

UNITED STATES OF AMERICA

DEPARTMENT OF ENERGY

OFFICE OF FOSSIL ENERGY

SABINE PASS LIQUEFACTION, LLC

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FE DOCKET NO. 10-111-LNG

OPINION AND ORDER DENYING REQUEST
FOR REVIEW UNDER SECTION 3(c)
OF THE NATURAL GAS ACT

OCTOBER 21, 2010

I. INTRODUCTION

On September 7, 2010, Sabine Pass Liquefaction, LLC (Sabine Pass) filed an application with the Office of Fossil Energy (FE) of the Department of Energy (DOE) under section 3 of the Natural Gas Act (NGA), 15 U.S.C. 717b, for long-term, multi-contract authorization to export up to the equivalent of 16 million tons per annum (mtpa) of domestically produced liquefied natural gas (LNG) by vessel from the Sabine Pass LNG Terminal for a 20-year term. Sabine Pass seeks to export this LNG to countries other than those that have negotiated free trade agreements (FTAs) with the United States,¹ including both countries that hold membership in the World Trade Organization (WTO Countries) and countries that do not hold membership in the WTO (non-WTO Countries), and with which trade is not prohibited by U.S. law or policy. Insofar as the application seeks authorization for LNG exports to WTO Countries, Sabine Pass specifically requested that FE conduct its review under the standards set forth in section 3(c) of the NGA, 15 U.S.C. 717b(c) instead of section 3(a) of the NGA, 15 U.S.C. 717b(a). Sabine Pass further requested that, given the alleged requirement in section 3(c) that the application be granted without delay or modification, that FE issue an order granting its request for exports to WTO Countries by September 22, 2010. Sabine Pass requests that this authorization commence on the date of first export to occur no later than ten years from the date the authorization is issued.

For the reasons set forth below, FE is herein rejecting the argument made by Sabine Pass to review the application for exports to WTO Countries under the section 3(c) standards of review. FE further finds that the instant application is appropriately reviewed under the

¹ Pursuant to DOE/FE Order No. 2833 issued August 11, 2010, Sabine Pass currently is authorized to export domestically produced LNG by vessel from the Sabine Pass LNG Terminal up to the equivalent of 16 mtpa to countries with which the United State has FTAs requiring national treatment for trade in natural gas for a period of 30 years beginning on the earlier date of first export, or September 7, 2020.

standards for applications to export natural gas set forth in section 3(a) of the NGA. Pursuant to section 3(a), FE will analyze the application in its entirety to determine whether the application is inconsistent with the public interest. Other procedures and standards set forth in the NGA; in DOE regulations at 10 CFR Part 590; and in applicable precedent will be followed.

II. SABINE PASS CONTENTIONS

Sabine Pass contends that current U.S. trade policy, as well as U.S. obligations under the WTO, require that FE authorize the export of LNG to WTO Countries and prohibit FE from restricting exports through discretionary or non-automatic authorization requirements.² Sabine Pass maintains that:

“[i]t would be inconsistent with U.S. obligations under WTO Agreements to restrict exports of natural gas or LNG to other WTO Countries except in certain narrow circumstances because the U.S. has undertaken commitments not to restrict such exports to other WTO Countries, whether directly or indirectly, through quantitative measures or other administrative measures. It would be a further violation of the most-favored-nation (‘MFN’) obligations under WTO Agreements for the U.S. to grant applications for exports to countries with which the U.S. has FTAs while denying applications for exports to other WTO Countries with which the United States does not have separate FTAs.”³

In support of its position, Sabine Pass refers to Annex 1A to the WTO Agreement and to a compendious legal memorandum, attached as Exhibit B to the Application, by the firm Stewart and Stewart, entitled “A Review of Int’l Trade-Related Legal Obligations and Policy Considerations Governing U.S. Export Licenses for Liquefied Natural Gas” (Aug. 23, 2010) (the Stewart memorandum).

Sabine Pass alleges that the requirements of section 3 (a) of the NGA are “arguably inconsistent with U.S. obligations under GATT Articles XI:1 and XIII:1, which impose

² Application at 3.

³ Application at 5-6.

disciplines on the use of export restrictions if such restrictions are not otherwise waived or justified by exemptions in other GATT articles.”⁴

III. THE STEWART MEMORANDUM

The Stewart memorandum provides an extensive elaboration of Sabine Pass’s arguments. The memorandum presents views related to (1) the requirements of United States law affecting DOE’s consideration of natural gas export applications; and (2) WTO and FTA provisions that might be implicated by DOE’s consideration of natural gas export applications.

IV. DISCUSSION AND CONCLUSIONS

The Department of Energy is authorized to approve or deny applications to export or import natural gas pursuant to specific authorization in section 3 of the NGA.⁵ The general standards for review of export applications are provided by section 3(a). Section 3(a) provides:

[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.

Applying the foregoing statutory language, DOE has consistently ruled that section 3(a) of the NGA creates a rebuttable presumption that proposed exports of natural gas are in the public interest. In Order No. 1473, for example, FE found that DOE must grant an export application unless evidence in the record of the proceeding overcomes the public interest

⁴ Application at 26.

⁵ The 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 FE in Redelegation Order No. 00-002.04D, issued on November 6, 2007.

presumption. As we also observed in Order No. 1473, in order to overcome the rebuttable presumption favoring export authorizations, opponents of an export license must make an affirmative showing of inconsistency with the public interest.⁶

Pursuant to the Policy Guidelines issued in 1984 and to other precedent, in evaluating the “public interest”, DOE has followed a policy of examining whether domestic supply shortages or domestic security needs overcome the statutory presumption that a proposed export is not inconsistent with the public interest. The goals of the Policy Guidelines are to minimize federal control and involvement in energy markets and to promote free and open trade:

The market, not government, should determine the price and other contract terms of imported [or exported] natural gas. The federal government’s primary responsibility in authorizing imports [or exports] will 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.⁷

As FE stated more recently in Order No. 2500, where FE authorized exports of LNG from Alaska to Japan and/or one or more countries on either side of the Pacific Rim:

DOE considers domestic need for the gas and any other issue determined to be appropriate, including whether the arrangement is consistent with DOE’s policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements, as the critical legal considerations to be weighed in reviewing the instant application for export authority.⁸

In reviewing the proposed LNG export under the Policy Guidelines in Order No. 1473, FE also indicated that it was guided by DOE Delegation Order No. 0204-111. That delegation order authorized the Administrator of the Economic Regulatory Administration (ERA) to exercise the agency’s review authority under NGA section 3 and directed the Administrator to regulate exports “based on a consideration of the domestic need for the gas to be exported and

⁶ Order No. 1473, note 42 at 13, *citing Panhandle Producers and Royalty Owners Association v. ERA*, 822 F.2d 1105, 1111 (DC Cir. 1987).

⁷ Cite to Policy Guidelines.

⁸ Cite to Order 2500.

such other matters as the Administrator finds in the circumstances of a particular case to be appropriate.” DOE Delegation Order No. 0204-111 is no longer in effect. However, the principal focus of this agency’s review of export applications in decisions under current delegated authority has continued to be the domestic need for the natural gas proposed to be exported, and any other factors to the extent they are shown to be relevant to a public interest determination.

Section 3 of the NGA was amended by the addition of the current section 3(c) in 1992. The 1992 amendment of section 3 did not replace the general “public interest” standard of section 3(a) but provided, in section 3(c), for circumstances in which exports would be deemed to be in the “public interest” and authorized without modification or delay. Section 3(c) applies solely in cases where applicants seek authority to export natural gas, including LNG, to countries with which the United States has executed an FTA providing for national treatment for trade in natural gas (“qualified FTA Countries”). The 1992 amendment of section 3 in effect eliminated any public interest analysis by DOE of applications to export natural gas, including LNG, to qualified FTA Countries and required that such applications must be deemed in the public interest and granted without modification or delay.

In the present case, Sabine Pass contends that DOE is required to apply section 3(c) in reviewing any application for natural gas exports to a WTO Country, even if it has not concluded an FTA with the United States.

Upon review and consideration of Sabine Pass’s request, including the Stewart memorandum, DOE/FE finds that the instant Application should be reviewed under section 3(a) of the NGA and further finds that Sabine Pass’s request is not supported by law or policy.

Accordingly, FE will reject the request to review the export authorization pursuant to section 3(c) of the NGA.

By their terms, section 3(a) of the NGA, not section 3(c) is the appropriate legal provision to apply to an application to export LNG to any nation other than FTA Countries that are qualified under section 3(c). Amid its voluminous argumentation, Sabine Pass has pointed to no legislation authorizing or requiring a different result. In the absence of such authorizing legislation, DOE has no authority to grant Sabine Pass's request for section 3(c) review.

Moreover, as noted above, DOE has implemented section 3(a) by consistently acknowledging that section 3(a) creates a rebuttable presumption that a proposed export is in the public interest. In analyzing whether the presumption favoring proposed exports is inconsistent with the public interest, DOE's principal concern under its Policy Guidelines is to support free and open trade on competitive market-based terms. Consequently, DOE's public interest analysis of export applications under section 3(a) has been and continues to be focused on domestic need for the natural gas proposed to be exported, whether there is a threat to the domestic security of supply, and other factors to the extent they are shown to be relevant to a public interest determination. Sabine Pass has not provided a basis for disregarding the Section 3(a) standards of review.

ORDER

Pursuant to section 3 of the NGA, and for the reasons set forth above, it is ordered that Sabine Pass's pending application for authorization to export LNG will be reviewed under section 3(a) of the NGA and Sabine Pass's request for review under section 3(c) of the NGA is denied.

Issued in Washington, D.C., on October 21, 2010.

A handwritten signature in dark ink, appearing to read "John A. Anderson", written over a horizontal line.

John A. Anderson
Manager, Natural Gas Regulatory Activities
Office of Oil and Gas Global Security and Supply
Office of Fossil Energy