

# Client Alert

Global Transactions Practice Group

November 4, 2013

## U.S. Department of Energy (DOE) Clarifies its Position on Modification or Revocation of DOE Liquefied Natural Gas Export Authorizations

Last month, Deputy Assistant Secretary Paula Grant of the DOE clarified DOE's current views with respect to the grounds under which it could revoke a liquefied natural gas (LNG) export authorization. In a letter<sup>1</sup> dated October 17 to U.S. Senator Lisa Murkowski, Ms. Grant stated, "[a]s we have stated consistently, DOE would not rescind a previously-granted [LNG export] authorization except in the event of extraordinary circumstances or use this authority as a price maintenance mechanism." This letter was in response to written queries from Senator Murkowski, the ranking member on the Senate Energy and Natural Resources Committee, seeking clarification as to the DOE's views and practices relating to the potential modification or rescission of a previously-issued DOE LNG export authorization.

### The Basis for Prior Confusion

While the DOE has long held the statutory authority to modify or rescind an LNG or natural gas export authorization<sup>2</sup>, its vague (and somewhat sinister-sounding) qualifications set out in the first round of recent LNG export authorizations caused significant concern to many in the international LNG marketplace.

For example, in the first of the LNG export authorizations, which was granted to Sabine Pass Liquefaction, LLC, in connection with its proposed Louisiana-based LNG export project, the DOE included a footnote that stated, "[i]n the event of any unforeseen developments of such significant consequences as to put the public interest at risk... DOE is authorized... 'to perform any and all acts and to prescribe, issue, make, **amend, and rescind** such orders, rules, and regulations as it may find necessary or appropriate'..."<sup>3</sup>

Perhaps unexpectedly, this footnote generated a virtual firestorm of international LNG industry concern and speculation as to the circumstances under which the DOE may actually exercise its authority to amend or rescind a previously-granted LNG export authorization, including whether DOE would exercise this authority in a manner designed to stabilize domestic gas prices in the future. Unfortunately, in the second long-term LNG export authorization granted by the DOE to Freeport LNG's project in Texas, the DOE further fuelled the industry's concerns by noting that "[w]e

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cannot precisely identify all the circumstances under which such action would be taken.”<sup>4</sup>

These concerns quickly became amplified in light of the current heated U.S. political debates whereby interest groups seeking the denial of LNG export authorization applications in the name of domestic energy availability, pricing and security are running up against LNG export project sponsors (and foreign LNG customers) advocating free markets, and whose multi-billion dollar investment and contracting decisions will underpin several proposed LNG export projects and the associated long-term take-or-pay LNG contracts that are necessary for such projects to get underway.

As a result of this confusion and uncertainty, the contracts being negotiated by these project participants quickly became populated with entirely new contractual risk allocation provisions dealing solely with the issue of which party or parties are to bear the risk of potential modification or rescission of the applicable LNG export authorization. LNG buyers in places as far away as India began to focus a great deal of attention on the potential political risks inherent in transacting with a U.S.-based LNG producer and exporter. We are aware of one potential participant in a project who solicited a proposal for insurance to cover against this specific type of risk, and it was astonished at the sky-high premium sought by the proposed underwriters.

## Recent Clarifications

Against this backdrop, Senator Murkowski sent a letter to the DOE last August seeking clarity as to the DOE’s views as to when and how it might exercise its powers of modification or rescission, as well as DOE’s past practices in this regard. About 6 weeks later, the DOE responded with a surprising and helpful degree of candor, particularly when viewed in light of the vague qualifications set out in the recent round of LNG export authorizations.

Some of the key highlights from the DOE response letter are as follows:

- DOE reiterates the importance of the investment-backed expectations of private parties. While a third party may petition the DOE to suspend or revoke a final order authorizing LNG exports, the DOE would permit all interested parties the opportunity to participate in a proceeding before issuing its decision. Additionally, the DOE re-emphasized that it would not revoke a previously-granted export authorization “except in the event of extraordinary circumstances” and, more importantly, the DOE would not exercise its revocation authority “as a price maintenance mechanism”.
- DOE’s consideration of the cumulative impact of prior export authorizations is only in respect of a new application for export authorization. The factors considered by the DOE for a new application may be different than those for a petition to revoke a previously-granted export authorization. Cumulative impact of approved exports will not be a factor considered by the DOE in a revocation proceeding.
- DOE has never revoked an LNG export authorization over the objection of the permit holder. Past instances of revocation are largely in respect of authorizations that had never been used. Many of such instances also involve non-compliance by the permit holder with the terms of its authorization and the outright failure of the permit holder to respond to attempted contacts by the DOE.

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- All past amendments to previously-granted export authorizations have been initiated by the permit holders. Generally, such amendments are to correct errors in the granting orders or in connection with revisions to the terms and conditions of the contract underlying an export authorization.

## Some Clarity Going Forward

While the recent DOE response letter sheds little light on exactly what may constitute “extraordinary circumstances”, it does send a much more clear and comprehensive signal to potential participants in U.S. LNG export projects that (1) the DOE will only seek the modification or rescission of a previously-issued export authorization in very unusual (or “extraordinary”) circumstances; (2) the DOE will not backtrack on a particular issued authorization on the basis that it misjudged the cumulative impact of its prior authorizations; and (3) in dealing with LNG export authorizations, the DOE does not view its role as being a domestic gas price regulator.

Of course, the DOE letter does not answer all of the various “what if” questions swirling in stakeholders’ heads, nor can it be relied upon as an absolute defense in any future modification or rescission proceeding, but it certainly does send a more clear and improved signal that the DOE takes the sanctity of its LNG export authorizations very seriously, and that the DOE has set the bar quite high for itself in connection with any future modification or rescission of a previously-granted export authorization.

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<sup>1</sup> A copy of the DOE response letter is available at [http://www.lnglawblog.com/wp-content/uploads/2013/10/10.21.13\\_DOE\\_Response\\_to\\_LAMWyden\\_re\\_revocation\\_of\\_LNG\\_export\\_licenses.pdf](http://www.lnglawblog.com/wp-content/uploads/2013/10/10.21.13_DOE_Response_to_LAMWyden_re_revocation_of_LNG_export_licenses.pdf) (last accessed October 31, 2013).

<sup>2</sup> Natural Gas Act, Section 16(a).

<sup>3</sup> Sabine Pass Liquefaction, LLC, DOE/FE Order No. 2961 (May 20, 2011).

<sup>4</sup> Freeport LNG Expansion, L.P. and FLNG Liquefaction, LLC, DOE/FE Order No. 3282 (May 17, 2013).