Summary of Testimony of Bill Cooper,
President of the Center for Liquefied Natural Gas,
before the Subcommittee on Energy and Power
of the U. S. House Committee on Energy and Commerce

"U.S. Energy Abundance:
Regulatory, Market, and Legal Barriers to Export"

June 18, 2013

Effective December 5, 2012, DOE published its order of precedence (the queue) informing the public as to the manner in which it would process the 15 applications pending before it and all subsequently filed applications. Preference was given to the pending DOE applications that had received approval from the Federal Energy Regulatory Commission (FERC) to use the FERC pre-filing process in the order the DOE application was received. All other pending and future DOE applications would be processed thereafter in the order the DOE application was received.

DOE's issuance of its order of precedence (the queue) is unlawful based upon the following:

1. The establishment and use of the queue is in essence an amendment to the rules promulgated by DOE as set forth in Title 10 Code of Federal Regulations (CFR) Part 590 and therefore is subject to the same notice and comment requirements as the original rules. Notice of the queue was not published in the Federal Register with an opportunity for the public to comment. The failure to provide notice and comment renders the queue void.
2. Any amendment to an existing rule cannot be applied retroactively, thus rendering the queue ineffective as to the 15 pending applications at the time of the queue's issuance.
3. DOE should proceed with its determinations of the pending applications based upon its rules set forth in 10 CFR Part 590.
4. DOE should proceed with its determinations of the pending applications within a reasonable time from the closing of the time periods set forth in the Federal Register notices for the pending applications.

Testimony of Bill Cooper, President of the Center for Liquefied Natural Gas,
before the Subcommittee on Energy and Power
of the U. S. House Committee on Energy and Commerce

"U.S. Energy Abundance:
Regulatory, Market, and Legal Barriers to Export"

June 18, 2013

Chairman Whitfield, Ranking member Rush, and members of the Subcommittee, thank you for the opportunity to present my views on the regulatory barriers to LNG exports.

Introduction

The Center for Liquefied Natural Gas (CLNG) is a non-profit trade association whose mission is to promote fact-based discussions on liquefied natural gas (LNG), support public policies that permit LNG exports and imports to be a part of the U.S. energy mix, and to ensure the safe, secure, and environmentally responsible development and operation of LNG facilities in the United States.

For the purposes of this testimony, all references to applications refer to applications for LNG exports to countries with which the United States does not have a free trade agreement.

The purpose of my testimony is to set forth the regulatory structure established by the U.S. Department of Energy (DOE) regarding LNG exports and provide a critique of DOE's decisions of general applicability regarding how it has elected to process pending LNG export applications.

Synopsis

Effective December 5, 2012, DOE published its order of precedence (the queue) informing the public as to the manner in which it would process the 15 applications pending before it and all subsequently filed applications. Preference was given to the pending DOE applications that had received approval from the Federal Energy Regulatory Commission (FERC) to use the FERC pre-filing process in the order the DOE application was received. All other pending and future DOE applications would be processed thereafter in the order the DOE application was received.

DOE's issuance of its order of precedence (the queue) is unlawful based upon the following:

1. The establishment and use of the queue is in essence an amendment to the rules promulgated by DOE as set forth in Title 10 Code of Federal Regulations (CFR) Part 590 and therefore is subject to the same notice and comment requirements as the original rules. Notice of the queue was not published in the Federal Register with an opportunity for the public to comment. The failure to provide notice and comment renders the queue void.
2. Any amendment to an existing rule cannot be applied retroactively, thus rendering the queue ineffective as to the 15 pending applications at the time of the queue's issuance.
3. DOE should proceed with its determinations of the pending applications based upon its rules set forth in 10 CFR Part 590.

4. DOE should proceed with its determinations of the pending applications within a reasonable time from the closing of the time periods set forth in the Federal Register notices for the pending applications.

Legal Authority

The statutory authority governing DOE in its deliberations of the pending export applications is Section 3(a) of the Natural Gas Act, which states:

> [N]o person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the [Secretary of Energy] authorizing it to do so. The [Secretary] shall issue such order upon application, unless after opportunity for hearing, [he] finds that the proposed exportation or importation will not be consistent with the public interest. The [Secretary] may by [the Secretary's] order grant such application, in whole or part, with such modification and upon such terms and conditions as the [Secretary] may find necessary or appropriate.[1]

DOE recognizes the Congressional mandate set forth in Section 3 of the Natural Gas Act, which "creates a rebuttable presumption that a proposed export of natural gas is in the public interest. DOE/FE[2] must grant such an application unless opponents of the application overcome that presumption by making an affirmative showing of inconsistency with the public interest."[3] However, Congress left it to DOE to promulgate rules as to how DOE would address applications for the export of natural gas. DOE promulgated such rules as set forth in 10 CFR Part 590.

Regulatory Process

Persons seeking to export LNG from the United States are required to file an application with DOE pursuant to the rules promulgated by DOE and publicly available in 10 CFR Part 590. The CFR is specific as to when an application must be filed (at

[1] 15 USC 717b(a)
[2] U.S. Department of Energy, Office of Fossil Energy
[3] *Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC*, FE Docket No. 10-161-LNG (May 17, 2013), page 6.

least 90 days in advance of the requested action[4]) and what an application must contain, including the following:

1. The project's scope, including volumes, dates of commencement and completion, and the facility description.

2. The source and security of the natural gas supply to be exported, with a description of the natural gas reserves supporting the project.

3. All participants to the project must be identified.

4. The terms of the transaction that affect the marketability of the gas must be disclosed.

5. The potential environmental impact must be described.[5]

Factual matters set forth in an application are required to be supported by data or documents to the extent practicable. If DOE finds an application incomplete, it may require that additional information be submitted to complete the application.[6]

Once an application is filed, DOE is required to publish a notice of the application in the Federal Register, providing at least 30 days from the date of publication for persons to file comments, protests or a motion to intervene or notice of intervention.[7]

"Any person wishing to become a party to the proceeding must file a motion to intervene or a notice of intervention, as applicable.[8] The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding."[9] In order to have the opportunity to request additional

[4] 10 CFR Section 590.201(b)
[5] 10 CFR Section 590.202
[6] 10 CFR Section 590.203
[7] 10 CFR Section 590.205(a)
[8] State commissions may intervene as a matter of right, thus the proper method is the filing of a notice of intervention. Any other person must seek DOE approval to intervene by the filing of a motion to intervene. 10 CFR Section 590.303.
[9] 77 Federal Register 72840

procedures as set forth in the following paragraph, a person must be a party to the proceeding.

If DOE grants a person's motion to intervene, thereby designating that person as a party to the proceeding, there are procedural options that are not available to persons merely filing comments or protests. Section 590.205(b): "The notice of application shall advise the parties of their right to request additional procedures, including the opportunity to file written comments and to request that a conference, oral presentation, or trial-type hearing be convened. Failure to request additional procedures at this time shall be deemed a waiver of any right to additional procedures"[10] if the application is approved.[11]

Once the time set forth in the Federal Register notice has expired, a party in opposition to the application who has not requested any particular "additional procedures" cannot do so later. Indeed, "If no party requests additional procedures, a final Opinion and Order may be issued based upon the official record, including the Application and responses filed by parties pursuant to [the] Notice, in accordance with 10 CFR 590.316."[12] In essence, the decision will then be based upon the documents filed in the docket. Consequently, upon the expiration of the time period set forth in the notice, no other evidence can be introduced by a party, thus closing the time period to present evidence.

After the expiration of the time period set forth in the Federal Register notice, with no requests for "additional procedures", and no evidence introduced to overcome the rebuttable presumption, "DOE/FE must grant" the application. With the expiration of the

[10] 10 CFR Section 590.205
[11] The time periods may be extended upon good cause shown, but should be construed narrowly.
[12] 77 Federal Register 72840

time period set forth in the Federal Register notice, the mere passage of time from that date forward does nothing to add to the evidentiary record upon which DOE must base its decision. Therefore, with the official record set, DOE should not suspend consideration of an application based upon extraneous matters beyond the official record. DOE should proceed to a decision after the expiration of the time period set forth in the Federal Register.

The Queue:

Prior to December 2012, fifteen (15) applications had been filed with DOE for authorization to export LNG to non-free trade agreement countries. Effective on December 5, 2012, DOE announced an order of precedence (the queue) for processing non-FTA LNG export applications pending before it. On its website, DOE made the following announcement:

> "DOE will begin processing all long-term applicants [sic] to export LNG to non-FTA countries in the following order:
>
> - All pending DOE applications where the applicant has received approval (either on or before December 5, 2012) from the Federal Energy Regulatory Commission (FERC) to use the FERC pre-filing process, in the order the DOE application was received.
>
> - Pending DOE applications in which the applicant did not receive approval (either on or before December 5, 2012) from FERC to use the FERC pre-filing process, in the order the DOE application was received.
>
> - Future DOE applications, in the order the DOE applications are received."[13]

A search of the 2012 index for the Federal Register does not reveal that prior notice was given regarding the establishment of the queue.

[13] http://energy.gov/fe/downloads/order-precedence-non-fta-lng-export-applications

Prior to the posting of the queue on DOE's website, DOE officials have said on numerous occasions in public forums that not all applications are created equally; noting that all that was required to file with DOE was $50 and a fax machine. The argument was to the effect that if an applicant pursued a FERC certificate, it was evidence that the applicant was willing to commit serious money in pursuit of the project, thus providing a way to sort out the serious applicants at DOE from those who were not serious about pursuing the authorization to export LNG. Evidently, that was the basis for the establishment of the queue because no other explanation has been offered. As explained below, the problem with that rationale is that it violates the Administrative Procedures Act, adds regulatory burdens not contemplated by the rules in 10 CFR Part 590, and is to be applied retroactively for the 15 applications.

The 15 applicants as of December 2012 reasonably relied upon the only enforceable rules DOE had published, namely those appearing in 10 CFR Part 590, to inform them as to the legal path forward regarding DOE's consideration of their applications. A plain reading of 10 CFR Part 590 clearly shows that upon the expiration of the time period set forth in the Federal Register, the application process becomes ripe so that DOE could proceed with a decision on the merits of the pending applications.

The promulgated rules of DOE prior to its issuance of the queue establish a time line to consider each of the pending applications. Based upon when the applicant files a complete application, a notice is published in the Federal Register, establishing a time period for comments, protests, and interventions,

the expiration of which (without proper requests for "additional procedures" as set forth above) allows DOE to proceed on the official record to make a determination. Consequently DOE, by following its rules, will make its decisions on a case-by-case basis. DOE's rules do not contemplate the establishment of a queue to decide the pending applications because the time of filing of a complete application and the time period set forth in the notice filed in the Federal Register establishes a queue for DOE on a case-by-case basis.

Because the promulgated rules set forth in 10 CFR Part 590, by their express language, set forth a mechanism for DOE to decide applications on a case-by-case basis, any modifications, changes, or amendments must be made in the same manner in which those existing rules were made. Those rules were promulgated pursuant to the Administrative Procedures Act and its rule-making provisions, which require notice and a comment period prior to the enactment of the rule's effective date. Consequently, any changes to the rules must be subject to a notice and comment period prior to the changes taking effect.

Since DOE's establishment of the queue required adherence to the notice and comment requirements used when the existing rules were promulgated, its failure to do so renders the order of precedence (the queue) void. Therefore, DOE should proceed with deciding the applications now pending as of this date pursuant to its published rules in 10 CFR Part 590.

An argument might be made that the queue was not an amendment to a rule, but merely an internal agency procedure to assist it in executing the rules. However, the courts have routinely held that an agency pronouncement

(regardless of whether the agency chooses to call it a rule, procedure, or order of precedence) must be published if the knowledge of the pronouncement is needed to keep the parties informed of the agency's requirements as a guide for their conduct. Quite clearly, any one or more of the 15 or future applicants might have decided to file with FERC earlier if they had known that DOE was predicating the manner in which it would decide applications pending before it based upon the time of filing at FERC.

DOE may determine that its current rules need to be modified. To do so will require adherence to the notice and comment requirements discussed above, but not for the applications now pending. A rule promulgated cannot have a retroactive effect unless expressly authorized by Congress. The Natural Gas Act does not authorize such retroactive application. Any new rule promulgated by DOE will have consequences to events already completed, namely when an applicant chooses to file at DOE in the first instance. Therefore, it cannot be applied retroactively to any applications pending before DOE at the time of its issuance. Such a retroactive application of a new rule would violate considerations of fairness, reasonable reliance, and settled expectations of the parties involved.

Regarding the time in which DOE has to render a decision, it should be noted that the Natural Gas Act does not provide a time limit for an agency decision. However, the Administrative Procedures Act and the cases construing it require that an agency conclude matters presented to it within a reasonable time, and a court may compel agency action unreasonably delayed.

Conclusion

An applicant should have the reasonable expectation that upon completion of the application, its filing with DOE, payment of the filing fee, and the expiration of the comment period as established in the Federal Register notice without evidence being introduced to overcome the statutory presumption, DOE would require nothing more than the official record to render a decision. In other words, an applicant should have the reasonable expectation that DOE would follow its promulgated rules and not seek to unlawfully change the rules by agency decree. Additionally, since the order of precedence (the queue) was not properly issued, it is void, meaning that all pending applications must be determined by DOE just as if the queue was never issued. Furthermore, an applicant should be able to expect DOE to render its decision within a reasonable time after the closing of the time period set forth in the Federal Register notice.