DOE takes action to kick-start a second round of LNG exports

June 27, 2018

In quick succession over the last few weeks, the Department of Energy's (DOE) Office of Fossil Energy issued two documents that, taken together, seem designed to spur the second wave of liquefied natural gas (LNG) export projects in the United States. With controversy roiling U.S. trade policy in areas from steel and aluminum to agricultural products, the DOE’s actions send a very different message. They seem plainly designed to give potential buyers of U.S. LNG confidence that they can safely sign long-term contracts and achieve surety of supply.

Macroeconomic analysis of LNG exports

The first action the DOE took was to issue an analysis of the effects of LNG exports on the U.S. economy. On its face, it was a routine update of DOE’s four previously issued analyses of the economic effects of natural gas exports. As the studies before had done, this report concludes that, while LNG exports may slightly increase U.S. gas prices, they produce a net benefit to the U.S. economy. What distinguishes this report is that it is a more wide-ranging analysis that considers a large number of scenarios stretching out over a more than 20-year period, and the analysis finds a net positive outlook in all of the 54 scenarios evaluated. The LNG investor and customer community should draw particular confidence from two features of the study that the prior analyses did not include:

- Because of the large number of scenarios studied, the analysis encompasses and reaches positive conclusions covering a wide range of uncertainty in market conditions; and

- The LNG export levels evaluated are market-determined, i.e. they assume no artificial constraints imposed by regulators, and they include higher levels of exports than the DOE previously evaluated.

In the face of this broad analysis, the specific macroeconomic conclusions the study reaches should likewise give domestic gas users comfort:

- The economic well-being of the average U.S. consumer increases with rising LNG exports as a result of the increased activity in the economy;

- The value of the dollar strengthens;

- Even domestic industries that are large consumers of natural gas continue to experience robust growth, even if at slightly lower rates than would apply without the exports, an effect the study characterizes as negligible;
- Higher LNG exports lead to more purchasing power for consumers and higher spending on goods and services;
- Aggregate investment in the economy grows; not surprisingly, growth is higher in the natural gas sector than in some other sectors; and
- Increased exports prompt increased production.

The study includes no mention of a cure for cancer or a solution to climate change, but the conclusions are otherwise very positive looking out to 2040 under a wide range of conditions.

The DOE is inviting public comment on the study through July 27, 2018.

Policy statement on LNG exports

The DOE's second issuance on LNG exports is a policy statement regarding long-term authorizations to non-free trade agreement countries. To those who do not closely follow the LNG export debates in the United States, the policy statement may seem a bit mysterious in that, while it announces DOE's strong intent not to rescind export authorizations once they are granted, the statement makes no actual change in policy.

LNG project developers have long fielded questions from worried financial backers and potential customers about one statement that the DOE has routinely included in its authorizations for exports to non-free trade agreement countries: the DOE reserves the right to "amend or rescind" export orders. The DOE has never exercised that right, and it has said it cannot foresee the circumstances that would cause it to do so. However, this has not allayed the worries of those who propose to make large investments in LNG exports or commitments to purchase premised on the stability of LNG supplies.

The policy statement seeks to respond to those concerns. It underscores the DOE's strong support for the factual findings and legal conclusions that underlie the export approvals it has issued, and the DOE notes that these orders have been upheld by the courts against an array of vigorous challenges. The DOE also emphasizes its recognition of the investment-backed commitments associated with LNG exports. In the policy statement, the DOE does not relinquish its authority to amend or rescind an LNG export approval, but it emphasizes that it "does not foresee a scenario where it would rescind" an authorization.

For those of us who have long considered the risk of rescission to be remote, this policy statement gives us one more tool to use in assuaging the concerns of our clients. And, if the DOE were to attempt a rescission, there would now be an even stronger argument that, absent circumstances not covered in any of the now 54 scenarios the DOE evaluated in its latest economic analysis, any rescission would be arbitrary, capricious, and an abuse of discretion, and therefore subject to overruling by a court.

This policy statement took effect upon publication.

Conclusion

Progress on a second wave of LNG projects has been effectively on hold as markets have evolved and begun to absorb the exports from the first wave. The DOE seems, with these two recent actions, to be anxious to send the world a message: where LNG is concerned, the DOE will be a strong, reliable trading partner, prepared to let markets determine the level of exports, with only the most light-handed government regulation, under a statute that has long been recognized as establishing a presumption in favor of approving export applications.

Contacts

Mary Anne Sullivan
Partner, Washington, D.C.
T +1 202 637 3695
maryanne.sullivan@hoganlovells.com

Kevin Keenan
Partner, Houston
T +1 713 632 1463
kevin.keenan@hoganlovells.com

Christopher Schindler
Partner, Washington, D.C.
T +1 202 637 5723
christopher.schindler@hoganlovells.com

Kyle Simpson
Senior Advisor, Washington, D.C.
T +1 202 637 3652
kyle.simpson@hoganlovells.com