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By DOE/FE at 4:26 pm, Jan 18, 2019



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January 18, 2019

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**Re: Comments of Sempra LNG & Midstream, LLC  
Natural Gas Contract Guidance  
Filing of Contracts and Purchase Agreements Associated With the  
Export of Natural Gas**

To the Office of Regulation, Analysis, and Engagement:

Pursuant to the notice announcing the proposed interpretive rule (“PIR”) published by the U.S. Department of Energy, Office of Fossil Energy (“DOE/FE”) in the Federal Register on December 19, 2018, 83 Fed. Reg. 65,111, Sempra LNG & Midstream, LLC (“SLNGM”) submits the following comments for consideration by the DOE/FE.<sup>1</sup>

I. Background

Pursuant to authorization delegated from the Secretary of Energy, the DOE/FE is responsible for, among other things, reviewing requests for authorization to export natural gas, including liquefied natural gas (“LNG”) to foreign nations. Section 3(a) of the Natural Gas Act (“NGA”) governs exports to countries with which the United States has **not** entered into a free trade agreement (“FTA”) requiring national treatment for trade in natural gas and with which trade

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<sup>1</sup> SLNGM develops, owns, operate, or holds interests in existing and proposed terminal facilities for the import and export of LNG in Louisiana and Texas.

is not prohibited by U.S. law or policy (“non-FTA countries”).<sup>2</sup> Section 3(a) of the NGA has been consistently interpreted as creating a rebuttable presumption that a proposed export of natural gas to non-FTA countries is in the public interest. Accordingly, DOE/FE must grant a request to export natural gas to non-FTA countries,<sup>3</sup> unless the opponents of such an application “overcome that presumption by making an affirmative showing of inconsistency with the public interest.”<sup>4</sup> Accordingly, following the submission of an application and the conduct of an informal adjudicatory proceeding, the DOE/FE must grant an application to export natural gas to non-FTA countries unless it determines that such exportation will not be consistent with the public interest.<sup>5</sup>

The regulations implementing the administrative procedures governing applications to DOE/FE for import and export authorization under Section 3 of the NGA are codified in 10 CFR part 590. These regulations were adopted pursuant to a final rule published in 1984 by the DOE/FE’s predecessor, the Economic Regulatory Administration (“ERA”),<sup>6</sup> and have remained largely unchanged since that time. Among other things, the administrative regulations in Part 590 apply to “[a]ny person seeking authorization to . . . export natural gas . . . from the United States, [seeking] to amend an existing . . . export authorization, or seeking any other requested action.”<sup>7</sup> As relevant to this proceeding, the regulations state that as part of any application filed with the DOE/FE for such authorizations, applicants must provide DOE/FE with “a copy of all **relevant** contracts and purchase agreements.”<sup>8</sup> However, the regulations do not specify what types of “contracts and purchase agreements” associated with the export of natural gas are considered “relevant” for purposes of complying with this filing requirement. Further, the DOE/FE has recognized that many authorization holders may not have entered into “relevant contracts and purchase agreements” at the time that the DOE/FE issues an export authorization. Nevertheless,

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<sup>2</sup> 15 U.S.C. § 717b(a). Exports to FTA countries are governed by Section 3(c) of the NGA. *Id.* § 717(c).

<sup>3</sup> Pursuant to Section 3(a) of the NGA and Section 590.404 of the Department of Energy’s regulations, the DOE/FE may attach such conditions to any order authorizing an export of natural gas to non-FTA countries “as may be required by the public interest after completion and review of the record.” 10 C.F.R. § 590.404.

<sup>4</sup> *Eagle LNG Partners Jacksonville II LLC*, DOE/FE Order No. 4078, FE Docket No. 17-79-LNG, Order and Opinion Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas in ISO Containers Loaded at the Eagle Maxville Facility in Jacksonville, Florida, and Exported by Vessel to Free Trade Agreement and Non-Free Trade Agreement Nations, at 8 (Sep. 15, 2017) (citing *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961, FE Docket No. 10-111-LNG, Opinion and Order Conditionally Granting Long-Term Authorization to Export Liquefied Natural Gas From Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations, at 28 (May 20, 2011); *Phillips Alaska Natural Gas Corp. & Marathon Oil Co.*, DOE/FE Order No. 1473, FE Docket No. 96-99-LNG, Order Extending Authorization to Export Liquefied Natural Gas from Alaska, at 13 (Apr. 2, 1999); *Panhandle Prods. & Royalty Owners Ass’n v. ERA*, 822 F.2d 1105, 1111 (D.C. Cir. 1987).

<sup>5</sup> The courts have interpreted Section 3(a) of the NGA as “containing a general presumption favoring [export] authorization. Thus, there must be an affirmative showing of inconsistency with the public interest to deny the application.” *Sierra Club v. DOE*, 867 F.3d 189, 203 (D.C. Cir. 2017) (internal citations and quotations omitted); see *West Va. Pub. Servs. Comm’n v. DOE*, 681 F.2d 847, 856 (D.C. Cir. 1982); *Panhandle*, 822 F.2d at 1111.

<sup>6</sup> Department of Energy, *Import and Export of Natural Gas; New Administrative Procedures*, 49 Fed. Reg. 35,302 (Sep. 6, 1984). The 1984 final rule was adopted following the publication of a notice of proposed rulemaking issued in 1981. Department of Energy, *Import and Export of Natural Gas; New Administrative Procedures; Proposed Rule*, 46 Fed. Reg. 44,696 (Sep. 1, 1981). On January 6, 1989, the administration of the natural gas import and export authorization program within the Department of Energy was transferred from the ERA to DOE/FE, which adopted the administrative rules set forth in Part 590. Department of Energy, *Administrative Procedures With Respect to the Import and Export of Natural Gas*, 54 Fed. Reg. 53,531 (Dec. 29, 1989).

<sup>7</sup> 10 C.F.R. § 590.201(a).

<sup>8</sup> *Id.* § 590.202(c) (emphasis added).

export authorization holders must file such contracts “once those agreements have been executed.”<sup>9</sup>

In addition to the information requirements applicable to the filing of applications to export natural gas, Section 590.407 of the Department of Energy’s regulations states that export authorization holders have a “continuing obligation” to provide DOE/FE with “written notification, as soon as practicable, of any prospective or actual changes to the information submitted during the application process upon which the authorization was based, including, but not limited to . . . the terms and conditions of any applicable contract.”<sup>10</sup> The regulations do not define what types of changes to the terms and conditions of applicable contracts must be filed nor do they specify when submission of such written notification must be made to comply with the “as soon as practicable” requirement.

Accordingly, there are two issues that are not specifically addressed in the Department of Energy’s regulations and that are the subject of this proceeding regarding the filing of contracts and the obligation to update them: (1) the **types** of contracts and contractual amendments that are relevant to DOE/FE public interest determination and therefore must be filed; and (2) **when** such relevant contracts and contractual amendments must be filed with DOE/FE to comply with the Part 590 regulations. Regarding the types of contracts that are relevant and must be filed, the DOE/FE has stated in individual authorization orders that export authorization holders must file “any **relevant long-term commercial agreements**” pursuant to which the authorization holder or LNG title-holder (*i.e.*, a Registrant) exports LNG.<sup>11</sup> The DOE/FE has elaborated that these “relevant long-term commercial agreements” include “all executed long-term contracts” associated with both the long-term export of LNG and the long-term supply of natural gas to the export facility.<sup>12</sup> Regarding the timing of an exporter’s obligation to file contracts and contractual amendments, the DOE/FE has stated that the filing of such contracts and amendments within thirty days of their execution will satisfy an authorization holder’s obligations under Sections 590.202(c) and 590.407 of the Department of Energy’s regulations.<sup>13</sup>

## II. The PIR’s Proposal

The PIR proposes several “clarifications to provide specificity, and thereby to reduce potential confusion and regulatory burdens, concerning DOE/FE’s practice under the aforementioned regulations.”<sup>14</sup> First, the DOE/FE lists “the types of ‘contracts and purchase agreements’ associated with the export of natural gas that are ‘relevant’ for purposes of 10 CFR

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<sup>9</sup> See, e.g., *Eagle LNG*, DOE/FE Order No. 4078, at 43.

<sup>10</sup> 10 C.F.R. § 590.707.

<sup>11</sup> *Id.* (emphasis added). A “Registrant” for the purposes of the DOE/FE’s export authorization program, is an entity, other than an export authorization holder, that holds title to LNG at the time it is exported from the United States and for whom an export authorization holder acts as agent to export the LNG under the authorization holder’s export authorization. Export occurs when the LNG is delivered to the flange of the LNG export vessel. See *Dow Chem. Co.*, DOE/FE Order No. 2859, FE Docket No. 10-57-LNG, Order Granting Blanket Authorization to Export Liquefied Natural Gas (Oct. 5, 2010). The Registrant is “registered” with the DOE/FE by the authorization holder acting as agent, which submits information on the Registrant’s behalf.

<sup>12</sup> *Eagle LNG*, DOE/FE Order No. 4078, at 46-47. The DOE/FE has defined “long-term” agreements to have a term of two years or longer. PIR, 83 Fed. Reg. at 65,113 n.14.

<sup>13</sup> *Eagle LNG*, DOE/FE Order No. 4078, at 43, 48.

<sup>14</sup> PIR, 83 Fed. Reg. at 65,113.

590.202(c).<sup>15</sup> Specifically, the following types of contracts would be considered “relevant” for the purposes of compliance with the filing requirements of Part 590.

- Natural gas supply agreements;
- Terminal service agreements;
- Purchase and sale agreements, which include long-term commercial agreements covering “free on board” sales subsequent to a terminal service agreement.
- Liquefaction tolling agreements, liquefaction and regasification tolling capacity agreements, and similar types of agreements; and
- Any other natural gas export contractual agreements that are associated with the first sale or transfer of natural gas at the point of export and specify the volume of natural gas under contract. These may include, but are not limited to, heads of agreement, memoranda of understanding, letters of intent, and similar types of agreements if and when they become fully binding and effective in lieu of a definitive agreement.

Under the PIR, the types of “relevant” agreements required to be filed with DOE/FE would include any agreements “for the sale, transfer, and/or export of natural gas, including LNG, prior to export,” including those agreements covering the in-tank transfer of LNG at export facilities occurring prior to the time of export when LNG is loaded onto the flange of the exporting vessel.

Second, the PIR clarifies **when** these types of “executed, long-term binding commercial agreements associated with the export of natural gas” must be filed. For the initial filing of “relevant” agreements, the PIR reaffirms the DOE/FE’s policy that the agreement must be filed within thirty days of its execution. In a footnote, the PIR clarifies that a relevant agreement is “executed” when “all parties to a long-term commercial agreement have signed the agreement, regardless of whether conditions precedent have been met, and that such an agreement is binding upon all parties to the transaction.”<sup>16</sup> Similarly, for amendments/modifications to such agreements, authorization holders must file notice with the DOE/FE within thirty days of the execution of the amendment/modification.

### III. SLNGM’s Comments on the PIR

SLNGM is generally encouraged by the DOE/FE’s efforts to clarify its contract filing requirements and supports this effort. SLNGM herein offers several comments and suggestions that will advance the DOE/FE’s goal articulated in the PIR of reducing confusion and regulatory burdens associated with compliance with the regulations it administers.

#### *A. The Scope of Contracts Considered to be “Relevant” for Part 590*

At the center of this proceeding is the DOE/FE’s interpretation of the term “relevant” in Section 590.202(c) of the Department of Energy’s regulations requiring applicants and authorization holders to file and update “relevant contracts and purchase agreements.” While the PIR helpfully provides a listing of the types of agreements DOE/FE considers to be “relevant,” it does not provide an explanation of the basis for DOE/FE’s conclusion that each of the listed types

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

<sup>16</sup> *Id.* n.13.

of contracts is “relevant.” The regulation at Section 590.202(c) does not call for the filing of all agreements without limitation, but require the DOE/FE to determine which agreements are “relevant.” In this context, “relevant” contracts can only mean those agreements that are relevant to the DOE/FE’s public interest determination with respect to proposed LNG exports under Section 3(a) of the NGA. Thus, the DOE/FE should explain why it considers those contracts listed in the PIR to be “relevant” for the purposes of its public interest determination with respect to applications to export LNG to non-FTA countries, such that they must be filed with DOE/FE pursuant to Section 590.202(c) and such that notice to the DOE/FE must be provided when those contracts are amended pursuant to Section 590.407.

In providing such a justification for its determination why the contracts listed in the PIR are relevant to the DOE/FE’s public interest determination regarding LNG exports, the DOE/FE might point to some of the factors it has considered in this determination. The DOE/FE’s prior decisions have looked to the 1984 Policy Guidelines setting out the criteria to be employed in evaluating applications for natural gas imports.<sup>17</sup> While nominally applicable to natural gas import cases, the DOE/FE has found these Policy Guidelines applicable to natural gas export applications, as well.<sup>18</sup> The goals of the Policy Guidelines are to minimize federal control and involvement in energy markets and to promote a balanced and mixed energy resource system. The Policy Guidelines provide that:

The market, not government, should determine the price and other contract terms of imported [or exported] gas. . . . The federal government’s primary responsibility in authorizing imports [or exports] should be to evaluate the need for the gas and whether the import [or export] arrangement will provide the gas on a competitively priced basis for the duration of the contract while minimizing regulatory impediments to a freely operating market.<sup>19</sup>

The DOE/FE’s analysis has also been guided by DOE Delegation Order No. 0204-111.<sup>20</sup> According to the Delegation Order, exports of natural gas are to be regulated primarily “based on a consideration of the domestic need for the gas to be exported and such other matters [found] in the circumstances of a particular case to be appropriate.”<sup>21</sup> Although the Delegation Order is no longer in effect, the DOE/FE’s review of export applications continues to focus on: (i) the domestic need for natural gas proposed to be exported; (ii) whether the proposed exports pose a threat to the security of domestic natural gas supplies; (iii) whether the arrangement is consistent with the DOE/FE’s policy of promoting market competition; and (iv) any other factors bearing on the public interest.<sup>22</sup> The DOE/FE has indicated that the following additional considerations are

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<sup>17</sup> New Policy Guidelines and Delegation Orders From Secretary of Energy to Economic Regulatory Administration and Federal Energy Regulatory Commission Relating to the Regulation of Imported Natural Gas, 49 Fed. Reg. 6,684 (Feb. 22, 1984) [hereinafter Policy Guidelines].

<sup>18</sup> *Phillips Alaska*, DOE/FE Order No. 1473, at 13 n.42.

<sup>19</sup> Policy Guidelines at 6,685.

<sup>20</sup> U.S. Department of Energy, Delegation Order No. 0204-111 (Feb. 22, 1982) [hereinafter Delegation Order]

<sup>21</sup> Delegation Order at para. (b).

<sup>22</sup> See, e.g., *Cameron LNG, LLC*, DOE/FE Order No. 3391-A, FE Docket No. 11-162-LNG, Final Opinion and Order Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel From the Cameron LNG Terminal in Cameron Parish, Louisiana, to Non-Free Trade Agreement Nations, at 9-10 (Sept. 10, 2014); *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961, FE Docket No. 10-111-LNG, Opinion and Order

relevant in determining whether proposed exports are in the public interest: whether the exports will be beneficial for regional economies, the extent to which the exports will foster competition and mitigate trade imbalances with the foreign recipient nations, and the degree to which the exports would encourage efficient management of U.S. domestic natural resources.<sup>23</sup> SLNGM asserts that in making a determination as to which types of contracts are “relevant” to its public interest determination for applications to export LNG, the DOE/FE should provide a justification for that determination, pointing to one or more of the above-stated criteria.

SLNGM believes that it is particularly appropriate for the DOE/FE to articulate a rationale for requiring the filing of natural gas supply agreements, given that it is not obvious what bearing such contracts have on the DOE/FE’s public interest determination in the current landscape and the potential for competitive harm that the disclosure of such agreements may have upon participants in today’s liquid domestic natural gas market. It is not clear what aspect of the DOE/FE’s public interest review is served by the provision of commercially sensitive natural gas supply agreements. For example, although domestic need for exported natural gas is a principal consideration in the DOE/FE’s public interest determination, as noted above, the DOE/FE’s analysis has routinely focus on other information such as aggregate data from the Energy Information Administration and macroeconomic studies commissioned by the DOE/FE to determine the lack of domestic need for the exported natural gas, rather than the existence or terms of specific natural gas supply contracts.<sup>24</sup> Further, given the DOE/FE’s policy that “[t]he market, not government, should determine the price and other contract terms of [exported] gas,” it is unclear why disclosure of the terms contained in natural gas supply agreements is relevant to the DOE/FE’s public interest determination. The rates and terms of service of those agreements affect only authorization holders/Registrants and their suppliers, which are free to negotiate in a competitive and liquid domestic natural gas market. Unlike the DOE/FE, whose regulatory authority does not extend to interstate and intrastate sales of natural gas, other state and federal agencies may have jurisdiction over the rates and terms of service of those sales arrangements, and thus any concerns regarding impacts to the domestic markets potentially implicated by gas purchase and sale agreements can be addressed by other agencies.

Even if the filing of natural gas supply agreements may have been relevant to the consideration of a natural gas export application when the Department of Energy’s administrative regulations at 10 C.F.R. Part 590 were promulgated in 1984, several fundamental changes have occurred in the domestic and international natural gas market that warrant a reexamination of the DOE/FE’s need to review natural gas supply agreements in the current era of abundant supplies.

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Conditionally Granting Long-Term Authorization to Export Liquefied Natural Gas From Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations, at 29 (May 20, 2011).

<sup>23</sup> See, e.g., *Cameron LNG, LLC*, DOE/FE Order No. 3846, at 105-125; *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 3792, at 162-191, *Cameron LNG, LLC*, DOE/FE Order No. 3391-A, at 125-35; *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961, at 34-38.

<sup>24</sup> See, e.g., *Eagle LNG*, DOE/FE Order No. 4078, at 24-29 (citing U.S. Energy Information Administration, Annual Energy Outlook 2017 (Jan. 2017); U.S. Energy Information Administration, Effect of Increased Levels of Liquefied Natural Gas Exports on U.S. Energy Markets (Oct. 2014); Center for Energy Studies at Rice University Baker Institute and Oxford Economics, The Macroeconomic Impact of Increasing U.S. LNG Exports (Oct. 29, 2015)); see also Department of Energy, *Study on Macroeconomic Outcomes of LNG Exports: Response to Comments Received on Study*, 83 Fed. Reg. 67,251 (Dec. 28, 2018) (adopting NERA Economic Consulting, Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports (June 7, 2018)).

The Part 590 regulations, which in relevant part have been unchanged since 1984, were promulgated at a time shortly after parts of the nation faced severe natural gas shortages. Domestic wholesale interstate natural gas sales were subject to more strict price regulation and pipelines served as the primary merchants in the sale for resale of natural gas at bundled delivered rates. Given these circumstances, the particular facts surrounding individual gas supply arrangements may have been more relevant to a public interest determination. In contrast, today's domestic natural gas market is unbundled from pipeline transportation, deregulated in respect of pricing and terms of service, extremely liquid, and very competitive. In addition, since the enactment of the Part 590 regulations, Congress passed the Energy Policy Act of 1992 ("EPAAct 1992"), which amended Section 3 of the NGA to remove restrictions on trade in natural gas with FTA countries.<sup>25</sup> In this environment, it is unclear what relevance natural gas supply contracts have upon the DOE/FE's public interest determination with respect to LNG exports.

Neither does SLNGM believe that the text of the regulation compels the DOE/FE to require the filing of natural gas supply agreements in the context of reviewing an LNG export application. As with all contracts, Section 590.202(c) of the Department of Energy's regulations requires the filing of only purchase agreements that are "relevant" to the agency's public interest determination. Purchase agreements may have been relevant in other contexts, such as DOE/FE's prior review of applications associated with natural gas imports,<sup>26</sup> where DOE/FE may have needed to have information related to the international source of supply. However, as discussed above, it is not clear how those agreements bear upon DOE/FE's public interest determination applicable to LNG exports. In this case, the regulations give the DOE/FE discretion to determine what contracts are "relevant" for the purposes of proceedings involving LNG exports and thus, DOE/FE would not be compelled by the text of the regulation to require the filing of gas purchase agreements (*i.e.*, natural gas supply agreements) where the agency determines that such agreements are not relevant. The courts owe deference to DOE/FE's interpretation of the regulations it administers, provided that they are assured that the agency has given a plausible reading of its own regulations and has given reasoned consideration to all the material facts and issues.<sup>27</sup>

While the utility to the DOE/FE in disclosing natural gas supply agreements is not immediately apparent, the public disclosure of the terms poses the potential for competitive disadvantage to LNG terminal operators and, where applicable, their tolling customers. Competitive issues may not rise to the same level of concern regarding the disclosure of the terms of contracts such as LNG sale and purchase agreements ("SPAs") or liquefaction and tolling service agreements ("LTSAs") given that the subset of counterparties to such agreements is relatively small – *i.e.*, there are currently only a limited number of LNG marketers and foreign utilities that are in a position to sign up for SPAs or LTSAs and these counterparties are often

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<sup>25</sup> Pub. L. No. 102-486 § 201, 106 Stat. 2866 (Oct. 24, 1992) (adding Section 3(b) and 3(c) to the NGA, codified at 15 U.S.C. § 717b(b)-(c)); *see also id* § 202 (expressing the sense of Congress that "natural gas consumers and producers, and the national economy, are best served by a competitive natural gas wellhead market").

<sup>26</sup> It is notable that the Part 590 regulations were implemented prior to the enactment of Section 3(b) and 3(c) of the NGA through the passage of Section 201 of the EPAAct 1992, which deemed all imports of LNG and imports of natural gas from FTA countries to be consistent with the public interest and required the DOE/FE to approve such imports "without modification or delay."

<sup>27</sup> *Louisiana Ass'n of Independent Producers & Royalty Owners v. Department of Energy*, 1992 U.S. App. LEXIS 27546 (D.C. Cir. No. 91-1233 at 5) (unpublished order) (citing 15 U.S.C. § 717r(b) (1988); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *New England Fuel Inst. v. ERA*, 875 F.2d 882, 887 (D.C. Cir. 1989).

publicly announced as the anchor tenants of an LNG project. In contrast, the inherent liquidity and competitiveness of the domestic natural gas market means that the terms of natural gas supply agreements, including the identity of the counterparty making the gas sales, can be commercially sensitive. Further, the need for flexibility and diversity of natural gas suppliers may mean that authorization holders and Registrants may enter into multiple supply arrangements, which may evolve over time. This could unreasonably compound the regulatory burden of authorization holders, Registrants, and the DOE/FE without any compelling rationale for requiring public disclosure of such arrangements.

Accordingly, in the absence of DOE/FE's articulation of a reasonable rationale as to why the submission of natural gas supply agreements is specifically relevant to its public interest determination regarding exports of LNG, SLNGM respectfully submits that it should reconsider its position in the PIR and no longer require the submission of "natural gas supply agreements" in the context of LNG export applications to non-FTA countries. Removing this requirement would be consistent with the PIR's goal of removing confusion and regulatory burdens. It would also be consistent with the Department of Energy's policy goal of streamlining natural gas exports and allowing for "expedited processing of larger-scale exports of natural gas as consistent with applicable law and [the Department of Energy's] statutory authority."<sup>28</sup>

Finally, SLNGM submits that the requirement to file long-term "natural gas supply agreements" is somewhat vague and if the DOE/FE continues to require the submission of such agreements, SLNGM respectfully requests that DOE/FE clarify that "natural gas supply agreements" only include those agreements or parts of an agreement that specifically involve the long-term purchase of natural gas by an authorization holder or a Registrant. The term "relevant contracts and purchase agreements" should not be construed to involve pipeline transportation service agreements, terms of asset management agreements not related to gas purchases, or gas sale and purchase agreements that are upstream of the point of export and do not directly involve authorization holders or Registrants as a contractual party.<sup>29</sup>

For similar reasons, it is unclear why agreements covering the in-tank transfer of LNG at export facilities occurring prior to the time of export are relevant to the DOE/FE's public interest determination. SLNGM submits that the DOE/FE should likewise articulate a rationale for the relevance of such agreements to its public interest determination or reconsider including them in the relevant contracts listed in the PIR.

### *B. Timing of Filing Initially Executed Relevant Agreements*

DOE/FE's policy, proposed in the PIR, of requiring authorization holders to file relevant long-term commercial agreements with the DOE/FE within thirty days of their execution, notwithstanding that some conditions precedent to the formation of a contract may not yet have been satisfied, is potentially problematic for many LNG export projects. Such agreements may be

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<sup>28</sup> Department of Energy, Notice of Availability of Final Report on Regulatory Review Under Executive Order 13783, 82 Fed. Reg. 50,491, 50,492 (Nov. 1, 2017). *Promoting Energy Independence and Economic Growth*, Executive Order 13783 (Mar. 28, 2017).

<sup>29</sup> In other words, DOE/FE should clarify that only those contracts to which an authorization holder or its Registrant are a party must be filed with the DOE/FE.



executed at an early stage of an LNG export project's development, may be amended as the project advances, and may be subject to several conditions precedent that must be satisfied before such agreements are legally binding upon the parties to those agreements. Further, the contracts executed at an early stage may not reflect a complete picture of the commercial arrangements ultimately adopted with respect to a fully-developed LNG export project. To address this concern, SLNGM has suggested that the DOE/FE require the filing of relevant agreements only when all conditions precedent of such agreements have been satisfied and the owners of the related LNG export terminal have taken a final investment decision with respect to such export terminal ("FID"). This would minimize the number of amendments that an authorization holder and/or Registrant would be required to file and would ensure that only binding agreements reflecting fully-formed projects are filed with and reviewed by the DOE/FE, thereby reducing the administrative burden to all parties without affecting the DOE/FE's public interest review.

Notwithstanding this suggestion, the PIR proposes that relevant contracts must be filed within thirty days of the date such agreements are "executed." The PIR states that a relevant agreement is considered to be "executed" when "all parties to a long-term commercial agreement have signed the agreement, regardless of whether conditions precedent have been met, and that such an agreement is binding upon all parties to the transaction."<sup>30</sup> The PIR's proposed standard for the timing of filing contracts creates a potential legal contradiction and does not address the concerns SLNGM has raised with the timing of filing relevant contracts with the DOE/FE.

Under the PIR's standard for determining when a contract is "executed" and therefore must be filed, a contract is considered "executed" when it is signed by and is **binding** upon all parties to the transaction." However, the standard also states that an agreement would be considered "executed . . . regardless of whether **conditions precedent have been met**."<sup>31</sup> If by this language, the DOE/FE intends that the satisfaction or waiver of conditions precedent should not be considered when determining when a contract is "effective," this position presents a potential conflict under the law of contracts.<sup>32</sup> The parties to commercial agreements, particularly those within the LNG export industry, often include in those contracts conditions precedent to the agreement becoming binding upon the parties. When the parties agree "that the contract is not to be effective or binding until certain conditions are performed or occur, no binding contract will arise until the conditions specified have occurred or been performed."<sup>33</sup> Accordingly, the

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<sup>30</sup> PIR, 83 Fed. Reg. at 65,113 n.13.

<sup>31</sup> *Id.*

<sup>32</sup> SLNGM cannot say with certainty that this interpretation is necessarily that proffered by the DOE/FE. As the Wisconsin Supreme Court has observed, "[t]here is a distinction (often blurred) between a condition under a contract (where, though there is a binding contract, performance is delayed until the condition is satisfied) and a condition to the making of a contract (where there is no contract until the condition is satisfied)." *Fox v. Catholic Knights Ins. Soc'y*, 665 N.W.2d 181, 189 (Wisc. 2003). The former interpretation as applied to the DOE/FE's articulated standard for determining when a contract has been "executed" would not necessarily present the legal problem that SLNGM has identified in its comments.

<sup>33</sup> Richard A. Lord, 13 Williston on Contracts § 38.7 (4th ed. 2017); *see, e.g.*, Restatement 2d of Contracts, § 225(1) (2nd 1981) ("Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused."); *Mumaw v. Western & Southern Life Ins. Co.*, 119 N.E. 132 (Ohio 1917) (holding that a contract is not effective until the performance of the condition precedents and that a condition precedent "calls for the happening of some event, or the performance of some act, after the terms of the contract have been agreed on, before the contract shall be binding on the parties"); *see also Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976) (noting that condition precedent to contract's formation occurs where parties have agreed

satisfaction or waiver of such conditions precedent is a necessary consideration in determining whether an agreement is binding upon the parties. Thus, SLNGM submits the DOE/FE should restate the standard to read as follows: “Executed” means that all parties to a long-term commercial agreement have signed the agreement and that **the obligation to purchase or sell natural gas or LNG under** such an agreement is binding upon all parties to the transaction.” The satisfaction of conditions precedent to the formation of such a contract should remain relevant for determining when such a purchase or sales obligation under an agreement is binding upon the parties.

An alternative interpretation of the DOE/FE’s standard for determining when a relevant contract is issued that referred only to whether the agreement had been signed and disregarded the question of whether the agreement is binding upon the parties would likewise be problematic. This approach would not allow for an efficient use of the resources of both the DOE/FE and applicants/authorization holders. LNG export projects are complex operations and the planning behind them is often underpinned by several intricate contractual arrangements between multiple parties. Depending upon the circumstances, a project developer may have signed and in place several key agreements,<sup>34</sup> including those agreements that the DOE/FE may eventually consider to be relevant to its public interest determination, years before the project is set to take an FID and move forward with construction. As the project is further developed, partners to the project are added, and other conditions change, such an agreement may be amended several times before it becomes binding upon the parties and takes legal effect. Accordingly, SLNGM submits that the best utilization of the time and resources of the DOE/FE and other parties will be achieved by requiring the filing of relevant agreements only when they are both signed and fully legally binding upon the parties to the agreement with respect to the obligation to purchase or sell natural gas or LNG under the relevant contract.

### *C. Filing Amendments to Executed Relevant Agreements*

As discussed above, under Section 590.407 of the Department of Energy’s regulations, authorization holders that have been granted orders by the DOE/FE authorizing the export of LNG are under “a continuing obligation to give the [DOE/FE] written notification, as soon as practicable, of any prospective or actual changes **to the information submitted during the application process upon which the authorization was based**, including, but not limited to, changes to . . . the terms and conditions of any applicable contracts.”<sup>35</sup> SLNGM does not believe it is the intent of either the DOE/FE or the Department of Energy’s regulations at Section 590.407 to require the submission of a notification or the filing of an amendment each and every time there is a change in the terms of the agreements that have been previously filed with the DOE/FE, no matter how minimal or immaterial to the DOE/FE’s public interest determination under the NGA those changes might be. SLNGM submits that it would be unnecessary for the purpose of fulfilling

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that contract will not be effective or binding until certain conditions occur, and no binding contract will arise until conditions specified have occurred).

<sup>34</sup> As discussed above, these agreements are most likely subject to multiple conditions precedent that must be satisfied before the agreements become legally binding upon the parties.

<sup>35</sup> 10 C.F.R. § 590.407 (emphasis added).

DOE/FE's statutory obligation under NGA Section 3(a) and unreasonably burdensome for the DOE/FE to require the filing of notification for all such modifications to contractual agreements.

As the emphasized language in the regulation suggests, changes of which the DOE/FE is required to be notified should be interpreted to only include those changes to terms that are relevant to the DOE/FE's public interest determination with respect to exports of LNG to non-FTA countries. Accordingly, SLNGM respectfully submits that an authorization holder's obligation to file notification with the DOE/FE of a change to a previously-filed agreement should only arise where a perspective or actual change relates to matters that DOE/FE has articulated are relevant to its public interest determination – *e.g.*, changes to the names of the parties, affiliation to the export facility, type of contract (SPA, LTSA, *etc.*), the firm or interruptible nature of the agreement, term, contract quantity, parties responsible for natural gas supply, name of party holding title to LNG at the time of export, export destination restrictions, terms required to be included in resale contracts, and any other terms for which the DOE/FE has specifically articulated a rationale regarding its relevance to DOE/FE'S public interest determination. This interpretation would be consistent with the language of Section 590.202(c), which only requires the filing of agreements that are relevant to the DOE/FE's public interest determination. Likewise, only those **changes** to relevant agreements that are themselves relevant to that determination should require notification. In this respect, the DOE/FE would provide authorization holders and other parties with a significantly greater degree of clarity by articulating a rationale for the relevance of the listed contracts to the agency's public interest determination for LNG exports under NGA Section 3(a), as discussed in Part III.A of these comments.

SLNGM submits that it would be unnecessary for the purpose of fulfilling DOE/FE's statutory obligation under NGA Section 3(a) and unreasonably burdensome for the DOE/FE to require the filing of notification for all modifications to contractual agreements without regard to a consideration of the relevance of those changes to the DOE/FE's public interest determination. The burden would be substantially compounded if the DOE/FE requires parties to file relevant contracts prior to the conditions precedent established in those contracts having been satisfied to the point that the contracts are fully binding on the parties. As discussed above, prior to the satisfaction of conditions precedent and the taking of FID on an export project, many amendments necessary to the development of a project but immaterial to DOE/FE's public interest determination can be expected to occur prior to the in-service date of an LNG export project.

For the reasons discussed above, SLNGM respectfully requests that the DOE/FE clarify that authorization holders are only required to provide notice to the DOE/FE pursuant to Section 590.407 where perspective or actual changes to previously-filed contracts relate to terms specifically identified by the DOE/FE as relevant to its public interest determination under NGA Section 3(a).

IV. Conclusion

For the foregoing reasons, SLNGM respectfully requests that the DOE/FE accept these comments in the captioned proceeding and revise the proposal set forth in the PIR regarding the filing of contractual information in the manner requested in these comments.

Respectfully submitted,

/s/ Jerrod L. Harrison

Jerrod L. Harrison

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