

Elba Liquefaction Company, L.L.C.
and



July 21, 2014

VIA ELECTRONIC DELIVERY

The Honorable Ernest Moniz
Secretary
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

RE: Proposed Procedures for Liquefied Natural Gas Export Decisions

Dear Secretary Moniz,

On May 29, 2014, the Department of Energy's ("DOE") Office of Fossil Energy announced the availability for public review and comment a notice of "Proposed Procedures for Liquefied Natural Gas Export Decisions" ("Proposed Procedures").¹ As explained in the Proposed Procedures, DOE proposes to suspend its current practice of issuing conditional export authorizations prior to final authorization decisions and only act on applications to export liquefied natural gas ("LNG") from the lower-48 United States to non-Free Trade Agreement ("NFTA") countries under section 3 of the Natural Gas Act ("NGA") when such applications are "ready for final action" after the review required by the National Environmental Policy Act ("NEPA") has been completed. Elba Liquefaction Company, LLC ("ELC") respectfully submits these comments on the Proposed Procedures.

Statement of Interest

Elba Liquefaction Company, L.L.C. ("ELC"), which is owned by Kinder Morgan, Inc. ("Kinder Morgan") subsidiary Southern Liquefaction Company, and Royal Dutch Shell plc ("Shell") subsidiary, Shell US Gas & Power LLC, is in the process of designing, engineering, permitting and seeking authorization from FERC in Docket No. CP14-103 to construct and operate a natural gas liquefaction facility comprised of up to 10 Movable Modular Liquefaction Systems units to liquefy up to 2.5 million tonnes per annum ("MTPA") of LNG to be available for export at the existing Southern LNG Company, L.L.C., ("SLNG") Elba Island LNG Terminal located in Chatham County, Georgia.

¹ *Proposed Procedures for Liquefied Natural Gas Export Decisions*, 79 Fed. Reg. 32,261 (June 4, 2014).

SLNG is a subsidiary of El Paso Pipeline Partners, L.P (EPB), of which Kinder Morgan is the general partner. SLNG currently imports LNG for storage and regasification using two LNG carrier berths, five LNG storage tanks, eleven vaporizers, send-out facilities, and other associated infrastructure. The Elba Island LNG Terminal currently has 11.5 Bcf of storage capacity, with 1.76 Bcf/d of peak vaporization and send-out capacity.

Another Shell subsidiary, Shell NA LNG LLC, is under contract with SLNG for roughly 65% of the existing regasification and storage capacity at the Elba Island Terminal and has executed a Liquefaction Services Agreement and a precedent agreement with ELC and SLNG, respectively, to contract for 100% of the LNG produced by ELC and exported by SLNG. In conjunction with the proposed liquefaction facilities to be constructed by ELC, SLNG also proposes to modify its existing facilities at the Elba Island LNG Terminal to allow for exports, and bi-directional service capable of both imports and exports of LNG.² Together, the ELC and SLNG projects are referred to as the Elba Liquefaction Project.

SLNG has received authorization from the DOE to export up to 0.5 Bcf/d of LNG by vessel from the Elba Island LNG Terminal to free trade agreement (“FTA”) Nations,³ and has filed an application with DOE for authorization to export up to 0.5 Bcf/d of LNG to non-free trade agreement (“NFTA”) Nations, which is currently pending DOE approval⁴. In addition, ELC and SLNG have completed the FERC’s pre-filing process in which they have positively engaged stakeholders in support of the Elba Liquefaction Project and, as stated above, filed with FERC an application under Section 3 of the NGA to construct, install and operate the Elba Liquefaction Project.

Kinder Morgan is the largest natural gas midstream services provider and fourth-largest energy company in North America. Kinder Morgan owns and operates two LNG import terminals, the Elba Island LNG Terminal, near Savannah, Georgia, and the Gulf LNG Terminal, near Pascagoula, Mississippi. In addition, Kinder Morgan also owns and operates 68,000 miles of natural gas transportation facilities operating in both interstate and intrastate commerce that connect directly and indirectly to virtually all of the nation’s existing or proposed LNG terminals.

Shell is a global group of energy and petrochemical companies with roughly 90,000 employees in more than 90 countries and territories. In the United States, Shell employs more than 22,000 people and operates in all 50 states. Shell is one of the world’s largest natural gas producers, with a diverse portfolio supplying gas to more countries than any other energy company. Shell is an innovator and leader in natural gas technologies, particularly Liquefied Natural Gas (LNG). Shell also helped design and build the world’s first commercial liquefaction plant at Arzew, Algeria. Shell’s LNG expertise goes beyond liquefaction plants. Shell is involved

² Application of Elba Liquefaction Co., L.L.C. and Southern LNG Co., L.L.C. for authorization under Section 3 of the NGA and Application of Southern LNG Co., L.L.C. for Abandonment under Section 7 of NGA, FERC Docket No. CP14-103-000 (Mar. 10, 2014).

³ *Order Granting Long-Term Multi-Contract Authorization To Export Liquefied Natural Gas By Vessel From The Elba Island Terminal To Free Trade Agreement Nations. Southern LNG Company, L.L.C.*, FE Docket No. 12-54-LNG, Order No. 3106 (June 15, 2012).

⁴ Application for Long-Term Authorization, Multi-Contract Authorization to Export Liquefied Natural Gas to Non-Free Trade Countries, DOE/FE Docket No. 12-100-LNG (Aug. 31, 2012).

in every stage of the LNG value chain: from the upstream (finding the fields and extracting the gas from them) to the downstream (liquefying the gas, shipping, converting the LNG back into gas and distributing it to customers). Today, Shell manages one of the world's largest fleets of LNG carriers, and is working to avail LNG as a transport fuel in the marine, heavy-duty road transport, and rail sectors.

Kinder Morgan and Shell's participation in the Elba Liquefaction Project creates a substantial and distinct interest in DOE's Proposed Procedures and its review of requests for LNG export authorization to non-FTA nations. In addition, both Shell and Kinder Morgan hold substantial interests in North American upstream, midstream, and/or downstream natural gas assets, all of which are likely to be impacted significantly with any acceleration, deceleration, change in limitations, or other shift in US gas export policy. Kinder Morgan and Shell therefore each maintain their own unique interest in the proposed changes to DOE's process for issuance of NFTA export licenses.

Introduction

The DOE has issued a *Notice of Proposed Procedures for LNG Export Decisions* with a 45-day public review and comment period. The stated intention of this proposal is to "streamline the regulatory process for applicants, ensure that applications that have completed NEPA review will not be delayed by their position in the current order of precedence, and give the Department a more complete understanding of project impacts."

To achieve this, DOE proposes to make final public interest determinations only after a project has completed the National Environmental Policy Act (NEPA) process, rather than issuing conditional authorizations.

ELC welcomes the opportunity to comment, and regards this proposed change as a potentially positive step in refining and optimizing the regulatory process for issuance of NFTA export licenses. If the change is implemented in such a way as to reward diligent work on NEPA process, while accelerating the pace of final NFTA export license approvals, then the U.S. economy will more widely experience the many benefits of natural gas exports as DOE has repeatedly acknowledged and cited in previous orders and other official statements.

ELC appreciates that DOE has undertaken to review its procedures for processing the applications filed before it. ELC respects the discretion the agency has to control its own dockets and to establish specific processes to undertake the agency's responsibilities. We also welcome the DOE's efforts to add clarity to its process.

Comments

ELC strongly supports markets being allowed to operate as freely as possible. Based on current projections, the amount of natural gas supplies to be produced from the U.S. lower-48 States support the development of LNG export and liquefaction facilities without regulatory restriction of the amount of gas to be exported. ELC concurs with the multiple assessments that the market will regulate itself such that not all gas export projects will materialize due mainly to the inevitability of both U.S. and global natural gas infrastructure ultimately catching up to world demand. To this end, the process for export licensure should ensure that commercially viable

and environmentally sound projects are not sidelined or delayed by the NFTA process any more than is fully necessary under the law.

ELC expressly advocates for the orderly and expeditious review and processing of all gas export applications, as a matter of policy and precedent. We likewise submit that DOE's stated policy goals, as well as the public interest, will be further served by the following reasonable and consistent advance work to the newly proposed condition for final NFTA export licensure.

It is ELC's general understanding that upon completion of NEPA process primarily through the extensive, regimented and well-defined FERC process⁵, DOE proposes to begin processing the final NFTA export authorization with its attendant public interest determination. In the case of ELC, the completion of NEPA process is to occur upon a finding of no significant impact ("FONSI.") DOE has indicated that the timeline for such final authorizations could resemble the current/preceding policy, wherein NFTA applicants receive conditional approval approximately every 6-8 weeks.

This process may help ensure that DOE does not put its limited resources toward processing applications which still face major and, for some, potentially insurmountable regulatory or commercial hurdles. This could also help advance the most viable and "ready" projects more quickly than those in earlier or more challenged stages. However, DOE can still achieve these same policy goals while pursuing the DOE's additional stated goals of streamlined regulatory process and ensuring that projects with completed NEPA work not face delays.

Specifically, DOE should endeavor to issue export licenses within days, rather than many weeks or months, after the applicable FERC documentation that the NEPA review has been completed. Such documentation may come in the form of a final Environmental Impact Statement, a finding of no significant impact through an Environmental Assessment or a finding of no consequence. Such slight modification of DOE's proposed process from a timing standpoint would, without materially changing DOE's intent and purpose, add meaningful value and clarity to project sponsors and their ultimate downstream markets that action on their NFTA DOE applications will be forthcoming provided that the NEPA process has been favorably completed.

Adding this clarity and specificity to the process will allow project sponsors to make the necessary commitment and investment to provide commercial flexibility, promote more rapid delivery to overseas markets where U.S. foreign policy interests amplify the need, reduce U.S. trade deficits, create domestic jobs and enhance DOE's coordination with FERC and other cooperating agencies. While DOE is correct that project sponsors may be willing to invest resources and capital up front to complete NEPA review prior to the time in which the NFTA application is ruled upon, it is unlikely that project sponsors, customers and financial lenders will be willing to go forward with actual construction⁶ without a definitive ruling from the DOE on the NFTA application. Therefore, allowing a long period of time to pass in between receiving FERC approval and DOE NFTA approval could be detrimental to the overall project schedule

⁵ See 18 C.F.R. Part 380.

⁶ Or, as the industry refers to it, take "FID" (final investment decision").

since most project construction schedules are finely tuned to the anticipated date of FERC approval.

To execute this goal of finalizing NEPA review and DOE NFTA authorization as close as possible, it will be imperative that DOE conduct some concurrent review of the pending NFTA applications prior to the time the NEPA determination is made at FERC. As set forth above, project sponsors' schedules cannot afford long periods of time awaiting a DOE ruling and it would be unrealistic to think that project sponsors would begin construction work and settle the related critical commercial and investment decisions involved in commencing an actual construction project without clear knowledge of the status of the sponsor's NFTA application. However, to prioritize its workload, DOE can examine its existing docket of NFTA applications and conduct basic research and observations about progress and viability of the various projects already under FERC review. Then, based on the determined project status, DOE can focus on performing as much advance work as possible on the application in order to complete the public interest review for NFTA approval as close as possible to the time of FERC's finding that the NEPA review has been completed.

Such concurrent review could be done with some, but likely minimal, communication and coordination, as a cooperating agency in the FERC docket⁷, with FERC and the applicant, while avoiding duplicative filings by applicants and analysis by both agencies on the same topics. In addition, such process would allow appropriate commentary by stakeholders to the project without permitting opponents to the project the opportunity to forum shop or raise the same issues in parallel proceedings. Finally, a cooperative approach reconciles and eliminates the possibility of having conflicting results from coordinating agencies which can lead to further judicial review and uncertainty.

Specifically, DOE has identified certain factors to evaluate in reviewing an application for export authorization, including "economic impacts, international impacts, security of natural gas supply, and environmental impacts, among others."⁸ DOE's public interest review, therefore, focuses on:

- (i) the domestic need for the 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 DOE/FE's policy of promoting market competition, and (iv) any other factors bearing on the public interest.⁹

While NEPA review is a strong indicator of a project's viability and the FERC review also contains a thorough analysis of the public convenience and necessity in addition to its

⁷ See 40 C.F.R. § 1507.6.

⁸ See, e.g., *Jordan Cove Energy Project, L.P., Jordan Cove Energy Project, L.P.*, Order Conditionally Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas By Vessel From The Jordan Cove LNG Terminal In Coos Bay, Oregon to Non-Free Trade Agreement Nations, DOE/FE Order No. 3413 at 6-7 (Mar. 24, 2014).

⁹ *Id.* at 8.

NEPA review which could be adopted by DOE, DOE's analysis could be streamlined and enhanced by fairly and objectively assessing several interrelated project characteristics, which correspond and relate to the factors that DOE has referenced in its orders.¹⁰ DOE could pursue this information simultaneous to the NEPA review, so that the public interest review might be substantially advanced for ready projects without causing undue delay.¹¹ Such project characteristics could include, for example:

Facility: DOE is aware of whether proposed projects are sited at greenfields, brownfields, or existing import facilities, and this is likely the most objective indicator of the likelihood and speed with which a project may complete its NEPA compliance requirements. Likewise, this simple test gives DOE a more complete understanding of project impacts since existing import facilities require smaller footprint expansions and fewer new operational or construction impacts. In addition, DOE can achieve perspective on the siting and the possible outcome of the NEPA review based on previous environmental studies performed in the past for existing LNG facilities.

Volumes: If a proposed project represents a comparatively large draw on gas supply, the public interest analysis, with regard to the potential for state or regional gas supply impacts, is more complex than a project with comparatively small volumes. The public interest calculus with regard to volumes should not, generally, be affected by NEPA compliance. Therefore, DOE could continue to follow the FERC's policy that with respect to the NEPA process, the source of the natural gas to be used for export is not part of the NEPA review.

Sources: In addition, the public interest analysis may look at whether or not the project has access to multiple sources of supply. An example of this would be whether the project is relying on one field or production area or whether it is connected to the interstate pipeline grid and ultimately has access to different production areas throughout the country.

Geographical Diversity: To the extent that a proposed project offers unique benefits to its region, such as construction and maintenance of potentially needed gas infrastructure, including long term import capacity, DOE may consider whether the project diversifies a regional economy through exports of natural gas.

Advanced commercial status: DOE may evaluate whether volumes are fully subscribed, partially subscribed, or unsubscribed. [Different types of agreements include: MOUs; Precedent Agreements; HOA (Heads of Agreement); SPA (Sales & Purchase Agreement); Liquefaction Services Agreements; LTA (Long-Term Agreement) – and DOE could easily ascertain and assess project status against such agreements.

Credibility of Project Sponsors: DOE may consider whether project sponsors are well capitalized, experienced in LNG project delivery, globally networked, and connected with upstream and midstream partners.

¹⁰ *Id.*

¹¹ ELC is not suggesting that such public policy review take place after the NEPA review is complete. Such review, if DOE elected to focus its efforts on case-specific analysis rather than general studies would need to be complete and ripe for a decision simultaneous, or close thereto, to the conclusion of the NEPA review.

Capacity for Rapid Delivery: DOE should consider whether a project faces such relative constraints as facility size/complexity, litigation exposure, and supply challenges so delivery is likely to be delayed. If the project has retained an experienced contractor to construct the project, this can be a strong indicator of whether delays are likely.

Local/Political Support: If the project has documented, public statements of support or opposition from local, state, and national political representatives and/or citizens groups and business associations, this is generally a reflection of whether a project is generally accepted within and is appropriate in a given area.

ELC notes that DOE's assessment of these characteristics would not compound the regulatory burden on NFTA applicants, because the information attendant to each factor is already known by DOE and/or a matter of public record at FERC (and therefore relevant to both.) Furthermore, these indicators tend to demonstrate the functioning of free markets in assessing which projects have responded to demand the most quickly and achieved the most support, advancement, and capital. While it is understood that DOE must pursue its own public interest analysis, there is no reason why DOE cannot use relevant facts obtained from the public record developed by FERC to complete its analysis. Further, it is not efficient for DOE to create a second, duplicative record which has already been acquired by the lead agency at FERC. Through this approach of maximizing DOE's time and resources by utilizing the existing FERC record for the project and the data that DOE has collected through its own studies of the issue¹², DOE should have the capability of issuing its NFTA determination close to, if not simultaneous to, the date that the FERC order on the LNG project is issued.

¹² See, Department of Energy Memorandum dated May 29, 2014, RE: "Request for an Update of EIA's January 2012 Study of Liquefied Natural Gas Export Scenarios," from Christopher Smith to Adam Sieminski.

Conclusion

ELC reiterates its request for the orderly and expeditious review and processing of all NFTA gas export applications. ELC also reiterates its appreciation for DOE's willingness to both entertain public comments and to consider suggested methods to attain the goals of the proposed process changes. DOE's procedures should contain a commitment to making its public interest determination and to issuing an order on the proposed NFTA export authorization along the same timeframe as the conclusion of the NEPA review, prioritizing those projects best positioned for delivery, so as not to delay a project sponsor's decision to proceed with the construction work. ELC stands ready to work with regulators, customers, government officials and neighbors to safely and responsibly provide liquefaction and export service to those countries that do not have the multitude of natural gas resources which the U.S. has to offer.

Thank you for the opportunity to provide comments on this important matter.

Respectfully submitted,

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