

UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY

IN THE MATTER OF)
)
Venture Global CP2, LNG LLC) FE Docket No. 21-131-LNG
)

Sierra Club Motion for Clarification Regarding December 12, 2023 Comments

On December 12, 2023, Sierra Club submitted comments, joined by numerous other organizations, reiterating opposition to Venture Global CP2's pending request for authorization to export LNG to non-free trade agreement countries. DOE included them in the DOE docket for this proceeding.¹ However, DOE prefaced this comment with a note stating that it constituted an "Off-the-Record Communication."²

Sierra Club intended this to be an on-the-record communication. The comments were delivered to the fergas@hq.doe.gov email address, which is the only official filing method DOE has provided,³ and which Sierra Club correctly understood would cause the comments to be placed in DOE's online docket for this application, where the comments would be publicly available and provide the applicants and other interested parties with an opportunity to respond.

On December 18, 2023, Sierra Club senior attorney Nathan Matthews called DOE to ask why this comment was nonetheless labeled "Off-the-Record," including (1) what Sierra Club should do differently in the future (in this and other proceedings), to ensure that future comments are not labelled as off-the-record, and (2) whether Sierra Club should take any action to correct or re-file this comment so that it would be treated on the record and unambiguously treated as part of this docket.

¹ https://www.energy.gov/sites/default/files/2023-12/OTR_Beyond%20Dirty%20Fuels%2012.12.2023.pdf

² *Id.*

³ See Notice of Application, 87 Fed. Reg. 1133 (Jan. 10, 2022).

DOE staff refused to answer either question over the phone. The only specific issue with Sierra Club's filing that staff identified was the fact that there was not an open comment period in this docket.

Lack of an open comment period does not itself render communication off-the-record. Sierra Club recognizes that DOE has taken the position, such as in *Sierra Club. v. DOE*, D.C. Cir. Case 22-1218, that outside of an active comment solicitation, the proper way to raise issues with DOE regarding an individual docket is to file a motion for leave to file a protest out of time.⁴ But even Sierra Club's December 12, 2023 comment letter was untimely or procedurally improper, this fact itself does not render it an "off-the-record communication." Nothing in DOE's regulatory definition of "off-the-record communication," 10 C.F.R. § 590.102(k), nor in the regulation pertaining to such communications, 10 C.F.R. § 590.108, refers to whether the communication was timely or in response to an open comment solicitation.

"Off-the-record" is not a label DOE can apply to communication just because it was untimely. DOE has authority to reject untimely filings regardless of whether those communications are "off-the-record."⁵ On the other hand, where a communication *is* "off-the-record" within the meaning of the regulatory definition, DOE has authority to impose broader sanctions than merely rejecting the filing, including dismissing a party's overall interest in a proceeding (potentially, even where that interest was previously raised in a proper filing). 10 C.F.R. § 590.108(a)(6).

Basic fairness and due process require that parties have adequate notice of what conduct could potentially expose them to this type of drastic sanction. DOE's regulations provide no notice that an unsolicited, but public, comment could constitute such conduct. And it would be unreasonable for DOE to prohibit interested parties from filing public comments like Sierra Club's December 12, 2023 comment, or to mandate that all such comments carry the procedural burdens of a motion for leave to file a protest out of time.

For these reasons, Sierra Club respectfully requests the following:

⁴ See DOE Response brief, Doc. 2002860, at 32-47 (Jun. 8, 2023).

⁵ See, e.g., 10 C.F.R. § 590.304(e).

1. Insofar as Sierra Club's December 12, 2023 comment, was designated as "off-the-record" purely because of timing, that DOE retract the off-the-record designation.
2. Insofar as there were other reasons for this designation:
 - a. that DOE clearly articulate those reasons, so that Sierra Club and the public can avoid inadvertent off-the-record communications in the future (in this and other dockets), and,
 - b. that DOE offer Sierra Club an opportunity to cure these issues with regard to this particular filing, with guidance on the steps that would be sufficient to do so.

/s/ Nathan Matthews

Nathan Matthews

Sierra Club

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SIERRA CERTIFIED STATEMENT OF AUTHORIZED REPRESENTATIVE

Pursuant to 10 C.F.R. § 590.103(b), I, Nathan Matthews, hereby certify that I am a duly authorized representative of the Sierra Club, and that I am authorized to sign and file with the Department of Energy, Office of Fossil Energy and Carbon Management, on behalf of the Sierra Club, the foregoing documents and in the above captioned proceeding.

Dated at Oakland, CA this 21st day of December, 2023

Nathan Matthews
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Attorney for Sierra Club

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Pursuant to 10 C.F.R. § 590.103(b), I, Nathan Matthews, hereby verify under penalty of perjury that I am authorized to execute this verification, that I have read the foregoing document, and that the facts stated therein are true and correct to the best of my knowledge.

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Attorney for Sierra Club

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Pursuant to 10 C.F.R. § 590.107, I, Nathan Matthews, hereby certify that I caused the above documents to be served on the persons included on the official service list for this docket, as provided by DOE/FE, on December 21, 2023.

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