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U.S. Department of Energy
1000 Independence Ave., SW
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SUBJECT: In the Matter of Freeport LNG Expansion L.P. and FLNG Liquefaction, LLC - FE Docket No. 11-161-LNG, Motions to Intervene Out of Time and Requests for Rulemaking Regarding Natural Gas Exports

On September 18, 2013 and September 19, 2013, respectively, America's Energy Advantage ("AEA") and the Industrial Energy Consumer of America ("IECA") (collectively, "Petitioners") each filed motions to intervene out of time in a proceeding before the U.S. Department of Energy's Office of Fossil Energy ("DOE/FE") concerning Freeport LNG Expansion L.P. and FLNG Liquefaction, LLC's ("FLEX") request for authorization to export liquefied natural gas ("LNG"). More specifically, in its December 19, 2011 application, FLEX requests long-term, multi-contract authorization for the second phase of its project to export up to the equivalent of 1.4 billion cubic feet per day ("Bcf/d") of LNG to any country with which the United States does not have a free trade agreement requiring national treatment for trade in natural gas and LNG, which has or in the future develops the capacity to import LNG via ocean-going carrier, and with which trade is not prohibited by U.S. law or policy ("non-FTA nations").

The April 13, 2012 deadline to intervene in this proceeding was published in the Federal Register on February 13, 2012.¹ Both AEA and IECA's motions to intervene are just over seventeen months out of time. Included with their dramatically late interventions, Petitioners filed nearly identical comments. These comments request that DOE/FE institute a rulemaking to promulgate regulations that specifically define the factors the agency will use when evaluating whether an application to export LNG is inconsistent with the public interest.²

¹ 77 Fed. Reg. 7,568.

² On April 8, 2013, the Sierra Club submitted a letter styled a "Petition for Rulemaking Regarding Natural Gas Export Policy," which DOE properly denied in its May 17, 2013 *Freeport* Order, and which DOE has continued to deny in its August 7, 2013 *Lake Charles* Order and September 11, 2013 *Dominion Cove Point* Order. *Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC*, DOE/FE Order No. 3282, at 106-09 (2013); *Lake Charles Exports, LLC*, DOE/FE Order No. 3324, at 118-24 (2013); and *Dominion Cove Point LNG, LP*, DOE/FE Order No. 3331, at 131-34 (2013).

The American Petroleum Institute (“API”) respectfully submits this letter urging DOE/FE to reject Petitioners’ significantly out-of-time motions to intervene³ and to not engage in the frivolous regulatory proceedings that AEA and IECA request, which are unnecessary and will serve only to delay further DOE/FE’s processing of pending LNG export applications.

I. API

API is a national trade association that represents over 500 companies involved in all aspects of the oil and natural gas industry. API’s members include owners and operators of LNG import and export facilities in the United States and around the world, as well as owners and operators of LNG vessels, global LNG traders, and manufacturers of essential technology and equipment used all along the LNG value chain. Our members also have extensive experience with the drilling and completion techniques used in shale gas development and in producing America’s natural gas resources in a safe and environmentally responsible manner.

II. AEA and IECA’s Late Interventions Will Adversely Impact the FLEX Proceeding

At this stage in the FLEX proceeding, Petitioners’ late interventions requesting DOE/FE alter the regulations that it will use to process FLEX’s application will have a significant adverse impact on the FLEX proceeding. In December 2012, following its issuance and request for comments on the LNG Export Study, DOE/FE established an order of precedence for processing the then-pending applications for authorization to export LNG to non-FTA nations, as well as any future applications the agency received. As of the date of this letter, and nearly twenty-two months after FLEX filed its application, the FLEX application for the second phase of its project is next in the queue to be processed.⁴ Based on DOE/FE’s recent orders and its public statements, it appears that DOE/FE will continue to process applications in accordance with the order of precedence.⁵

As noted above, Petitioners’ interventions out of time in the FLEX proceeding were filed more than seventeen months late.⁶ Under its regulations, DOE has discretion to grant interventions out of time “for good cause shown and after considering the impact of granting the late motion of the

³ In the event DOE/FE grants AEA’s and/or IECA’s motions, API respectfully requests that this letter also be treated as a motion to intervene out of time and that DOE/FE grant such motion.

⁴ DOE has updated the order of precedence to add applications received after December 5, 2012. The most recent version of the order of precedence is available at <http://www.doe.gov/fe/downloads/order-precedence-non-fta-lng-export-applications> (last visited Oct. 3, 2013).

⁵ See, e.g., Press Release, Energy Department Authorizes Dominion’s Proposed Cove Point Facility to Export Liquefied Natural Gas (Sept. 11, 2013), available at <http://www.doe.gov/articles/energy-department-authorizes-dominion-s-proposed-cove-point-facility-export-liquefied> (last visited Oct. 3, 2013).

⁶ AEA and IECA cite to API’s intervention out of time in the Freeport McMoRan proceeding at DOE to support their own late interventions. This attempt is artificial and disingenuous. Unlike AEA and IECA’s late interventions in this proceeding, API’s intervention was one week late, not seventeen months. API also did not request additional Agency procedures that would most certainly have a negative impact on the proceedings.

proceeding.”⁷ To date, there are few examples of late interventions in proceedings before DOE/FE to draw upon. However, there are a variety of examples of late interventions in proceedings before the Federal Energy Regulatory Commission (“FERC”), which, like DOE, derives its jurisdiction over certain activities related to LNG exports from Section 3 of the Natural Gas Act (“NGA”). In fact, FERC has a strong history of regularly granting late interventions submitted out-of-time where the party can demonstrate that its late intervention will have no adverse impact on the proceeding.⁸

Looking to FERC’s policy on late interventions, FERC recently explained that it “has a liberal intervention policy in applications for authorization of natural gas projects before an order on the merits has been issued.”⁹ However, FERC’s policy is not limitless. In granting late interventions, FERC has explained that it only is appropriate to do so where FERC has determined “that granting ... intervention at this stage of the proceeding will not cause undue delay or disruption or otherwise prejudice the applicant or other parties.”¹⁰ Similarly, in denying the Sierra Club’s motion to intervene out of time in the Sabine Pass Liquefaction, LLC proceeding, DOE/FE found that “granting the Motion to Intervene would unnecessarily delay the issuance of final agency action herein and unfairly prejudice the parties to this proceeding.”¹¹ DOE/FE explained, “it is reasonable to conclude at least that Sabine Pass’s own business interests will be negatively affected by further delay in the issuance of a final order herein.”¹² Although DOE/FE’s decision was in the context of a final order, the same principles clearly apply in this proceeding. FLEX will be unduly harmed by the Petitioners’ efforts to derail the regulatory process on the eve of completion.

The Petitioners’ dramatically late intervention in the FLEX proceeding is also challenged because both entities clearly have had notice of the proceeding given their repetitive protests and comments in opposition to LNG exports in multiple other LNG export project proceedings, before Capitol Hill, and in the news media. Accordingly, DOE/FE must find that Petitioners’ frivolous pleadings are patently artificial efforts to delay the review of not only the FLEX application but, in fact, all non-FTA LNG export applications currently pending before DOE/FE.

AEA and IECA assert in their respective late interventions that “no party will be prejudiced by DOE accepting [their] comments.”¹³ However, this simply is not the case. AEA and IECA

⁷ 10 C.F.R. § 590.303(d).

⁸ See, e.g., *Cheniere Creole Trail Pipeline, LP*, 142 FERC ¶ 61,137 at P 23 (2013); *Sabine Pass Liquefaction, LLC*, 139 FERC ¶ 61,039 at PP 14-15 (2012); and *Cameron LNG, LLC*, 118 FERC ¶ 61,019 at PP 21-22 (2007).

⁹ *Cheniere Creole Trail Pipeline, LP*, 142 FERC ¶ 61,137 at 23 (2013) (citing *Sabine Pass Liquefaction, LLC*, 139 FERC 61,039 at PP 14-15 (2012)).

¹⁰ *Id.*

¹¹ *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961-A, at P 26 (2012).

¹² *Id.*

¹³ AEA Consolidated Motion to Comment and Intervene Out of Time, at P 5; and IECA Consolidated Motion to Comment and Intervene Out of Time, at P 5.

request that DOE/FE initiate a notice and comment rulemaking process to establish definitive standards under which the Agency will review applications to export LNG to non-FTA nations. As set forth in greater detail below, such regulatory action is unnecessary and only would serve to unduly delay the issuance of DOE/FE's order on FLEX's application and unduly disrupt this proceeding.

III. New Rules and Guidance are Unnecessary and Unwarranted Under Section 3 of the Natural Gas Act

Petitioners argue that the 1984 Policy Guidelines are insufficient with regard to LNG exports to the Natural Gas Act's mandate to protect the public interest. However, the 1984 Policy Guidelines and DOE's regulations governing LNG exports are intended to provide room for market forces, rather than strict regulations, to shape domestic natural gas markets, including energy production, consumption and pricing.

The U.S. Supreme Court's description of another domestic initiative intended to allow greater leniency for market forces further clarifies the importance of such policies. In discussing the Natural Gas Policy Act of 1978 ("NGPA"), the Supreme Court noted that the NGPA represented a Congressional determination "to move toward a less regulated national natural gas market" which "give[s] market forces a more significant role in determining the supply, demand, and the price of natural gas."¹⁴ DOE specifically recognized and applied this principle in *Yukon Pacific*, noting the Court's finding that "the change in regulatory perspective embodied in the NGPA rested in significant part on the belief that direct federal price control exacerbated supply and demand problems by preventing the market from making long-term adjustments."¹⁵ The 1984 Policy Guidelines and DOE's current regulations promote this important policy and regulatory approach and should be preserved.

Despite the fact that the 1984 Policy Guidelines were drafted in an import context, DOE has used the concepts embodied in that document to inform its analysis of applications for authorization to export LNG to non-FTA countries. For example, in *Yukon Pacific*, the Agency explained,

[I]n evaluating exports, the DOE is mindful of the broad energy policy principles set forth in the DOE's natural gas import policy guidelines. While those guidelines deal with imports, the principles are applicable to exports as well. The guidelines establish the policy that market forces will generally bring about results more in the public interest than will extensive regulation.¹⁶

¹⁴ *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 474 U.S. 409, 422-24 (1986).

¹⁵ *Yukon Pacific Corp.*, DOE/FE Opinion and Order No. 350, at n.10 (Nov. 16, 1989) (citing *Transcontinental Gas Pipe Line*, 474 U.S. at 422-24).

¹⁶ *Yukon Pacific Corp.*, DOE/FE Opinion and Order No. 350, at 17 (Nov. 16, 1989).

Most recently, in its *Dominion Cove Point* order, DOE/FE cited the 1984 Policy Guidelines and explained, “[w]hile nominally applicable to natural gas import cases, DOE/FE subsequently held in Order No. 1473 that the same policies should be applied to natural gas export applications.”¹⁷ The considerations provided for in the 1984 Policy Guidelines represent a balance between domestic need and a competitive marketplace. The importance of this non-restrictive approach to assessing LNG imports and exports is underscored by statements of Senator Ron Wyden (D-OR), Chairman of the Senate Committee on Energy and Natural Resources, in a recent exchange with DOE Acting Assistant Secretary of Fossil Energy Christopher Smith. There, Senator Wyden commented on the benefits of DOE’s flexible approach over a proscriptive, algorithmic method of evaluating the public interest and recognized that an algorithmic approach would constrain DOE’s ability to sufficiently balance the necessary factors.¹⁸

As the wave of import applications that swept this nation in the early 2000s demonstrated, not all proposed projects ultimately will be viable for reasons unrelated to DOE regulation. This is simply one permit, and every proposed export project must secure many additional approvals before construction can commence. But beyond that, market forces and global competition will push inherently unviable projects aside. The flexibility and underlying promotion of market competition represented in DOE’s current regulations and policies play an important role in encouraging innovative technology by not acting as a regulatory bar. These regulations and policies are robust and working efficiently, and Petitioners have not cited any actual impacts or other plausible rationale for their requested regulatory reform.¹⁹

IV. Conclusion

For the reasons above, API urges DOE to reject the Petitioners’ drastic attempts to intervene nearly 18 months late, to reject the Petitioners’ efforts to establish a rulemaking that would impose unnecessary regulatory obstacles, and to continue on its current course of processing pending LNG export applications for approval on an expedited basis. The contrary arguments are, as detailed above, without merit and should not alter the ongoing DOE process. In the event DOE/FE grants AEA’s and/or IECA’s motions, API respectfully requests that this letter also be treated as a motion to intervene out of time and that DOE/FE grant such motion. Should you have any questions, please feel free to contact me.

¹⁷ *Dominion Cove Point LNG, LLC*, DOE/FE Order No. 3331, at 8 (2013).

¹⁸ *Domestic Supply and Exports: Hearing Before the S. Comm. on Energy and Natural Resources*, 113th Cong. at 2:14:30 through 2:18:00 (2013) available at <http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=0380bed7-f9ef-4450-bfa0-a3af60f7a184>.

¹⁹ While API does not advocate that the Agency do so, to the extent that DOE finds it necessary to alter or refine its regulations or policies concerning applications for authorization to export LNG to non-FTA countries, API urges DOE to retain the current role that market forces are allowed to play in shaping our nation’s natural gas supply and demand.

Best regards,

A handwritten signature in dark ink, appearing to read 'Erik Milito', with a stylized flourish at the end.

Erik Milito

Group Director, Upstream and
Industry Operations