and railcars to Gibbstown, New Jersey. The trucks and railcars transporting LNG from Wyalusing to Gibbstown constitute a “virtual pipeline” that is an obvious attempt to circumvent the Commission’s jurisdiction that it would otherwise clearly have exercised had BCREP or any of its affiliated entities constructed a physical pipeline between these two points.

First, the transportation of the LNG would be between two defined and consistent points of location. In its petition, BCREP states that “New Fortress will be the sole offtaker of LNG produced by BCREP at the Facility pursuant to a multi-year agreement with BCREP” and “New Fortress will transport the LNG from the Facility by non-pipeline modes of transportation, *i.e.* truck and rail, for delivery to marine vessels at the LNG transloading facility in Gibbstown, New Jersey . . . .”<sup>51</sup> According to DRP’s petition for a declaratory order, “New Fortress has entered into a multi-year agreement with DRP to have the exclusive right to transload LNG through the [Gibbstown] Facility” and that “New Fortress anticipates delivering LNG to the Facility by means of truck and railcar from LNG liquefaction facilities being developed by New Fortress, such as the facility in Wyalusing Township, Bradford County, Pennsylvania . . . .”<sup>52</sup> Thus, as proposed, LNG would be transported in interstate commerce between Pennsylvania and New Jersey for multiple years pursuant to New Fortress’s agreements with BCREP and DRP.

Second, the amount of LNG that would be transported from the Wyalusing Facility to the Gibbstown Facility would be of a volume and frequency comparable to a natural gas pipeline. Based on filings by Energy Transport Solutions (“ETS”), a New Fortress subsidiary that sought and obtained a special permit to carry LNG by rail from Wyalusing to Gibbstown, ETS “anticipates operating two unit trains a day,”<sup>53</sup> and that each unit train will consist of “50-100 cars per day.”<sup>54</sup> Thus, if each approved DOT specification 113C120W tank car can hold 30,000 gallons of LNG,<sup>55</sup> and each gallon of LNG equals 26,993 therms, then each rail car has the capacity to transport 2,699 dekatherms of natural gas. If two unit trains each carrying 50 cars travel from Wyalusing to Gibbstown per day, that would amount to 269,900 dekatherms per day (Dth/d) of natural gas. If the unit trains each carried 100 cars, then

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<sup>50</sup> *Southern LNG Inc.*, 131 FERC ¶ 61,155 at P 17 (2010).

<sup>51</sup> BCREP Petition at 3.

<sup>52</sup> DRP Petition at 5.

<sup>53</sup> See Application for a Special Permit, to Transport Methane, Refrigerated Liquid in DOT 113 Tank Cars at 7, Energy Transport Solutions LLC (Aug. 21, 2017) (Attached as Exhibit C). ETS is a subsidiary of New Fortress Energy, LLC.

<sup>54</sup> *Id.* at 6.

<sup>55</sup> Preliminary Regulatory Impact Analysis, PHMSA-2018-0025 (HM-264) RIN 2137-AF40 (October 2019) at 23.



539,800 Dth/d would be carried from Wyalusing to Gibbstown. This range of 269,900–539,800 Dth/d is comparable to the capacity of a natural gas pipeline.<sup>56</sup> Of note, this figure does not include the additional transport of LNG from Wyalusing to Gibbstown via truck or ISO container, and does not include LNG received by the Gibbstown Facility from non-Wyalusing sources.

BCREP cites the Commission’s decisions in *Air Products and Chemicals, Inc.*<sup>57</sup> and *Pivotal I*<sup>58</sup> arguing the Facility is similar enough to the facilities in those decisions that the Commission should decline to exercise jurisdiction in this case. However, the facilities at issue in *Air Products* were several refrigerated liquid methane liquefaction plants used to provide fuel for railroad locomotives, and the Commission explicitly found that this use did not “constitute an integral part of the interstate flow of gas because these facilities would not liquefy the gas to facilitate transportation of the gas.”<sup>59</sup> Here, the Facility’s purpose is to liquefy natural gas to facilitate its transportation by truck and rail from Pennsylvania to New Jersey.

Similarly, in *Pivotal I*, the LNG produced at the facility in question and subsequently transported by surface vehicles to end users was to be “consumed as vehicular fuel, other end-use fuel, or feedstock,”<sup>60</sup> and the Commission found that the facility was not merely “interposed on what would otherwise have been a *continuous flow of natural gas* in an *interstate* pipeline system.”<sup>61</sup> Here, the Facility is a point on a straight line of continuously-flowing natural gas from the Marcellus shale formation in Pennsylvania to Gibbstown, New Jersey.

Thus, after consolidating both BCREP’s and DRP’s petitions for declaratory orders,<sup>62</sup> the Commission should exercise its Section 7 jurisdiction over the transportation of natural gas in interstate commerce between Pennsylvania and New Jersey, because the Commission’s “concern when presented with liquefaction facilities that will receive gas from a pipeline system and send out LNG by truck or another non-pipeline mode of transportation is whether failure to assert jurisdiction . . . would allow circumvention of the Commission’s NGA jurisdiction over the interstate transportation of gas by pipeline,”<sup>63</sup> and because

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<sup>56</sup> For example, the Adelphia Gateway Pipeline Project is an 18-inch pipeline that transports 250,000 dekatherms per day. Oil & Gas Journal (2019). FERC certificate progresses Adelphia Gateway project. December 20, 2019. Retrieved from <https://www.ogj.com/pipelines-transportation/pipelines/article/14074005/ferc-certificate-progresses-adelphia-gateway-project>. The Millennium Eastern System Upgrade Project in New York consists of 30- and 36-inch pipelines with a capacity of approximately 223,000 dekatherms per day. NYSDEC (2017). Millennium Pipeline Company, LLC (Eastern System Upgrade Project). Retrieved from <https://www.dec.ny.gov/enb/110570.html>.

<sup>57</sup> 58 FERC ¶ 61,199 (1992).

<sup>58</sup> 148 FERC ¶ 61,164 (2014).

<sup>59</sup> 58 FERC at 61,619.

<sup>60</sup> *Pivotal I*, 148 FERC ¶ 61,164 at P 4.

<sup>61</sup> *Id.* at P 18 (first emphasis added) (quoting *Air Products*, 58 FERC at 61,619).

<sup>62</sup> See Section I, *supra*.

<sup>63</sup> *Pivotal I*, 148 FERC ¶ 61,164 at P 23.

“liquefaction of the gas [would be] interposed on what would otherwise have been a continuous flow of natural gas in an interstate pipeline system.”<sup>64</sup>

## **V. The Commission’s Jurisdiction Would Not Be Overly-Expansive and Would Fill a Regulatory Gap.**

BCREP complains that if the Commission were to exercise jurisdiction over the Facility, the “absurd consequence” of that decision would be to expand the Commission’s jurisdiction to every liquefaction facility located inland.<sup>65</sup> BCREP neglects that the Commission exercises jurisdiction on a case-by-case basis,<sup>66</sup> and any decision the Commission makes about BCREP’s Facility is not necessarily binding on another facility with different features. Furthermore, the Facility is unlike other inland liquefaction facilities in that it is part of a novel “virtual pipeline” running from Pennsylvania to New Jersey.

Next, BCREP argues that there is no “regulatory gap” that the Commission must fill with regard to the Facility.<sup>67</sup> In support of this argument, BCREP claims that the Facility is “subject to comprehensive environmental and safety regulation and therefore cannot fall into any regulatory gap.”<sup>68</sup> While the Facility may be subject to *multiple* environmental and safety regulations imposed by *multiple* federal and state entities, this does not mean that it is subject to *comprehensive* regulation. In fact, the primary benefit to human health and the environment that would be provided by the Commission’s jurisdiction over the Facility would be a comprehensive analysis of the entire transportation and export operation, and the Commission’s determination whether, based on this comprehensive understanding, the overall project is “not inconsistent with the public interest”<sup>69</sup> and/or “required by the present or future public convenience and necessity.”<sup>70</sup> As with any application under Section 3 or Section 7, other federal and state entities play an important role in imposing regulatory requirements that protect human health and the environment.<sup>71</sup> The presence of these requirements, therefore, does not justify the absence of the Commission’s jurisdiction.

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<sup>64</sup> *Air Products and Chemicals, Inc.*, 58 FERC ¶ 61,199 (1992).

<sup>65</sup> BCREP Petition at 11–12.

<sup>66</sup> *Marathon Oil Company et al.*, 53 FPC 2164, 2173 (1975).

<sup>67</sup> BCREP Petition at 12–13.

<sup>68</sup> BCREP Petition at 12.

<sup>69</sup> 18 C.F.R. § 153.7(c)(1) (governing applications under Section 3).

<sup>70</sup> 18 C.F.R. § 157.6(b)(2) (governing applications under Section 7).

<sup>71</sup> *See Pivotal II*, 151 FERC ¶ 61,006 (Bay, Commissioner, dissenting) (“The majority attempts to buttress its analysis with the claim that an ‘over-expansive application of section 3’ is unnecessary here because Pivotal’s ‘facilities are regulated by various federal, state and local agencies.’ Of course, the same is true with respect to the ‘traditional’ LNG terminals and cross-border pipelines that the majority concedes are subject to the Commission’s jurisdiction.”).

## **VI. Should the Commission Decline to Exercise its Jurisdiction, a Natural Gas Project Contrary to the Public Interest and Not Required by the Public Convenience and Necessity Will Be Constructed and Operated.**

BCREP's filings raise another issue for the Commission to consider: is the Facility consistent with the public interest, and/or is it required by the present or future public convenience and necessity?<sup>72</sup> Under Section 3 of the NGA, the Commission cannot approve an LNG terminal unless it finds that the proposed exportation or importation will be consistent with the public interest.<sup>73</sup> Under Section 7, the Commission must determine whether interstate transportation and the facilities used therefor are required by the public convenience and necessity.<sup>74</sup> There is no plausible way to determine whether the Facility is consistent with the public interest or required by the present or future public convenience and necessity because there has been no analysis of the planned operation under the National Environmental Policy Act ("NEPA"),<sup>75</sup> and no Environmental Impact Statement issued. The Commission must exercise jurisdiction in order to participate in the NEPA analysis and ensure that the project is consistent with the public interest and required by the public convenience and necessity. To assist the Commission in its understanding of the scope of this project's impact, DRN hereby attaches and incorporates by reference comments submitted by DRN--regarding both the Gibbstown Facility and the transport of LNG from the Facility to Gibbstown--to NJDEP,<sup>76</sup> the Corps,<sup>77</sup> PHMSA,<sup>78</sup> DRBC,<sup>79</sup> and DOE.<sup>80</sup>

As of now, many questions and concerns remain as to the safety of the project. These concerns are exacerbated by DRP's history of misconstruing project features regarding the Gibbstown Facility and their constant contradictions. *See* Exhibit A (wherein DRN lists examples of features that DRP has misconstrued or contradicted). As it stands, it cannot be reasonably concluded that the project will be in the public's interest or that it is required by the public convenience and necessity.

### **A. The Manner in Which BCREP and its Affiliates Propose to Transport LNG is Dangerous**

One of the threats imposed by this project is the heightened danger of transporting volatile LNG via railcars and trucks through highly populated areas. As DRN understands, the proposed route involves crossing densely populated areas in Pennsylvania including Wilkes Barre, Allentown, and Philadelphia. Scientists have constantly advised against the transport

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<sup>72</sup> 18 C.F.R. §§ 153.7(c)(1), 157.6(b)(2).

<sup>73</sup> 15 U.S.C. § 717b(a)

<sup>74</sup> 15 U.S.C. § 717f(c)(1)(A), (2).

<sup>75</sup> 42 U.S.C. §§ 4321-4370h.

<sup>76</sup> Attached hereto as Exhibit D.

<sup>77</sup> Attached hereto as Exhibit E.

<sup>78</sup> Attached hereto as Exhibit F.

<sup>79</sup> Attached hereto as Exhibit G.

<sup>80</sup> Attached hereto as Exhibit H.

of LNG through highly populated areas due to the risk of human and technological error, as well as national security risks.

The Congressional Research Service has issued several publications detailing the unique dangers posed by the transport and storage of LNG. The CRS has found that “a major spill would likely result in a . . . serious fire.”<sup>81</sup> Their review of the literature notes that a safety zone could require more than 4,000 feet distance from an LNG spill.<sup>82</sup> CRS also notes that counterterrorism advisors have “asserted that terrorists have both the desire and capability to attack LNG shipping with the intention of harming the general population.”<sup>83</sup> In citing a 2014 study for the Maritime Administration, CRS warned that “prospective shippers of LNG by rail (to ports) perform a detailed study of potential routes for LNG transportation...that avoid densely populated areas and identify emergency response capabilities.”<sup>84</sup>

A California Energy Commission LNG white paper explains the two types of exclusion zones that are calculated by federal regulators to provide public safety:

“Federal regulations identify two types of exclusion zones: thermal-radiation protection (from LNG fires) and flammable vapor-dispersion protection (from LNG clouds that have not ignited but could migrate to an ignition source). Thermal-radiation exclusion distances are determined by using the National Fire Protection Association (NFPA) standard for the production, storage, and handling of LNG, or by using a computer model that accounts for facility-specific and site-specific factors, including wind speeds, ambient temperature, and relative humidity. For example, the thermal-exclusion zone around the Cove Point LNG facility in Maryland is 1,600 feet.<sup>8</sup> The required distances assure that heat from an LNG fire inside the dikes, for example, would not be severe enough at the property line to cause death or third-degree burns. Safe distances from dispersing LNG vapor clouds are determined by the same NFPA standards or by a computer model that considers average gas concentration in air, weather conditions, and terrain roughness. The exclusion zones for the LNG facility in Cove Point cover 1,017 acres, and the exclusion zones for the Elba Island, Georgia facility cover 840 acres.<sup>9</sup> The permitting authority, in cooperation with the DOT-Office of Pipeline Safety

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<sup>81</sup> CONGRESSIONAL RESEARCH SERVICE, Liquefied Natural Gas (LNG) Import Terminals: Siting, Safety, and Regulation at 6, (Dec. 14, 2009), [https://www.everycrsreport.com/files/20091214\\_RL32205\\_e95cb50c88dbd56a2c8f706b2d521ef7ae81ee00.pdf](https://www.everycrsreport.com/files/20091214_RL32205_e95cb50c88dbd56a2c8f706b2d521ef7ae81ee00.pdf)

<sup>82</sup> Id at 7.

<sup>83</sup> Id at 23.

<sup>84</sup> CONGRESSIONAL RESEARCH SERVICE, Liquefied Natural Gas by Rail: Policy Issues, at 1–2 (Nov. 18, 2019).

and the Coast Guard, would determine the exclusion zones for LNG tankers and port facilities.”<sup>85</sup>

The application of these federal regulations would require an exclusion zone analysis that could affect siting and operations at the Facility. Without the application of this type of assessment and other factors that are applied through federal review, there is a regulatory gap that can expose the public and the environment to great risk.

The amount of energy contained in LNG is quite alarming. One gallon of LNG has 0.89975 therms of energy.<sup>86</sup> One DOT-113 tank car has a capacity of approximately 30,000 gallons,<sup>87</sup> meaning that there would be approximately 27,000 therms worth of energy per tank car. With this much LNG per tank car, it would only take 22 tank cars to hold the equivalent energy of the Hiroshima bomb.<sup>88</sup> According to Energy Transport Solutions, LLC’s (“ETS’s”) application for a special permit from the Pipeline and Hazardous Materials Safety Administration (“PHMSA”), the trains used to transport the LNG will contain 50-100 cars.<sup>89</sup> Despite these risks, there has been no NEPA review of the project, and BCREP is insisting that the Commission should not be involved.

Additionally, there is also a significant risk associated with transporting LNG by truck. Truck risk factors include driver behavior, traffic congestion and truck speed, and the increasing volume of trucks on the road relative to other vehicles.<sup>90</sup> Alarming, a study showed that 2,925 LNG carriers were involved in crashes over a 12-month period.<sup>91</sup> These accidents could prove catastrophic as they could result in fires and explosions due to loss of containment. The daily truck traffic generated by the Wyalusing Facility estimated by BCREP in the application for the air pollution control plan approval submitted to PADEP is 400 trucks each day, 365 days per year.<sup>92</sup> This will add substantial truck traffic to the roadways that will be used. These roadways are rural roads as the trucks leave the Facility and also travel through small towns with business districts that will be disrupted by truck traffic. This

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<sup>85</sup> “LIQUEFIED NATURAL GAS IN CALIFORNIA: HISTORY, RISKS, AND SITING”, STAFF WHITE PAPER. CALIFORNIA ENERGY COMMISSION, JULY 2003, 700-03-005. Page 9.  
[http://pstrust.org/docs/cec\\_lng\\_white\\_paper.pdf](http://pstrust.org/docs/cec_lng_white_paper.pdf)

<sup>86</sup> Report to the Congress, Liquefied Energy Gases Safety (July 31, 1978) at 2-2; see also U.S. DEPT. ENERGY, LIQUEFIED NATURAL GAS: UNDERSTANDING THE BASIC FACTS, at 9 (noting that one cubic foot of LNG contains 660,000 BTU)

<sup>87</sup> Preliminary Regulatory Impact Analysis, PHMSA-2018-0025 (HM-264) RIN 2137-AF40 (October 2019) at 15. (Attached as Exhibit I)

<sup>88</sup> The Hiroshima Bomb had the equivalent of 15 kilotons of TNT. John Malik, LOS ALAMOS NAT’L LAB. for U.S. DEPT. ENERGY, THE YIELDS OF THE HIROSHIMA AND NAGASAKI NUCLEAR EXPLOSIONS, at 25 (1985).

<sup>89</sup> See Application for a Special Permit, to Transport Methane, Refrigerated Liquid in DOT 113 Tank Cars at 6, Energy Transport Solutions LLC (Aug. 21, 2017) (Attached as Exhibit C).

<sup>90</sup> Risk Assessment of Surface Transport of Liquid Natural Gas (March 20, 2019) at 95. (Attached as Exhibit J)

<sup>91</sup> *Id.* at 98.

<sup>92</sup> “Minor Source Plan Approval Application, Bradford County Real Estate Partners LLC, Natural Gas Processing Plant, Wyalusing Township, Bradford County, Pennsylvania, December 2018”, Table A-11, Fugitive Emissions, p. 51 of PDF.

has become a subject of controversy locally for communities along the potential transportation routes.

Calculations of the number of people within two miles of two potential rail routes range from 1.65 to 1.95 million people and of two potential truck routes range from 613,000 to 929,000 people, based on the 2010 Census. Resolutions have been passed by local governments along the truck and rail routes opposing the project's transportation due to safety, environmental justice and pollution concerns and the disruption of traffic. The truck and rail transportation will impact many by traveling through communities with dense minority and low income populations. Certified resolutions from eight local governments located in Lackawanna, Berks, and Lehigh Counties in Pennsylvania and Camden County, New Jersey are attached to this Protest.<sup>93</sup> As the trucks move southeast towards the Gibbstown Facility, the trucks will add to highway traffic on already heavily traveled highway systems. The trucks complete their journey through the Greater Philadelphia Region and, if crossing to reach Gibbstown on the Commodore Barry Bridge, will cut through Chester, PA, directly and adversely impacting the environmental justice community of Chester. If crossing the Delaware River further north, the environmental justice communities of the City of Camden and other Camden and Gloucester County municipalities in New Jersey will be directly impacted.

Furthermore, the transportation of LNG is likely to impact Chester, Pennsylvania, a low-income and minority neighborhood regarded as an environmental justice community. In addition, the Gibbstown Facility is located 2.73 miles from Chester. The Public Interest Law Center describes Chester:

“Chester, Pennsylvania is a small city with a low-income African American population, located in the affluent, mostly white Delaware County – and it is the site of an unprecedented cluster of industrial polluting facilities. Chester has been home to a trash incinerator that handled waste from the entire county, a sewage treatment plant that still receives the entire county's sewage, and numerous other waste processing plants, oil refineries, and industrial polluters. Essentially, the low-income, black community of Chester has been forced to live amidst the waste of the more affluent, white towns and cities around it.”<sup>94</sup>

Chester has been credited with starting the environmental justice movement in the United States with early opposition to the cluster of environmentally damaging projects that exposed residents to a disproportionate level of air and water pollution and industrial activity that adversely impacted the public's health.

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<sup>93</sup> See Exhibit K.

<sup>94</sup> The Public Interest Law Center, Environmental Racism in Chester, <https://www.pubintlaw.org/cases-and-projects/chester-2/> (last visited October 14, 2020).

“Dr. Reverend Horace Strand from the [Chester Environmental Partnership \(CEP\)](#) is the driving force for environmental justice in Chester. Rev. Strand represents Chester on our Stakeholder Advisory Board. In the early 1990s, Rev. Strand of the Faith Temple Church founded Chester Residents Concerned for Quality of Living (CRCQL) to address the numerous environmental hazards that the people of Chester faced on a daily basis. He lead his group to block the permitting of new hazardous waste facilities in Chester and in doing so became a national figure in the suit *Chester v Seif, PA DEP* that went to the US Supreme Court, firmly establishing Chester as an **Environmental Justice** Community.”<sup>95</sup>

Due to the recognition by EPA, PADEP, and other permitting agencies of the environmental injustices ongoing in Chester, an environmental justice intermediary has been established by these agencies to discuss the permitting of new potential projects with the community in addition to the normal public participation process. Despite the numerous risks to the Chester community, neither BCREP nor DRP, nor any of their affiliates have embarked on such a community engagement program with the Chester community.

Chester, which is already environmentally overburdened, will bear a large brunt of risk due to possible human error and technological failure. First, the transportation of LNG trucks are set to pass through the center of Chester to access the Commodore Barry Bridge. This would expose 34,000 people to the threat of an accident. Second, given the close proximity of Chester to the Gibbstown Facility, the Chester residents could be exposed to the catastrophic impacts of a release of LNG, including fires, explosions, or super-cold vapor clouds. Lastly, ships passing less than a mile from the Chester population center could become high-capacity bombs due to accidents or national security threats. According to a letter sent to Greenwich Township by DRP, “Dock 2 would provide navigational access, mooring, and loading equipment for two vessels up to 173,400 cubic meters in capacity.”<sup>96</sup> This is the equivalent of 45,807,433 gallons.<sup>97</sup> One gallon of LNG has 0.89975 therms of energy,<sup>98</sup> meaning that one LNG ship has 41,215,237 therms of energy. After converting therms to tons of TNT, one LNG ship at Dock 2 equals 1,039,053 tons of TNT.<sup>99</sup> For comparison, the atomic bomb dropped on Hiroshima at the end of the second World War

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<sup>95</sup> Perelman School of Medicine, Chester, <http://ceet.upenn.edu/target-communities/chester/> (last visited October 14, 2020).

<sup>96</sup> Application submitted by Delaware River Partners, LLC, Regarding Property at 200 No. Repauno Avenue, Block 8, Lot 4, Greenwich Township, Gloucester County (February 26, 2019) (Attached as Exhibit L).

<sup>97</sup> Metric Conversions, Cubic Meters to US Gallons, <https://www.metric-conversions.org/volume/cubic-meters-to-us-liquid-gallons.htm> (last visited October 15, 2020).

<sup>98</sup> Report to the Congress, Liquefied Energy Gases Safety (July 31, 1978).

<sup>99</sup> Kyle’s Converter, Therms (US) to Tons of TMT, [http://www.kylesconverter.com/energy,-work,-and-heat/therms-\(u.s.\)-to-tons-of-tnt](http://www.kylesconverter.com/energy,-work,-and-heat/therms-(u.s.)-to-tons-of-tnt) (last visited October 15, 2020).

was the equivalent of 15,000 tons of TNT.<sup>100</sup> This means that one LNG ship is equal to approximately 69 Hiroshima atomic bombs.

The Commission cannot allow a project like this to proceed without taking jurisdiction and ensuring that these effects are carefully studied through an Environmental Impact Statement.

The danger of LNG is also exacerbated when transloading LNG. The Gibbstown Facility would transload throughout the day from trucks or rail cars into shipping vessels. This process would take around 2 weeks to complete, an extended period that greatly increases the opportunity for accidents and spills. Typically, traditional LNG terminals with on-shore liquefaction facilities complete transloading in one day in order to minimize risk. The Gibbstown Facility is not taking appropriate safety measures in order to protect the human community from unavoidable risks that come from extending the time to transload, such as human error or technological failure. The Gibbstown Facility is located in a densely populated area with communities such as Gibbstown, Tinicum Township, Chester and the Philadelphia Airport within ~2 miles of the site. The Gibbstown Facility also places at least 75 neighbors that are within 200 feet of the property, at greater risk, including a child care center and a Greenwich Township Public School.

Given the dangers of LNG, it is imperative that the Commission exercise its jurisdiction in order to carefully evaluate and minimize the risk of transporting LNG.

### **B. The Climate Change Effects of the Facility have not been Assessed**

The Facility is not within the public interest because it will have severe effects on our climate, and those effects have yet to be assessed or documented. Science has conclusively demonstrated that human release of greenhouse gas emissions (GHGs), including methane, are a direct cause of climate change. LNG facilities directly and indirectly exacerbate the climate crisis by releasing GHGs into the atmosphere. The Facility is expected to increase traffic from the Facility by 400 trucks each day, 365 days per year.<sup>101</sup> The emissions from these diesel trucks will contribute carbon emissions. The operation of other diesel equipment and construction and operation of an LNG facility will release GHG emissions. In addition, the increased demand for natural gas created by the construction and operation of both the Wyalusing and Gibbstown facilities will have upstream GHG impacts via fracking, extraction, production, processing, and transport of the natural gas and the liquefaction process. Fugitive emissions of methane occur during all these stages, including pipeline transport, liquefaction, overland truck and rail transport, and storage. DRP has acknowledged in its petition that, at least in some circumstances, “boil off gas could be flared

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<sup>100</sup> Simon Scarr, et al., In a Flash, a Changed World, Reuters Graphic (August 4, 2020), <https://graphics.reuters.com/WW2-ANNIVERSARY/HIROSHIMA/rlgpdnqljpo/>.

<sup>101</sup> “Minor Source Plan Approval Application, Bradford County Real Estate Partners LLC, Natural Gas Processing Plant, Wyalusing Township, Bradford County, Pennsylvania, December 2018”, Table A-11, Fugitive Emissions, p. 51 of PDF.



at the [Gibbstown] Facility . . . .”<sup>102</sup> Finally, the natural gas will be consumed downstream from the Facility, and the ultimate consumption of the natural gas will also result in GHG emissions.

Climate change has serious and significant environmental, economic, and safety impacts and as a result of its harmful impacts on our communities and environment, climate change poses one of the most extreme existential threats facing humanity. Commissioner Glick has clearly outlined FERC’s NGA mandate to consider climate change impacts resulting from its actions and decisions in recent statements:

“Climate change poses an existential threat to our security, economy, environment, and, ultimately, the health of individual citizens. Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, which can be released in large quantities through the production and consumption of natural gas. Congress determined under the NGA that no entity may transport natural gas interstate, or construct or expand interstate natural gas facilities, without the Commission first determining the activity is in the public interest. This requires the Commission to find, on balance, that a project’s benefits outweigh the harms, including the environmental impacts from climate change that result from authorizing additional transportation. Accordingly, it is critical that, as an agency of the federal government, the Commission comply with its statutory responsibility to document and consider how its authorization of a natural gas pipeline facility will lead to the emission of GHGs, contributing to the existential threat of climate change.”<sup>103</sup>

As such, the effects concerning climate change must be carefully evaluated through an Environmental Impact Statement by the Commission when determining whether a facility is in the public’s interest. Here, an Environmental Impact Statement has not been issued and BCREP is attempting to shut the Commission out of the process. It is imperative that the Commission take jurisdiction over this project in order to carefully analyze the effects that it will have on our climate.

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<sup>102</sup> DRP Petition at 5.

<sup>103</sup> Texas Eastern Transmission, Item No.: C-2, FERC CP18-10-000 (2018).

**VII. Conclusion**

For the reasons stated above, the Commission should deny the relief sought by BCREP and exercise jurisdiction over the Facility and the overall project, including the Gibbstown Facility, under Sections 3 and 7 of the NGA.

Maya K. van Rossum



the Delaware Riverkeeper  
Delaware Riverkeeper Network

Enclosures