



6450-01-P

DEPARTMENT OF ENERGY

10 CFR Part 590

Filing of Contracts and Purchase Agreements Associated with the Export of Natural Gas

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Proposed interpretive rule.

SUMMARY: The Department of Energy (DOE or the Department) is proposing an interpretive rule to clarify certain DOE regulations governing the export of natural gas, including liquefied natural gas (LNG), under the Natural Gas Act (NGA). Under DOE's regulations, any person seeking authorization to export natural gas from the United States, or to amend an existing export authorization, must provide DOE's Office of Fossil Energy (DOE/FE) with a copy of "all relevant contracts and purchase agreements." DOE is proposing this interpretive rule to clarify the types of contracts and purchase agreements associated with the export of natural gas that DOE considers to be "relevant" for purposes of these regulations. DOE's regulations also impose a "continuing obligation" on authorization holders to notify DOE/FE "as soon as practicable" of any prospective or actual changes to the information submitted during the application process upon which the authorization was issued, including "the terms and conditions of any applicable contracts." In this proposed interpretative rule, DOE is seeking to clarify the phrase "as soon as practicable" to mean within 30 days of the execution of the contracts.

DATES: Public comment on this proposed interpretive rule will be accepted until ***[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]***.

ADDRESSES: You may submit comments using any of the following methods, although email is preferred:

1. *Email*: Send e-mail to *fergas@hq.doe.gov* or *regulations.gov*. Include “Natural Gas Contract Guidance” in the subject line of the email. Please include the full body of your comments in the text of the message or as an attachment.

2. *Regular Mail*: U.S. Department of Energy (FE-34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026-4375.

3. *Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.)*

U.S. Department of Energy (FE-34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E-042, 1000 Independence Avenue, SW., Washington, DC 20585. Telephone: (202) 586-9478.

Due to potential delays in the delivery of postal mail, we encourage respondents to submit comments electronically to ensure timely receipt. **PLEASE NOTE**: If submitting a filing via email, please include all related documents and attachments (e.g., exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

Docket: This notice of proposed rulemaking and any comments that DOE receives will be made available on DOE’s website at: <https://www.energy.gov/fe/services/natural-gas-regulation>.

FOR FURTHER INFORMATION CONTACT: Amy Sweeney, U.S. Department of Energy (FE-34), Office of Regulation, Analysis, and Engagement, Office of Fossil Energy, Forrestal Building, Room 3E-042, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-

2627, Email: *amy.sweeney@hq.doe.gov*; or Cassandra Bernstein or Charles Park, U.S.

Department of Energy (GC-76), Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6D-033, 1000 Independence Avenue SW., Washington, DC 20585; (202) 586-9793 or (202) 287-6531, Email: *cassandra.bernstein@hq.doe.gov* or *charles.park@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

- I. Statutory Background
- II. Regulatory Background
- III. Proposed Regulatory Interpretations
- IV. Public Comment Procedures
- V. Approval of the Office of the Secretary

I. Statutory Background

The Department of Energy is responsible for authorizing exports of natural gas to foreign nations pursuant to section 3 of the NGA, 15 U.S.C. 717b.¹ Under section 3(c) of the NGA, exports of natural gas to countries with which the United States has entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas and with which trade is not prohibited by U.S. law or policy (FTA countries) are “deemed to be consistent with the public interest.” Therefore, applications authorizing natural gas and LNG exports to FTA countries must be granted “without modification or delay.”² Section 3(a) of the NGA governs exports to any other country with which trade is not prohibited by U.S. law or policy (non-FTA countries).

¹ Authority to regulate the imports and exports of natural gas, including LNG, under section 3 of the NGA (15 U.S.C. 717b) has been delegated to the Assistant Secretary for Fossil Energy in Redesignation Order No. 00-006.02, issued on November 17, 2014.

² 15 U.S.C. 717b(c). The United States currently has FTAs requiring national treatment for trade in natural gas with Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea, and Singapore. FTAs with Israel and Costa Rica do not require national treatment for trade in natural gas.

DOE has consistently interpreted section 3(a) of the NGA as creating a rebuttable presumption that a proposed export of natural gas to non-FTA countries is in the public interest.³

Accordingly, DOE conducts an informal adjudication and grants the application unless DOE finds that the proposed exportation will not be consistent with the public interest.⁴

II. Regulatory Background

DOE's regulations implementing section 3 of the NGA are codified in 10 CFR part 590. Under those regulations, "[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"⁵ is required to provide DOE/FE with, *inter alia*, "a copy of all relevant contracts and purchase agreements."⁶ DOE's regulations do not specify what types of "contracts and purchase agreements" associated with the export of natural gas are considered "relevant" for purposes of 10 CFR 590.202(c).

DOE implements this regulatory authority as part of its long-term export authorizations for natural gas, including LNG.⁷ For example, in the "Terms and Conditions" section of DOE/FE's long-term LNG export orders, DOE/FE states that authorization holders are required to file, or cause to be filed, "any relevant long-term commercial agreements" pursuant to which the authorization holder or LNG title-holder (*i.e.*, Registrant) exports LNG "once those agreements

³ See *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 203 (D.C. Cir. 2017) ("We have construed [NGA section 3(a)] as containing a 'general presumption favoring [export] authorization.'" (quoting *W. Va. Pub. Serv. Comm'n v. U.S. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982)).

⁴ See *id.* ("there must be 'an affirmative showing of inconsistency with the public interest' to deny the application" under NGA section 3(a)) (quoting *Panhandle Procedures & Royalty Owners Ass'n v. Econ Regulatory Admin.*, 822 F.2d 1105, 1111 (D.C. Cir. 1987)).

⁵ 10 CFR 590.201(a).

⁶ *Id.* at 590.202(c).

⁷ For purposes of this proposal, the terms "authorization" and "order" are used interchangeably.

have been executed.’⁸ Similarly, in the “Order” section, DOE/FE states that the authorization holder shall file, or cause others to file, “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.⁹

DOE regulations also impose a “continuing obligation” on authorization holders to give 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.”¹⁰ DOE regulations do not specify when submission of such written notification must be made to constitute “as soon as practicable.” However, in DOE/FE’s long-term export orders, DOE/FE expressly “finds that the submission of all such [long-term commercial export] agreements or contracts within 30 days of their execution ... will be consistent with the ‘to the extent practicable’ requirement of section 590.202(b).”¹¹ Likewise, DOE/FE imposes a 30-day time period for an authorization holder to notify DOE/FE of a change in the company name, the term of any long-term contracts, and other relevant modifications.¹²

III. Proposed Regulatory Interpretations

DOE proposes the following clarifications to provide specificity, and thereby to reduce potential confusion and regulatory burdens, concerning DOE/FE’s practice under the aforementioned regulations. As set forth above, these proposed clarifications are consistent with DOE/FE’s practice under its long-term export authorizations, and thus are intended to provide

⁸ See, e.g., *Eagle LNG Partners Jacksonville II LLC*, DOE/FE Order No. 4078, FE Docket No. 17-79-LNG, Opinion and Order 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 (Sept. 15, 2017), at 43 (Terms and Conditions Para. H).

⁹ See *id.* at 46-47 (Ordering Paras. I(i), (ii)).

¹⁰ 10 CFR 590.407.

¹¹ See, e.g., *Eagle LNG Partners Jacksonville II LLC*, DOE/FE Order No. 4078, at 43 (Terms and Conditions Para. H); see also *id.* at 46-47 (Ordering Paras. I(i), (ii), K, Q) (imposing 30-day reporting periods).

¹² See *id.* at 48 (Ordering Para. L).

additional guidance for authorization holders in complying with existing and/or future orders.

A. Proposed Interpretation of 10 CFR 590.202(c)

DOE proposes to clarify the types of “contracts and purchase agreements” associated with the export of natural gas that are “relevant” for purposes of 10 CFR 590.202(c). DOE proposes to interpret the term “relevant contracts and purchase agreements” to include the following types of executed,¹³ long-term¹⁴ binding commercial agreements associated with the export of natural gas (collectively, Executed Agreements):

- i. Natural gas supply agreements;
- ii. Terminal service agreements;
- iii. Purchase and sale agreements;¹⁵
- iv. Liquefaction tolling agreements, liquefaction and regasification tolling capacity agreements, and similar types of agreements; and
- v. 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.¹⁶

Under DOE’s proposed interpretation, Executed Agreements may be associated with the sale, transfer, and/or export of natural gas, including LNG, prior to export.¹⁷ For example, for export facilities that operate on a tolling model, if an off-taker that holds initial title to the LNG within the storage tank of an export facility (Party A) enters into an agreement to sell the LNG to

¹³ “Executed” means that 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.

¹⁴ “Long-term” means any Executed Agreement with a term of two years or longer.

¹⁵ “Purchase and sale agreements” include long-term commercial agreements covering “free on board” sales subsequent to a terminal service agreement.

¹⁶ “Any other natural gas export contractual agreements” 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.

¹⁷ An “export” occurs when the LNG is delivered to the flange of the LNG export vessel. *See Freeport LNG Expansion, L.P., et al.*, DOE/FE Order No. 3282, FE Docket No. 10-161-LNG, Order Conditionally Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Freeport LNG Terminal on Quintana Island, Texas, to Non-Free Trade Agreement Nations, at 10 n.28 (May 17, 2003) (citation omitted).

another party (Party B) prior to the LNG being loaded onto a ship, both Party A's and Party B's contracts would be considered "relevant" for purposes of 10 CFR 590.202(c).

B. Proposed Interpretation of 10 CFR 590.407

DOE proposes to interpret the phrase "as soon as practicable" in 10 CFR 590.407 with respect to the continuing obligation of authorization holders and Registrants to provide written notification to DOE/FE of any prospective or actual changes to the information submitted during the application process. Specifically, DOE/FE will consider a written notification of any Executed Agreement(s) filed within 30 days of its execution to have been submitted "as soon as practicable" under this regulation. DOE/FE believes a 30-day timeframe, absent good cause for delay, will provide a reasonably sufficient time for authorization holders to prepare and file the written notifications with DOE/FE.

C. Anticipated Administrative Benefits

In this proposed interpretive rule, DOE/FE is not proposing any new requirements for applicants or authorization holders under 10 CFR part 590. Rather, DOE's intent is to reduce administrative uncertainty and minimize regulatory burdens associated with the application of 10 CFR 590.202(c) and 10 CFR 590.407.

IV. Public Comment Procedures

Interested persons are invited to participate in this proceeding by submitting data, views, or arguments. Written comments should be submitted to the address, and in the form, indicated in the **ADDRESSES** section of this proposed rule. To help DOE review the comments, interested persons are asked to refer to specific proposed provisions, if possible.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as one copy from which the information claimed

to be exempt by law from public disclosure has been deleted. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under the DOE Freedom of Information regulations at 10 CFR 1004.11.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed interpretive rule.

Signed in Washington, DC, on December 13, 2018.

Steven E. Winberg
Assistant Secretary
Office of Fossil Energy

[FR Doc. 2018-27450 Filed: 12/18/2018 8:45 am; Publication Date: 12/19/2018]