

UNITED STATES OF AMERICA

DEPARTMENT OF ENERGY

OFFICE OF FOSSIL ENERGY AND CARBON MANAGEMENT

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LAKE CHARLES EXPORTS, LLC )  
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DOCKET NO. 11-59-LNG  
DOCKET NO. 16-110-LNG

OPINION AND ORDER DENYING REQUEST FOR REHEARING  
OF ORDER DENYING APPLICATION FOR SECOND EXTENSION  
OF DEADLINE TO COMMENCE EXPORTS OF LIQUEFIED NATURAL GAS  
TO NON-FREE TRADE AGREEMENT COUNTRIES

DOE/FECM ORDER NO. 3324-D  
DOE/FECM ORDER NO. 4011-C

JUNE 21, 2023

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## **FREQUENTLY USED ACRONYMS**

AEO	Annual Energy Outlook
Bcf/d	Billion Cubic Feet per Day
Bcf/yr	Billion Cubic Feet per Year
CCS	Carbon Capture and Sequestration
DOE	U.S. Department of Energy
EIA	U.S. Energy Information Administration
EPC	Engineering, Procurement, and Construction
FE	Office of Fossil Energy (before July 4, 2021)
FECM	Office of Fossil Energy and Carbon Management
FERC	Federal Energy Regulatory Commission
FID	Final Investment Decision
FTA	Free Trade Agreement
LCE	Lake Charles Exports, LLC
LNG	Liquefied Natural Gas
NGA	Natural Gas Act

## I. INTRODUCTION and BACKGROUND

On June 21, 2022, Lake Charles Exports, LLC (LCE) filed an application (Second Extension Request)<sup>1</sup> with the Department of Energy’s (DOE) Office of Fossil Energy and Carbon Management (FECM) under section 3 of the Natural Gas Act (NGA).<sup>2</sup> LCE asked DOE to amend, for a second time, its two long-term export authorizations<sup>3</sup> issued on July 29, 2016<sup>4</sup> and June 29, 2017,<sup>5</sup> under NGA section 3(a),<sup>6</sup> to extend the export commencement deadline therein from December 16, 2025 to December 16, 2028, respectively.<sup>7</sup> These two long-term authorizations authorize LCE to export domestically produced liquefied natural gas (LNG) from the proposed Lake Charles Terminal liquefaction facilities to be constructed in Lake Charles, Louisiana (Liquefaction Project),<sup>8</sup> to any country with which the United States has not entered

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<sup>1</sup> *Lake Charles Exports, LLC*, Application for Amendment to Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Countries, Docket Nos. 11-59-LNG and 16-110-LNG (June 21, 2022) [hereinafter Second Extension Request].

<sup>2</sup> The authority to regulate the imports and exports of natural gas, including liquefied natural gas under section 3 of the NGA (15 U.S.C. § 717b) has been delegated to the Assistant Secretary for FECM in Redelegation Order No. S4-DEL-FE1-2023, issued on April 10, 2023.

<sup>3</sup> For purposes of this Order, DOE uses the terms “authorization” and “order” interchangeably.

<sup>4</sup> *Lake Charles Exports, LLC*, DOE/FE Order No. 3324-A, Docket No. 11-59-LNG, Final Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Lake Charles Terminal in Calcasieu Parish, Louisiana, to Non-Free Trade Agreement Nations (July 29, 2016) [hereinafter Order No. 3324-A]. Prior to issuing the final DOE/FE Order No. 3324-A, DOE issued a conditional order approving LCE’s 2011 application seeking authorization to export LNG to non-FTA countries, *see Lake Charles Exports, LLC*, DOE/FE Order No. 3324, Docket No. 11-59-LNG, Order Conditionally Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Lake Charles Terminal to Non-Free Trade Agreement Nations (Aug. 7, 2013).

<sup>5</sup> *Lake Charles Exports, LLC*, DOE/FE Order No. 4011, Docket No. 16-110-LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Lake Charles Terminal in Lake Charles, Louisiana, to Free Trade Agreement and Non-Free Trade Agreement Nations (June 29, 2017) [hereinafter Order No. 4011].

<sup>6</sup> 15 U.S.C. § 717b(a).

<sup>7</sup> Second Extension Request at 2.

<sup>8</sup> The Lake Charles Terminal is an existing LNG import terminal located in Lake Charles, Calcasieu Parish, Louisiana. *See, e.g.* Second Extension Request at 1 & n.1. LCE is a wholly owned subsidiary of Energy Transfer Equity, L.P. *See* U.S. Dep’t of Energy, Lake Charles Export, LLC, Notice of Change in Control, 87 Fed. Reg. 36,844 (June 21, 2022). LCE states that “[v]arious subsidiaries of Energy Transfer LP (Energy Transfer) are developing the Liquefaction Project.” Second Extension Request at 4.

into a free trade agreement (FTA) requiring national treatment for trade in natural gas and with which trade is not prohibited by U.S. law or policy (non-FTA) countries:<sup>9</sup>

- Under DOE/FE Order No. 3324-A, as amended,<sup>10</sup> authorizing the export of LNG, for a 20-year term, in a volume equivalent to 730 Bcf/yr of natural gas; and
- Under DOE/FE Order No. 4011, as amended,<sup>11</sup> authorizing the export of LNG, for a 20-year term, in a volume equivalent to 121 Bcf/yr of natural gas.<sup>12</sup>

Consistent with DOE practice, each authorization originally set forth a seven-year deadline for LCE to commence exports of LNG to non-FTA countries – July 29, 2023, and June 29, 2024, for Order Nos. 3324-A and 4011, respectively.<sup>13</sup> Pursuant to NGA section 3, DOE authorizes the export of LNG itself, while the Federal Energy Regulatory Commission (FERC) authorizes the construction and operation of onshore LNG terminal facilities.<sup>14</sup> Additionally, similar to DOE’s practice of establishing deadlines by which commercial exports of LNG to non-FTA countries must begin, FERC establishes deadlines by which LNG terminal facilities must be constructed and placed into service.<sup>15</sup>

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<sup>9</sup> Non-FTA countries are countries with which the United States has not entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas, and with which trade is not prohibited by U.S. law or policy. The United States currently has FTAs requiring national treatment for trade in natural gas with Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea, and Singapore. FTAs with Israel and Costa Rica do not require national treatment for trade in natural gas.

<sup>10</sup> Order No. 3324-A, *amended by* Order No. 3324-B (Oct. 6, 2020) (extending export commencement deadline).

<sup>11</sup> Order No. 4011, *amended by* Order No. 4011-A (Oct. 6, 2020) (extending export commencement deadline in non-FTA authorization).

<sup>12</sup> Second Extension Request at 1-2. DOE/FE Order No. 4011 is a consolidated order authorizing exports to both FTA and non-FTA countries. Because only the non-FTA portion of that order is at issue in this proceeding, all references to Order No. 4011 herein are to the non-FTA authorization alone.

<sup>13</sup> *See* Order No. 3324-A, at 151 (Ordering Para. D); Order No. 4011, at 55 (Ordering Para. E); *see also* App. at 3-4, n.9.

<sup>14</sup> 15 U.S.C. §§ 717b(a), (e); *see also* *Sierra Club v. Fed. Energy Regulatory Comm’n*, 827 F.3d 36, 40 (D.C. Cir. 2016) (observing that, while DOE “maintains exclusive authority over the export of natural gas as a commodity,” DOE has delegated to FERC the authority to approve or deny an application for siting, construction, operation, or expansion of an LNG terminal under NGA section 3(e)).

<sup>15</sup> NGA section 3(e)(3)(A) provides that “the Commission may approve an [LNG terminal] application) . . . , in whole or part, with such modifications and upon such terms and conditions as the Commission [finds] necessary or appropriate.” 15 U.S.C. § 717b(e)(3)(A).

In an order issued in December 2015, FERC first authorized the construction and operation of the Liquefaction Project, setting a construction and in-service deadline five years from the date of its authorizing order.<sup>16</sup> Following an initial request from the Liquefaction Project's developers, this deadline was extended to December 16, 2025.<sup>17</sup> On March 4, 2020, LCE submitted its first request to DOE seeking an extension of its commencement date (First Extension Request) to align with FERC's extension of its construction deadline.<sup>18</sup> On October 6, 2020, DOE granted LCE's request to amend its non-FTA export commencement deadline in Order Nos. 3324-A and 4011, as amended, to December 16, 2025, under NGA section 3(a), 15 U.S.C. § 717b(a) (2020 LCE Extension Order).<sup>19</sup>

On May 6, 2022, and before LCE filed its Second Extension Request, FERC granted a second extension of the Liquefaction Project's construction and in-service deadline, to December 17, 2028.<sup>20</sup> On June 21, 2022, LCE filed its Second Extension Request, asking DOE to extend the export commencement deadline in Order Nos. 3324-A and 4011, as amended, to December 16, 2028 (to align with FERC's approval of a request to extend the construction and in-service deadline).<sup>21</sup> On April 21, 2023, DOE issued DOE/FECM Order Nos. 3324-C and 4011-B

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<sup>16</sup> *Lake Charles LNG Export Co., LLC, et al.*, Order Granting Section 3 and Section 7 Authorizations and Approving Abandonment, FERC Docket Nos. CP14-119-000 *et al.*, 153 FERC ¶ 61,300 (2015), *reh'g denied*, 155 FERC ¶ 61,328 (2016).

<sup>17</sup> Letter order to Lake Charles LNG Co., LLC, FERC Docket Nos. CP14-119-000 *et al.* (issued Dec. 5, 2019).

<sup>18</sup> Lake Charles Exports, LLC, Application for Amendment of Long-Term Authorizations to Export Liquefied Natural Gas to Free Trade Agreement and Non-Free Trade Agreement Countries, Docket Nos. 11-59-LNG & 16-110-LNG (Mar. 4, 2020) [hereinafter First Extension Request].

<sup>19</sup> See Lake Charles Exports, LLC, DOE/FE Order Nos. 2987, *et al.*, Docket Nos. 11-59-LNG and 16-110-LNG, Order Granting Application to Amend Long-Term Authorizations (Oct. 6, 2020) [hereinafter 2020 LCE Extension Order], [https://www.energy.gov/sites/prod/files/2020/10/f79/ord2987a%2C%203324b%2C%204011a\\_0.pdf](https://www.energy.gov/sites/prod/files/2020/10/f79/ord2987a%2C%203324b%2C%204011a_0.pdf).

<sup>20</sup> *Lake Charles LNG Export Co., LLC, et al.*, Order Granting Extension of Time Request, FERC Docket Nos. CP14-119-002, *et al.*, 179 FERC ¶ 61,086 (2022), [https://elibrary.ferc.gov/eLibrary/filelist?accession\\_number=20220506-3073](https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20220506-3073) [hereinafter FERC 2022 Extension Order]. We note that, although the FERC 2022 Extension Order extended the construction and in-service deadline to December 17, 2028, the Second Extension Request refers to December 16, 2028, as the extended FERC deadline (*see* Second Extension Request at 2-5).

<sup>21</sup> Second Extension Request at 2-3.

(Denial Order) denying LCE’s Second Extension Request.<sup>22</sup> Based on the record and guided by our longstanding rationale for the export commencement period, DOE determined that LCE had not shown good cause under section 3(a) of the NGA for a second extension of the export commencement deadline in Order Nos. 3324-A and 4011, as amended.<sup>23</sup>

Also on April 21, 2023, DOE issued a Policy Statement on Export Commencement Deadlines in Authorizations to Export Natural Gas to Non-Free Trade Agreement Countries (Policy Statement).<sup>24</sup> The Policy Statement announced that DOE will no longer extend commencement deadlines for non-FTA LNG export authorizations “unless the authorization holder demonstrates both that: it has physically commenced construction on the associated export facility, and its inability to comply with the existing export commencement deadline is the result of extenuating circumstances outside of its control.”<sup>25</sup> The Policy Statement also clarified that extension requests filed prior to the issuance of the Policy Statement—including LCE’s—were not subject to the bright-line approach adopted by the Policy Statement and would instead be reviewed “under DOE’s prior practice based on the record in each commencement extension proceeding.”<sup>26</sup>

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<sup>22</sup> *Lake Charles Exports, LLC*, DOE/FECM Order Nos. 3324-C, *et. al.*, Docket Nos. 11-59-LNG and 16-110-LNG, Order Denying Application for Second Extension of Deadline to Commence Exports of Liquefied Natural Gas to Non-Free Trade Agreement Countries (Apr. 21, 2023) [hereinafter Denial Order].

<sup>23</sup> *Id.*

<sup>24</sup> U.S. Dep’t of Energy, Policy Statement on Export Commencement Deadlines in Authorizations to Export Natural Gas to Non-Free Trade Agreement Countries, 88 Fed. Reg. 25,272 (Apr. 26, 2023) [hereinafter Policy Statement]. DOE published the original version of the Policy Statement on its website on April 21, 2023, noting that “should any discrepancy occur between the document posted here and the document published in the Federal Register, the Federal Register publication controls.” Thus, the citation here is to the Federal Register publication.

<sup>25</sup> Policy Statement, 88 Fed. Reg. at 25,273.

<sup>26</sup> *Id.* at 25,278.

On May 22, 2023, LCE timely filed a Request for Rehearing of the Denial Order.<sup>27</sup> For the reasons set forth below, DOE denies LCE’s Request for Rehearing.<sup>28</sup> Accordingly, LCE’s existing authorizations, including its current deadline to commence exports to non-FTA countries under both orders by December 16, 2025, remain in effect. In addition, should LCE be unable to commence exports by December 16, 2025, it is welcome to resubmit a non-FTA request so that it can be evaluated under current policies with the most recent market information.

## II. SUMMARY OF LCE’S REHEARING ARGUMENTS

### A. LCE Contends DOE’s Seven-Year Export Commencement Deadline Is Contrary to NGA Section 3

LCE asserts that DOE has “no basis, statutory or otherwise,” for its initial seven-year export commencement deadline and thus the “imposition of such an initial deadline is contrary to NGA section 3 and is arbitrary and capricious.”<sup>29</sup> LCE maintains that “[n]othing in NGA section 3 imposes ‘an obligation to ensure...that non-FTA authorizations are utilized in a timely manner’ or requires an export commencement deadline.”<sup>30</sup> Rather, according to LCE, NGA section 3 is “completely silent” on these subjects and “does not provide any room for agency gap-filling or deference to such efforts.”<sup>31</sup> Therefore, in LCE’s view, DOE’s “attempt to create a deadline

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<sup>27</sup> Lake Charles Exports, LLC, Request for Rehearing of DOE/FECM Order Nos. 3324-C, *et. al.*, Order Denying Application for Second Extension of Deadline to Commence Exports of Liquefied Natural Gas to Non-Free Trade Agreement Countries, Docket Nos. 11-59-LNG and 16-110-LNG (Apr. 21, 2023) [hereinafter Request for Rehearing].

<sup>28</sup> LCE’s affiliate Lake Charles LNG Export Company LLC (Lake Charles LNG Export) holds separate, non-additive authorizations to export LNG from the proposed Liquefaction Project. *See* Second Extension Request at 1 & n.2. Lake Charles LNG Export has filed a similar Request for Rehearing in response to DOE/FECM Order Nos. 3868-B and 4010-B denying Lake Charles LNG Export’s application for a second extension of its deadline to commence exports of LNG from the Liquefaction Project. Concurrently with this Order, DOE is issuing an Order Denying Lake Charles LNG Export’s Request for Rehearing in both proceedings (DOE/FECM Order Nos. 3868-C and 4010-C, respectively).

<sup>29</sup> Request for Rehearing at 39-40.

<sup>30</sup> *Id.* at 40 (citing Denial Order at 18).

<sup>31</sup> *Id.*



through a policy pronouncement exceeds its statutory authority and has no basis in the statutory public interest standard by which DOE is bound.”<sup>32</sup>

**B. LCE Believes DOE’s Interpretation of “Good Cause” is Inconsistent with NGA Section 3**

LCE asserts that DOE erred in reviewing its Second Extension Request under “merely a ‘good cause’ standard.”<sup>33</sup> In LCE’s view, “NGA section 3’s reference to ‘good cause’ is governed by and subject to the statutory standard pursuant to which DOE must approve a LNG export application unless it ‘will not be consistent with the public interest.’”<sup>34</sup> Thus, according to LCE, DOE has “no discretion to exceed its statutory authority by denying an extension where, as here, that denial will result in the demise of an approved project found to be in the public interest by FERC, as recently as May 2022.”<sup>35</sup>

**C. LCE Asserts it Demonstrated ‘Good Cause’**

LCE asserts in its Request for Rehearing that its Second Extension Request “established ‘good cause’ under the standards applicable to all extension requests predating the Policy Statement.”<sup>36</sup> LCE contends that, prior to the Policy Statement, DOE considered the “same general factors” to evaluate whether an extension request established “good cause,” including whether project-specific facts warranted an extension, the amount of time requested, any unique delays and challenges faced by the authorization holder, and whether FERC had approved an extension of its own construction and in-service deadline.<sup>37</sup> In LCE’s view, the impact of the COVID-19 pandemic, LCE’s execution of several long-term offtake contracts, LCE’s semi-

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<sup>32</sup> *Id.* at 40-41.

<sup>33</sup> *Id.* at 38.

<sup>34</sup> *Id.*

<sup>35</sup> Request for Rehearing, at 39.

<sup>36</sup> *Id.* at 16.

<sup>37</sup> *Id.*

annual reports to DOE detailing the Liquefaction Project’s progress toward construction, and FERC’s recent extension approval are “more than enough to satisfy the ‘good cause’ standard.”<sup>38</sup>

“As for the impact of COVID-19,” LCE points to Royal Dutch Shell, plc’s (Shell) withdrawal from the Liquefaction Project, the difficulty of obtaining financing when the “LNG long-term contract market was frozen for nearly three years,” and the delays incurred from LCE’s engineering, procurement, and construction (EPC) contractors soliciting updated bids.<sup>39</sup> LCE further asserts that, in denying its application, DOE required LCE to supply more than “‘generalized statements’ regarding the impact of COVID-19” and to ‘provide evidence’ of actions taken to advance the Project” since its first extension—neither of which, according to LCE, DOE required prior to issuing the Policy Statement.<sup>40</sup> LCE maintains that DOE “merely needed to ask” for a “more detailed description of the adverse effects of the COVID-19 pandemic” or “more specific information regarding the progress that LCE had made on the Project,” and LCE “would have been happy to provide” it.<sup>41</sup>

With respect to progress toward completion of the Liquefaction Project, LCE first argues that the “execution of additional offtake contracts should have itself been sufficient” because “securing long-term offtake contracts is the foundation for completing an LNG project.”<sup>42</sup> LCE also asserts in its Request for Rehearing that DOE should have asked it for more information to allow LCE to further supplement its request and if DOE had “requested or required further information showing the [Liquefaction] Project’s progress, LCE would have further emphasized” additional “evidence of the physical construction” that, according to LCE, “unquestionably

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<sup>38</sup> *Id.* at 17.

<sup>39</sup> *Id.* at 18-19.

<sup>40</sup> *Id.* at 18.

<sup>41</sup> Request for Rehearing at 18.

<sup>42</sup> *Id.* at 19-20.

establishes sufficient ‘progress toward completion.’”<sup>43</sup> LCE maintains that, because this “evidence” was detailed in reports filed with DOE and with FERC, DOE could have “easily taken administrative notice of these reports and their contents.”<sup>44</sup> In LCE’s view, for DOE “instead to say nothing, disregard publicly filed reports...and request no further information” constitutes “arbitrary and capricious agency action.”<sup>45</sup> LCE further argues that DOE’s denial “is all the more unreasonable” because without the requested extension the “Project ‘likely would fail.’”<sup>46</sup> LCE thus contends that because DOE’s denial “will likely result in...the hundreds of millions of dollars that have already been spent [becoming] a total loss,” it raises “serious constitutional questions concerning a lack of due process and impermissible takings.”<sup>47</sup>

Additionally, LCE asserts that “DOE’s refusal to accord any consideration to the second extension granted by FERC...is a clear departure from prior DOE policy and precedent.”<sup>48</sup> LCE maintains that “DOE’s ‘good cause’ inquiry has always taken into account, at least in part, FERC’s judgments,” and points to the 2020 LCE Extension Order and Port Arthur LNG, LLC (PALNG) Extension Order as support.<sup>49</sup> In LCE’s view, “principles of reasoned decisionmaking demand that DOE articulate its reasons for disagreeing with FERC’s findings supporting an extension.”<sup>50</sup> Thus, according to LCE, “ignoring FERC’s determination and reasoning altogether, as DOE did in the Denial Order...reflects arbitrary decisionmaking.”<sup>51</sup>

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<sup>43</sup> *Id.* at 21, 24.

<sup>44</sup> *Id.* at 24-25.

<sup>45</sup> *Id.* at 25.

<sup>46</sup> *Id.* at 25, 29 (citing the 2020 LCE Extension Order).

<sup>47</sup> Request for Rehearing at 26.

<sup>48</sup> *Id.* at 26.

<sup>49</sup> *Id.* at 26-27 (citing 2020 LCE Extension Order at 6; *Port Arthur LNG, LLC*, DOE/FECM Order Nos. 3698-C & 4372-B, Docket Nos. 15-53-LNG, *et al.*, Order Granting Application to Extend Term to Begin Exports of Liquefied Natural Gas to Free Trade Agreement Countries and to Extend Deadline to Commence Exports of Liquefied Natural Gas to Non-Free Trade Agreement Countries, at 12 (Apr. 21, 2023) [hereinafter PALNG Extension Order]).

<sup>50</sup> *Id.* at 27.

<sup>51</sup> *Id.*

#### **D. LCE Argues Granting the Second Extension Request is Consistent with the Purpose of DOE's Export Commencement Deadline**

LCE asserts that granting its Second Extension Request would “be consistent with the purpose of DOE’s export commencement deadline” required by the public interest standard of NGA Section 3.<sup>52</sup> LCE first points to the “recognized need to allow for ‘unplanned delays in the licensing and construction,’” arguing that there “can be no serious dispute that LCE endured such ‘unplanned delays’” resulting from the effects of the COVID-19 pandemic.<sup>53</sup> LCE maintains that granting its request “will not ‘frustrate[]’ the efforts of any other current or prospective authorization holders.”<sup>54</sup> In LCE’s view, “DOE does not appear to disagree,” given DOE’s acknowledgement of other authorization holders’ progress and its recognition that the decline of the COVID-19 pandemic and Russia’s Ukraine invasion “present ‘opportunities for participants in the U.S. LNG market.’”<sup>55</sup> LCE also asserts that denying its extension does “nothing” to reduce the gap between total approved authorization volume and total operational capacity, as DOE cannot reduce a given LNG project’s authorized export volume to FTA nations if a developer fails to satisfy DOE’s export commencement deadline for the non-FTA project component.<sup>56</sup> Here, LCE is authorized to export the same volume to FTA and non-FTA countries on a non-additive basis, and its FTA authorization would remain valid even if it missed the commencement deadline for its non-FTA authorization.<sup>57</sup>

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<sup>52</sup> *Id.* at 35.

<sup>53</sup> Request for Rehearing at 35 (citing Denial Order at 13-14).

<sup>54</sup> *Id.* at 36 (citing Denial Order at 13-14).

<sup>55</sup> *Id.* (citing Denial Order at 15).

<sup>56</sup> *Id.* at 36-37.

<sup>57</sup> *Id.*

LCE further contends that denying its application would not further the commencement deadline’s additional purpose to “cultivat[e] a healthy market for LNG export authorizations.”<sup>58</sup> LCE maintains that “there is no evidence suggesting that granting an extension would have any chilling effect on current or prospective authorization holders” and thus denying LCE’s extension does not further the deadline’s purpose.<sup>59</sup> Nor does it, according to LCE, “comply with the NGA section 3 requirement that DOE authorize all otherwise-compliant non-FTA export applications that are not inconsistent with the public interest.”<sup>60</sup>

**E. LCE Claims its Second Extension Request was Subjected to a Heightened Standard**

LCE asserts that DOE, throughout the Denial Order, “repeatedly indicated that LCE must satisfy a higher standard for its extension application, despite a lack of prior notice to LCE.”<sup>61</sup> In LCE’s view, comparing PALNG’s successful initial extension application with LCE’s unsuccessful Second Extension Request “demonstrates the higher standard that DOE impermissibly applied to LCE’s application.”<sup>62</sup> LCE asserts that, in denying its application, DOE found it contained “‘generalized statements’ [which] did not demonstrate with sufficient specificity how the COVID-19 pandemic impacted the [Liquefaction] Project.”<sup>63</sup> Yet, according to LCE, DOE approved PALNG’s application which “invoked similar generalized statements” regarding the adverse impacts from the COVID-19 pandemic.<sup>64</sup> LCE further states that in granting PALNG’s application, DOE “acknowledged FERC’s extension” and “noted that ‘[n]o facts associated with’ PALNG’s original application were affected by the extension,” but that

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<sup>58</sup> *Id.* at 37.

<sup>59</sup> Request for Rehearing at 37.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 29.

<sup>62</sup> *Id.* at 29-31.

<sup>63</sup> *Id.* at 30.

<sup>64</sup> *Id.*

“DOE declined to take into account these same considerations when deciding LCE’s second extension request.”<sup>65</sup>

LCE contends that when it submitted its Second Extension Request, DOE gave it “no reason to expect that an ‘unprecedented’ second extension” would be held to a “heightened standard as compared to a first extension request.”<sup>66</sup> LCE asserts that because “nothing in NGA section 3(a) suggests that the public-interest standard changes depending on a first or second extension request,” LCE thus had “every reasonable expectation that the same standard would apply to first and second extension requests.”<sup>67</sup>

LCE also contends that DOE’s assertion that “LCE ought to have amended its March 2020 application” is “flawed in several respects.”<sup>68</sup> According to LCE, this is a “tacit admission” that DOE would have granted an extension “but for the fact that LCE sought that additional time via two extension requests, rather than a single, longer request at the beginning.”<sup>69</sup>

LCE maintains that DOE’s approval of PALNG’s request “betrays its reasoning for denying LCE’s request as pretextual.”<sup>70</sup> In LCE’s view, if DOE correctly concluded that LCE “failed to demonstrate ‘good cause’ because ‘the primary, acute effects of the COVID-19 pandemic had largely subsided’ by June 2022,” DOE should also have required PALNG to submit more reasoning for its extension request in November 2022.<sup>71</sup> LCE further asserts that

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<sup>65</sup> Request for Rehearing at 30 (citing PALNG Extension Order at 12).

<sup>66</sup> *Id.* at 31 (*cf.* Lake Charles Exports, LLC, Application for Amendment of Long-Term Authorizations to Export Liquefied Natural Gas to Free Trade Agreement and Non-Free Trade Agreement Countries, Docket Nos. 11-59-LNG and 16-110-LNG (Mar. 4, 2020) [hereinafter First Extension Request]).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (citing Denial Order at 14-15).

<sup>69</sup> *Id.* at 31-32.

<sup>70</sup> *Id.* at 33.

<sup>71</sup> Request for Rehearing at 33 (citing Denial Order at 15).

DOE's prior position "belies" the federal government's "consistent stance" that "the pandemic continued to impose real burdens on individuals and businesses throughout 2022."<sup>72</sup>

Finally, LCE contends that "DOE applied a version of the Policy Statement's new, more rigorous standard to LCE's extension request, despite no prior notice to LCE."<sup>73</sup> LCE argues that it was "plainly improper" for DOE to consider the Policy Statement in the Denial Order, given LCE's "undisputed lack of notice" and because "DOE omitted any similar analysis from its simultaneous PALNG Extension Order."<sup>74</sup> LCE further asserts that, even proceeding under the new Policy Statement, DOE should have granted LCE's request.<sup>75</sup> According to LCE, it "provided DOE with ample evidence" to meet both parts of the Policy Statement's required demonstration.<sup>76</sup>

### III. STANDARD OF REVIEW

Under NGA section 19(a), a party "aggrieved" by an order issued by DOE may file a request for rehearing within 30 days after the issuance of the order.<sup>77</sup> When acting upon such a request, DOE has the "power to grant or deny rehearing or to abrogate or modify its order without further hearing."<sup>78</sup>

The purpose of a rehearing is to provide an opportunity for parties to challenge a DOE action when they are aggrieved for the first time, and for DOE to consider such a challenge before the action is subject to judicial review.<sup>79</sup>

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<sup>72</sup> *Id.* at 34-35.

<sup>73</sup> *Id.* at 27-28.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 28.

<sup>76</sup> *Id.* at 28-29.

<sup>77</sup> 15 U.S.C. § 717r(a); *see also* 10 C.F.R. § 590.501.

<sup>78</sup> 15 U.S.C. § 717r(a).

<sup>79</sup> *See Pan Am. Petroleum Corp. v. Fed. Power Comm'n*, 322 F.2d 999, 1003-04 (D.C. Cir. 1963).

#### IV. DISCUSSION

##### A. DOE's Authority under the NGA to Impose Conditions and Grant Extensions For Good Cause is Well-Established.

LCE asserts that DOE has “no basis, statutory or otherwise,” for its initial seven-year export commencement deadline, and thus that the “imposition of such an initial deadline is contrary to NGA section 3 and is arbitrary and capricious.”<sup>80</sup> According to LCE, DOE’s “attempt to create a deadline through a policy pronouncement exceeds its statutory authority and has no basis in the statutory public interest standard by which DOE is bound.”<sup>81</sup> LCE also asserts that DOE’s denial raises constitutional concerns.<sup>82</sup>

Both the NGA and DOE's regulations provide DOE with broad authority to attach conditions to non-FTA export authorizations.<sup>83</sup> NGA section 3(a) states, in its entirety:

[DOE] shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. **[DOE] may by its order grant such application, in whole or in part, with such modification and upon such terms and conditions as the [Department] may find necessary or appropriate,** and may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.<sup>84</sup>

Since 2011, when DOE issued its first conditional long-term export authorization involving domestically produced LNG to Sabine Pass Liquefaction, LLC (Sabine Pass),<sup>85</sup> DOE has interpreted “upon such term and conditions as the [Department] may find necessary or

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<sup>80</sup> Request for Rehearing at 40.

<sup>81</sup> *Id.* at 40-41.

<sup>82</sup> *Id.* at 18, 26.

<sup>83</sup> See 15 U.S.C. § 717b(a); see also 10 C.F.R. § 590.404.

<sup>84</sup> 15 U.S.C. § 717b(a).

<sup>85</sup> See *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 2961, Docket No. 10-111-LNG, Opinion and Order Conditionally Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations (May 20, 2011) [hereinafter *Sabine Pass*]. DOE incorporated this seven-year commencement period in Sabine Pass’s final order (DOE/FE Order No. 2961-A), issued on August 7, 2012.



appropriate” to include a deadline of seven years for authorization holders to commence exports to non-FTA countries from the date the authorization is issued.<sup>86</sup> In DOE’s authorization to Sabine Pass, we noted that although Sabine Pass had requested “that its authorization commence on the earlier of the date of first export or five years from the date of the issuance of the authorization,” we determined, after reviewing the record, that a period of seven years for an applicant to commence its non-FTA exports was consistent with the public interest.<sup>87</sup> DOE further determined that “the purpose of [the commencement deadline] is to ensure that other entities that may seek similar authorizations are not frustrated in their efforts to obtain those authorizations by authorization holders that are not engaged in actual export operations.”<sup>88</sup> In addition, we found that a seven-year operations commencement date provided “a reasonable accommodation given [Sabine Pass’s] representation that it plans to be ready to commence operations by 2015–2016.”<sup>89</sup> DOE reasoned that a seven-year commencement period “provides approximately two years beyond [Sabine Pass’s] current planned commencement date before the condition must be met,” and thus “will allow for time lost due to unplanned delays in licensing and construction of the planned liquefaction facilities.”<sup>90</sup>

DOE also has regulatory discretion to impose suitable terms. Under 10 C.F.R. § 590.404, we may “issue a final opinion and order and attach such conditions thereto as may be required by the public interest after completion and review of the final record.”<sup>91</sup> It is clear that we have authority to include an export commencement deadline as a condition to a non-FTA export

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<sup>86</sup> *Id.*; see also Denial Order at 13 (noting that the seven-year commencement deadline has been a condition of all long-term LNG export authorizations granted to date).

<sup>87</sup> *Sabine Pass*, DOE/FE Order No. 2961, at 2, 33.

<sup>88</sup> *Id.* at 33.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> 10 C.F.R. § 590.404.

authorization, it is consistent with our precedent to include such terms, and it is reasonable for us to expect those terms and conditions to be followed.

Therefore, rather than being arbitrary and capricious, the commencement deadline condition has multiple reasonable and long-articulated purposes. First, as noted above, the commencement deadline “ensure[s] that other entities that may seek similar authorizations are not frustrated in their efforts to obtain those authorizations by authorization holders that are not engaged in actual export operations.”<sup>92</sup> Second, the deadline ensures that DOE’s decision approving the authorization does not rely on stale facts.<sup>93</sup> That purpose is all the more important in the context of a request to extend a commencement deadline where, after several years, it is incumbent upon the agency charged with ensuring that non-FTA authorizations are not inconsistent with the public interest to consider whether the requested extension will alter DOE’s public interest determination in originally granting the authorization under NGA section 3(a). Therefore, it is reasonable for DOE to impose conditions to ensure that it can fulfill its statutory responsibility.

LCE also asserts that DOE erred in reviewing its extension application under “merely a ‘good cause’ standard.”<sup>94</sup> In LCE’s view, the “good cause” language of NGA section 3 cannot be divorced from the statute’s command to approve LNG export applications, including applications for extension of time, “unless they ‘will not be consistent with the public interest.’”<sup>95</sup> Thus, according to LCE, DOE has “no discretion to exceed its statutory authority by denying an extension” when a project is found to be in the public interest.<sup>96</sup>

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<sup>92</sup> Denial Order at 13-14; *see also Sabine Pass*, DOE/FE Order No. 2961, at 33.

<sup>93</sup> Denial Order at 18-19.

<sup>94</sup> Request for Rehearing at 38.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 39.

Even if the public interest determination that DOE made when issuing an initial authorization is relevant for a request to modify the initial authorization, LCE’s conclusion that DOE is somehow bound by that initial public interest finding, regardless of whether LCE has shown good cause for a modification, is plainly wrong.

First, DOE’s interpretation and application of the good cause standard for modifications to orders is well established and plainly authorized, as the language of NGA Section 3(a) reveals immediately:

[DOE] shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent with the public interest. [DOE] . . . may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order in the premises as it may find necessary or appropriate.<sup>97</sup>

While section 3(a) uses the directing word “shall” with respect to initial applications to export natural gas (so long as DOE finds that the export will not be inconsistent with the public interest), it also uses the word “may,” which by definition indicates discretion, in the context of any supplemental order.<sup>98</sup> DOE’s statutory discretion to amend orders—including those initial conditions on authorizations that it finds necessary and appropriate, such as the date by which exports must begin—could not be more clear.

Nor does section 3(a) of the NGA, by its terms, require (or, for that matter, permit) DOE to make a supplemental order modifying the authorization if good cause is not shown.<sup>99</sup> In fact, by establishing two requirements—a finding that the authorization, as modified, is not inconsistent with the public interest, and a showing that a modification is for good cause—section 3(a) imposes an *additional* burden on modifications than it does on initial

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<sup>97</sup> 15 U.S.C. § 717b(a).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

authorizations.<sup>100</sup> LCE’s interpretation of section 3(a), in which DOE has no discretion on supplemental orders once an underlying authorization has been found ‘not inconsistent with the public interest’ altogether eliminates the “opportunity for hearing” and “for good cause shown” from the standard. Such a reading distorts the plain language interpretation of section 3(a) and is untenable.

In addition, it is unclear why DOE’s original finding of exports from LCE being found in the public interest would force DOE to grant an extension request. While the NGA does not require DOE to reevaluate an underlying authorization to export LNG when a modification is requested,<sup>101</sup> DOE does, appropriately, consider whether the requested extension will alter DOE’s public interest determination granting the export authorization under NGA section 3(a).<sup>102</sup> For the reasons discussed above related to the purpose of the commencement deadline, DOE’s conclusion that LCE’s export of natural gas to non-FTA countries was not inconsistent with the public interest relied, in part, on a condition that exports commence within seven years (subsequently extended by approximately 28.5 months for Order No. 3324-A and approximately 17.5 months for Order No. 4011).<sup>103</sup> Here, LCE has asked DOE to amend that condition. LCE makes no showing that this material change in DOE’s authorization will yield a project that remains in the public interest. And, for the reasons discussed below, an extended commencement deadline at the very least raises questions about whether the authorization would remain in the public interest.

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *See* Denial Order at 12.

<sup>103</sup> *See* Order No. 3324-A at Term and Condition B and Ordering Para. D, and Order No. 4011 at Term and Condition B and Ordering Para. E.

To be clear, DOE’s determination that LCE’s export of natural gas to non-FTA countries is not inconsistent with the public interest *if* it commences by December 16, 2025, remains unchanged.<sup>104</sup> The denial of LCE’s Second Extension Request does not vacate LCE’s export authorizations or its commencement extensions granting 28.5 and 17.5 additional months to commence exports.<sup>105</sup> Moreover, any authorization holder—including LCE should it be unable to commence exports by December 16, 2025—is welcome to resubmit a non-FTA application so that it can be evaluated under current policies with the most recent market information.

Finally, DOE properly exercised its statutory authority, and thus LCE does not have any claims related to lack of due process or impermissible takings. First, DOE’s regulations at 10 C.F.R. Part 590 set forth procedures for persons to submit applications to obtain authorizations from DOE to import and export natural gas under the NGA, including requesting an export commencement extension.<sup>106</sup> Based on the regulations, LCE filed a Second Extension Request with DOE. This opportunity—the proceeding itself—provides all the process that is due to LCE and any other applicant, and LCE’s dissatisfaction with the result thus far does not render the process insufficient. Second, LCE has no property right in, or other entitlement to, a second commencement extension. LCE’s existing authorizations, which will remain valid and were already amended to include a later commencement deadline than the original authorization, are clear that exports must begin by December 16, 2025.<sup>107</sup> A denial of a request to postpone that date a second time therefore does nothing to change existing expectations.<sup>108</sup> To the extent LCE committed resources to advance the project without certainty that it could meet the terms of its

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<sup>104</sup> Denial Order at 19.

<sup>105</sup> *Id.*

<sup>106</sup> 10 C.F.R. § 590.100 *et seq.*

<sup>107</sup> *See* 2020 LCE Extension Order.

<sup>108</sup> *See infra* section IV.E (observing that LCE’s semi-annual reports indicated that it would be ready to commence exports by 2022, 2023, 2024, and 2025). Even as years have come and gone, that has not invalidated LCE’s active authorizations.)

existing authorization, LCE did so at risk. LCE now argues for an entitlement it does not hold, and for DOE to mitigate risks for which DOE is not responsible. Again, despite LCE's disappointment with DOE's statutory implementation, and despite LCE's claims to the contrary, DOE has met every constitutional requirement.

**B. DOE's Denial of LCE's Second Extension Request is Consistent with the Purpose of the Commencement Deadline.**

In addition to asserting that inclusion of any commencement deadline as a condition of authorization is arbitrary and capricious, which DOE addresses in section IV.A above, LCE also asserts that granting its extension request would "be consistent with the purpose of DOE's export commencement deadline... to allow for 'unplanned delays in [] licensing and construction.'"<sup>109</sup> LCE claims that granting its Second Extension Request would not have "any chilling effect on current or prospective authorization holders" and would do nothing "to reduce the so-called authorization 'overhang'" because it will still be able to export to FTA nations.<sup>110</sup>

As discussed above, the commencement deadline has multiple purposes.<sup>111</sup> Enforcing the commencement deadline allows DOE to "better assess whether any new non-FTA applications are in the public interest," "provide[s] more certainty to the U.S. and global LNG export markets," and "ensure[s] that DOE is making decisions utilizing the latest market information and analytical tools available."<sup>112</sup>

In utilizing the latest market information, DOE considers the impact of its actions on existing authorization holders that have commenced exports, as well as those that have yet to

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<sup>109</sup> Request for Rehearing at 35 (citing Denial Order at 13-14).

<sup>110</sup> *Id.* at 36-37.

<sup>111</sup> *See supra* at 14-15.

<sup>112</sup> Denial Order at 18.

commence exports, and potential new entrants to the LNG market.<sup>113</sup> Cumulative exports are material to DOE's public interest determination, as our precedent demonstrates.<sup>114</sup> For instance, DOE's 2018 LNG Export Study examined the impact of varying levels of LNG exports on domestic energy markets, identifying various assumptions for domestic and international supply and demand conditions to capture a wide range of uncertainty in natural gas markets.<sup>115</sup> The seven-year timeline, without specific good cause shown for a longer timeline, allows DOE to rely on those market forces while still monitoring total exports and not disadvantaging new entrants.

DOE also considers the total approved non-FTA export volume as compared to the actual export volume.<sup>116</sup> In examining this difference, it exacerbates the uncertainty over when or whether approved exports will become available, especially if authorized projects such as LCE take over 17 years—the amount of time between LCE's initial application for non-FTA exports and the latest extended commencement date LCE has requested—to commence exports. In addition, regardless of its impacts on potential authorization holders, the uncertainty associated with projects in continuous limbo that repeatedly seek additional time to commence exports (when they have admittedly not reached a final investment decision and have changed their estimated date to begin exports seven times<sup>117</sup>) hinders DOE's ability to properly assess new

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<sup>113</sup> See, e.g., Freeport LNG Expansion, L.P., et al., DOE/FECM Order No. 4961, Docket No. 21-98-LNG, Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations, at 70-71 (Mar. 3, 2023) [hereinafter Freeport LNG Expansion Order].

<sup>114</sup> See, e.g., *id.* at 55-58.

<sup>115</sup> See NERA Economic Consulting, *Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports* (June 7, 2018), <https://www.energy.gov/sites/prod/files/2018/06/f52/Macroeconomic%20LNG%20Export%20Study%202018.pdf> [hereinafter 2018 LNG Export Study or 2018 Study].

<sup>116</sup> See e.g., Freeport LNG Expansion Order at 70-71, 76.

<sup>117</sup> Semi-Annual Reports for Lake Charles Exports, LLC, Docket No. 11-59-LNG – Order 3324, <https://www.energy.gov/fecm/articles/semi-annual-reports-lake-charles-exports-llc-fe-dkt-no-11-59-lng-order-3324> (last viewed June 21, 2023).

non-FTA applications and increases the possibility that the reasoning supporting certain non-FTA authorizations has weakened or become invalid.<sup>118</sup> This is a circumstance we seek to avoid.

While DOE found that LCE had demonstrated good cause for the additional time in its First Extension Request, and that it did not alter its original public interest determination, DOE was concerned that an extension of this duration—extending the commencement date to 17 years from the initial application for export authorization and 12 years from DOE’s initial authorization—would alter the underlying public interest determination.<sup>119</sup>

Approving LCE’s Second Extension Request on the record before us would require DOE to continue to rely on the facts presented in LCE’s original 2011 application. There are examples of facts in that application that have become obsolete due to changes in the domestic and global marketplace for natural gas, including the estimates of U.S. natural gas supply and demand.<sup>120</sup> For instance, the market projection referenced in LCE’s 2011 application, U.S. Energy Information Administration’s (EIA) Annual Energy Outlook (AEO) 2010, had projections only through the year 2035 whereas since 2017, EIA’s AEO includes projections through the year 2050.<sup>121</sup> AEO 2010 did not even include an estimate of LNG exports as that was seen as a “new market” at the time. Simply put, the facts LCE relied upon are increasingly out of date.

Thus, based upon the above LCE’s argument seeks to render the commencement deadline meaningless. To approve an extension request that has failed to demonstrate good cause would

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<sup>118</sup> See Denial Order at 18-19.

<sup>119</sup> See Denial Order at 12.

<sup>120</sup> See Lake Charles Exports, LLC, Application of Lake Charles Exports, LLC for Long-Term Authorization to Export Liquefied Natural Gas, Docket No. 11-59-LNG, at 11, 12, 14, 17, 22 (May 6, 2011).

<sup>121</sup> See, e.g., U.S. Energy Info. Admin., Annual Energy Outlook 2023 (AEO 2023) (Mar. 16, 2023), [https://www.eia.gov/outlooks/aeo/pdf/AEO2023\\_Narrative.pdf](https://www.eia.gov/outlooks/aeo/pdf/AEO2023_Narrative.pdf).



be contrary to the very purpose of the commencement deadline and would perpetuate the very concerns that DOE is attempting to address. As the Denial Order stated, “[i]f DOE did not enforce these commencement deadlines, an authorization holder might seek extension after extension without ever being ready to proceed with its project.”<sup>122</sup>

Furthermore, LCE asserts that a denial of its Second Extension Request does not address the authorization “overhang,” implying that its Second Extension Request was evaluated under the Policy Statement. As explained in Section IV.D.3 below, LCE’s Second Extension Request was not evaluated under the Policy Statement, as evidenced by the fact that it was not rejected on the basis that LCE failed to demonstrate it has physically commenced construction on the Liquefaction Project or its inability to comply with the existing export commencement deadline was the result of extenuating circumstances outside of its control. Rather, the Second Extension Request was evaluated, and denied, on the basis of DOE’s long-standing criteria for considering whether an extension is “for good cause shown,” particularly in light of the extent to which the requested extension would significantly alter a condition DOE had found “necessary and appropriate” to its public interest evaluation.

Lastly, while we agree with LCE that NGA section 3 requires DOE to authorize all otherwise compliant non-FTA export applications that are not inconsistent with the public interest, we do not accept LCE’s argument that “unless DOE has reason to conclude that a requested authorization **or an extension thereof** is inconsistent with the public interest, it cannot deny it.”<sup>123</sup> As explained in more detail in section IV.A above, an authorization to export is distinct from a modification to a condition on that export authorization. And while DOE does consider whether a commencement deadline extension will alter the public interest determination

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<sup>122</sup> Denial Order at 17.

<sup>123</sup> Request for Rehearing at 37.

of the underlying export authorization (for example, by changing a material condition that DOE found to be “necessary or appropriate” for finding that the authorization was not inconsistent with the public interest), that consideration does not eliminate the applicant’s responsibility to demonstrate good cause for the modification.

### **C. The Record Supports DOE’s Denial of LCE’s Second Extension Request**

As explained above, section 3(a) of the NGA provides, in relevant part, that DOE “may from time to time, after opportunity for hearing, and for good cause shown, make such supplemental order...as it may find necessary or appropriate.”<sup>124</sup> Each request to amend the export commencement deadline for a non-FTA authorization is unique and evaluated on a case-by-case basis.<sup>125</sup> In consideration of an extension request, prior to issuance of the Policy Statement, DOE considered the project-specific facts presented in the extension application, including the authorization holder’s progress in constructing the proposed export facility, the additional time necessary to commence exports, and any unique delays and challenges faced by the authorization holder; whether FERC approved an extension of its “construction and in-service deadline;” and any arguments raised in protest by an opposing party, motions to intervene, or comments filed in response to the request.<sup>126</sup> DOE also considered whether granting a commencement extension request would alter DOE’s original “public interest” determination for the underlying non-FTA authorization.<sup>127</sup> As explained in detail below, based on the record submitted to DOE, our finding that LCE's Second Extension Request failed to demonstrate good cause was reasonable.

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<sup>124</sup> 15 U.S.C. § 717b(a).

<sup>125</sup> Policy Statement, 88 Fed. Reg. at 25,275.

<sup>126</sup> *Id.* at 25,275-76.

<sup>127</sup> Denial Order at 12-13.

LCE claims that under DOE’s pre-Policy Statement standard of review, its Second Extension Request was “more than enough to satisfy the ‘good cause’ standard” for applications predating the Policy Statement.<sup>128</sup> LCE alleges that, before the Policy Statement, DOE considered the “same general factors” to evaluate whether an extension request established “good cause,” and that it satisfied those standards by noting its execution of several long-term offtake contracts, its semi-annual reports to DOE detailing the Project’s construction-related progress, the impact of the COVID-19 pandemic on its Liquefaction Project, and FERC’s recent extension approval.<sup>129</sup> LCE also contends that DOE did not take administrative notice of its semi-annual reports, and more generally, that DOE should have requested additional information from LCE.<sup>130</sup> LCE asserts that if DOE needed LCE to “‘provide [more] evidence’ of actions taken to advance the Project” since its first extension, DOE “merely needed to ask.”<sup>131</sup>

LCE’s Second Extension Request did not satisfy the burden required to demonstrate good cause that DOE has historically considered when evaluating extension requests. Specifically, LCE failed to describe 1) in specificity the steps it had taken towards completing the Liquefaction Project, since the approval of its First Extension Request in October 2022; 2) what unique delays and challenges it faced, since the approval of its First Extension Request in October 2020; and 3) why FERC’s grant of extension to complete construction must be dispositive on DOE’s consideration of a request to extend commencement of export.

Before addressing the sufficiency of the explanation LCE provided in its Second Extension Request, we first address LCE’s more general objection that if DOE needed more specific information on how these factors delayed its progress, DOE should have simply asked

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<sup>128</sup> Request for Rehearing at 17.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 4, 18.

<sup>131</sup> *Id.* at 18.

for more detailed information and it would have been happy to provide it. NGA Section 3(a) states that “[DOE] . . . may from time to time, after opportunity for hearing, and for good cause *shown*, make such supplemental order in the premises as it may find necessary or appropriate.”<sup>132</sup> Therefore, the burden is on the applicant—not DOE—to demonstrate good cause for DOE to issue a supplemental order, such as an order granting a commencement extension request. DOE will consider all the evidence submitted by an applicant, but DOE is not obligated to independently search for evidence to support the applicant’s request if the applicant fails to submit that information. In addition, if this burden were placed on DOE, it would disrupt DOE’s administration of the LNG regulatory program by incentivizing applicants to, as in this instance, provide only the most cursory information and shift the resource burden from applicants to DOE to develop a record sufficient to act. Furthermore, it would be contrary to the often-adversarial process established for orders by establishing a moving target that intervenors would not be able to appropriately address in their protests.

Concerning the steps LCE had taken since its First Extension Request, as noted in the Denial Order, the only fact LCE provided was that it had executed long-term offtake contracts.<sup>133</sup> LCE applied for authorization to export LNG to non-FTA countries in 2011 and was approved to export LNG to non-FTA countries in 2016. At the time LCE filed its Second Extension Request, about 36% of its total authorized volume was subscribed, with long-term offtake contracts for approximately 0.85 Bcf/d.<sup>134</sup> Moreover, DOE takes administrative notice of the fact that offtake

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<sup>132</sup> 15 U.S.C. § 717b(a) (emphasis added).

<sup>133</sup> Second Extension Request at 3-6. *See also* Denial Order at 15.

<sup>134</sup> *See* Lake Charles Facility Long-Term Contract Information and Registrations at U.S. LNG Export Facilities (Nov. 1, 2022), <https://www.energy.gov/fecm/articles/lake-charles-facility> (LCE’s current long-term offtake contracts with their associated volumes and dates executed are: ENN LNG (Singapore) Pte. Ltd. (China) 1.8 million metric tons per annum (mtpa), Mar. 28, 2022; ENN Global Trading Pte. Ltd. (China), 1 mtpa, Mar. 28, 2022; Gunvor Singapore Pte Ltd., (Singapore), 2 mtpa, Apr. 29, 2022; SK Gas Trading (South Korea), 0.4 mtpa, Apr. 29, 2022, China Gas Hongda Energy Trading Co., Ltd. (China), 0.7 mtpa, Jun. 1, 2022; Shell NA LNG LLC (United Kingdom), 2.1 mtpa, Aug.

contracts LCE used to demonstrate progress on the Liquefaction Project are not necessarily tied to this facility, as noted in its public summaries. Thus, rather than demonstrating that LCE was progressing toward completing the Liquefaction Project, the execution of long-term offtake contracts after the passage of so much time highlighted how little progress LCE had made. Presently, after more than a decade since seeking authorization to export LNG and almost seven years since DOE initially authorized LCE to commence exports to non-FTA countries, LCE has executed long-term offtake contracts for only approximately half of its total authorized volume.<sup>135</sup>

DOE notes that all of the LNG export projects that are currently operational had at least one fully executed contract prior to obtaining their DOE non-FTA authorization, reached a final investment decision (FID) within 6 years of applying for the DOE non-FTA authorization, and commenced exports within 9 years from their original DOE application, whereas LCE only executed long-term offtake contracts after 11 years from its original DOE application and has yet to reach FID after twelve years. In light of the time that has passed and the limited progress LCE has made toward commencing exports, DOE determined it could not sustain a decision that there is good cause to authorize an extension for an additional three years, as required by section 3(a) of the NGA.<sup>136</sup>

Furthermore, LCE repeatedly states that DOE should have taken administrative notice of its semi-annual reports, but LCE's semi-annual reports are ambiguous. For example, LCE's most recent semi-annual update states that it conducted "[m]aintenance clearing of the greenfield

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23, 2022. The total contracted volume at the time of the Second Extension Request is equivalent to 5.9 mtpa, or 0.85 Bcf/day. LCE notes that these contracted volumes are not specifically tied to the Liquefaction Project. LCE's public summaries of the contracts state that these volumes may be delivered to the Buyer from any alternate location on the U.S. Gulf Coast, with approximately half the volumes contracted with Chinese entities.)

<sup>135</sup> See *id.* (as of August 23, 2022, LCE has subscribed approximately 50% of its volume, or approximately 1.16 Bcf/day).

<sup>136</sup> Denial Order at 15.

site.”<sup>137</sup> LCE offered no details, however, explaining what type of “maintenance clearing” occurred or how much occurred. The maintenance could have included anything from trimming grass to heavy excavation, but DOE has no way to identify or decipher these critical facts from the information provided in the update. Again, LCE did not meet its burden to offer specific facts and explanation to support its request. This deficiency was especially critical with LCE asking to postpone its export commencement date an *additional five years* in total—on orders that had already received commencement extensions of 28.5 months and 17.5 months, respectively—beyond its initial seven-year commencement deadline. Second, LCE’s complaint that DOE did not take administrative notice of its semi-annual reports is, at worst, harmless error. Even a generous reading of LCE’s semi-annual reports, as discussed in Section IV.E below, would not have changed DOE’s determination that LCE failed to demonstrate good cause for its Second Extension.<sup>138</sup>

Concerning the unique delays and challenges LCE faced, the only reasons LCE proffered for needing even more time than it had already been approved were complex FID financing agreements that are not material to DOE’s decision making and general references to global events without any information specific to LCE’s efforts.

With respect to LCE’s justification for delay related to its “[c]omplex FID financing arrangements,”<sup>139</sup> LCE explained that it had executed several long-term agreements, but that a precondition of FID is that all authorizations must remain in effect through FERC’s construction and in-service deadline of December 16, 2028.<sup>140</sup> LCE’s submission of “[c]omplex FID

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<sup>137</sup> Lake Charles Exports, LLC, Semi-Annual Report, Docket No. 11-59-LNG, at 2, (Apr. 3, 2023), [https://www.energy.gov/sites/default/files/2023-04/20230403\\_LCE%20DOE\\_FE-OrderNos\\_3324\\_3324-A\\_SemiAnnualReport.pdf](https://www.energy.gov/sites/default/files/2023-04/20230403_LCE%20DOE_FE-OrderNos_3324_3324-A_SemiAnnualReport.pdf).

<sup>138</sup> See Denial Order at 19. DOE notes that it did reference LCE’s semi-annual reports in the Denial Order, but did not discuss them in detail. See *id.* at 15 n.82. We have specifically addressed the semi-annual reports below.

<sup>139</sup> Second Extension Request at 5.

<sup>140</sup> *Id.*

financing arrangements” as justification for a second extension ignored DOE’s past precedent. DOE is not required to, nor has it ever considered the terms of an authorization holder’s financial arrangement as a factor to show good cause for a commencement extension request. As described above, when evaluating an extension request, DOE considers the steps an authorization holder has taken toward progressing the project and the unique, project-specific challenges that developed since the prior authorization which prompted an extension request. “Complex FID financing arrangements” and their associated terms and conditions do not provide insight into the steps LCE had taken toward progressing the project, nor do they describe the unique, project-specific challenges that developed which required LCE to need more time to commence exports. Rather, “[c]omplex FID financing arrangements” are something all authorization holders must negotiate and manage. Several authorization holders, including ones that were authorized *after* LCE, have already met or are on track to meeting their commencement deadlines. To the extent projects need to maintain their authorizations to reach FID, it is a burden that the authorization holder must bear and that cannot be shifted to the Department. Moreover, there cannot be an expectation that DOE must grant an extension for an authorization holder to obtain FID; this is not justification that an extension of the commencement deadline is warranted.

As we observed in the Denial Order, DOE’s seven-year commencement deadline is “based upon an explicit recognition that an authorization holder [] need[s] time to construct its proposed facility before commencing exports.”<sup>141</sup> Seven years was deemed “sufficiently long” to allow for “unplanned delays in [] licensing and construction” which inherently includes any delays associated with complex financial arrangements needed to finance the construction.<sup>142</sup> LCE had its non-FTA authorization for almost six years by the time it applied for the second

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<sup>141</sup> Denial Order at 13.

<sup>142</sup> *Id.*

extension,<sup>143</sup> a length of time in which other projects have been able to obtain FID, construct necessary facilities, and begin commercial exports.<sup>144</sup> A statement of fact that an active authorization is necessary to reach FID does not explain why, in the past six years, LCE could not reach FID. Therefore, while DOE acknowledged that lenders seek assurance that DOE export authorizations will remain valid due to complex financing arrangements, we reasonably determined that this universally applicable challenge facing authorization holders was an insufficient reason to grant an extension.<sup>145</sup>

With respect to LCE’s identification of global events as the cause for further delay, LCE’s few statements addressing the unique delays and challenges it faced were too vague and generic for DOE to act upon.<sup>146</sup> LCE stated, “*the world* has experienced significant changes in the global LNG market,” “*the world* has experienced increased trade tensions,” and “global events over the past few years have created an extremely challenging environment for construction of *large-scale infrastructure projects* and execution of international commercial agreements.”<sup>147</sup> DOE reasonably evaluated whether other authorization holders, faced with the same general global challenges at the same time, were able to meet their application deadlines. We found that impacts from the COVID-19 pandemic were not unique to LCE, with liquefaction capacity for three projects advancing to FID in 2022 and 2023.<sup>148</sup> Where applicants provided

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<sup>143</sup> Order No. 3224-A was issued July 29, 2016, and Order No. 4011 was issued June 29, 2017, 70 months and 59 months, respectively, before the filing of the Second Extension Request.

<sup>144</sup> Calcasieu Pass received its non-FTA export authorization, DOE/FECM Order No. 4346, on March 5, 2019. On March 1, 2022, Calcasieu Pass loaded its first cargo of LNG at the newly constructed Venture Global Calcasieu Pass Project, and it has exported dozens of cargoes to date. See Venture Global Calcasieu Pass, LLC, Semi-Annual Status Report, Docket Nos. 13-69-LNG *et al.*, at 2 (Mar. 31, 2023). See also Denial Order at 16 & n.86.

<sup>145</sup> Denial Order at 18.

<sup>146</sup> See *id.*

<sup>147</sup> Second Extension Request at 4 (emphasis added).

<sup>148</sup> Denial Order at 16-17 (“[S]ince 2022, three additional authorization holders—Venture Global Plaquemines LNG, LLC; Corpus Christi Liquefaction Stage 3, LLC; and Port Arthur LNG, LLC—have each announced that they have reached a final investment decision and commenced construction of their respective export facility . . .”).



concrete and specific information about particular challenges, such as Port Arthur, DOE considered that information. But LCE did not provide specific facts explaining *how* the COVID-19 pandemic was impacting the development and construction of the Liquefaction Project.<sup>149</sup> Instead, LCE simply stated that it “had not been spared from the effects of these difficult circumstances.”<sup>150</sup> It was LCE’s burden, not DOE’s, to articulate the particular challenges its Liquefaction Project was facing to show good cause for an additional extension to its commencement deadline. DOE, in consideration of the record and the progress other authorization holders were able to make during the COVID-19 pandemic, reasoned that the mere existence of general global challenges did not establish good cause to grant a commencement extension.

LCE’s vague statement about the “difficult circumstances” it faced was also reasonably considered and addressed in the Denial Order.<sup>151</sup> DOE explained that global events had created both challenges *and* opportunities for participants in the U.S. LNG market.<sup>152</sup> Even LCE noted that global events had helped the U.S. LNG market, concluding “. . . however, the global LNG market has also experienced renewed appetite for securing long-term LNG supply.”<sup>153</sup> Thus, DOE was justified in its decision that this fact in support of an extension request was unpersuasive.

DOE also countered LCE’s claim that COVID-19 had “created an extremely challenging environment for construction of large-scale infrastructure projects”, citing Venture Global Calcasieu Pass, LLC’s export facility in Cameron Parish, Louisiana, as an example of a project

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<sup>149</sup> *Id.* at 15.

<sup>150</sup> Second Extension Request at 4.

<sup>151</sup> Denial Order at 15-17.

<sup>152</sup> *Id.* at 16.

<sup>153</sup> Second Extension Request at 4-5.

that completed construction during the COVID-19 pandemic and began operations in 2022 (four years before its commencement deadline).<sup>154</sup> Consequently, as explained in detail in the Denial Order, DOE reasoned that LCE’s seven-year commencement deadline, plus the additional 28.5 months under Order No. 3324-A and 17.5 months under Order No. 4011<sup>155</sup> that LCE received pursuant to the approval of its the First Extension Request, was a sufficient buffer against unexpected delays and challenges, including the COVID-19 pandemic.<sup>156</sup>

LCE appears to view FERC’s extension of a construction and in-service deadline as sufficient to establish good cause for DOE to extend an export commencement deadline accordingly. This view is mistaken, as DOE treats the FERC extension as a *necessary*—but not *sufficient*—condition for its own extension. As explained in the Denial Order, our export commencement deadlines allow more time than FERC’s typical five-year construction and in-service deadline.<sup>157</sup> Therefore, to consider a request for extending a commencement deadline *before* an applicant received approval from FERC to extend the construction and in-service deadline would be premature and a poor use of agency resources. As demonstrated by our precedent, and noted in the Denial Order, “an authorization holder obtaining an extension of its FERC [construction] deadline is a *prerequisite* to DOE considering an extension of the export commencement deadline...”<sup>158</sup> Put simply, a FERC approval of a construction and in-service extension request informs DOE that a request for an extension to commence exports is ripe for consideration.<sup>159</sup> But a FERC construction and in-service extension does not, on its own,

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<sup>154</sup> Denial Order at 16-17.

<sup>155</sup> See 2020 LCE Extension Order; see also Denial Order at 3-4.

<sup>156</sup> Denial Order at 18.

<sup>157</sup> *Id.* at 18 & n.93.

<sup>158</sup> *Id.* at 18-19 (emphasis added).

<sup>159</sup> See *id.*

establish good cause for a commencement extension or obligate DOE to approve a request for a commencement extension.<sup>160</sup>

FERC and DOE exercise different authority under NGA section 3—specifically, FERC authorizes the siting, construction, expansion, or operation of onshore LNG terminals,<sup>161</sup> and DOE authorizes the export (or import) of natural gas.<sup>162</sup> FERC’s evaluation of terminal facilities and the impacts of such facilities reasonably may or may not change if the deadline to commence operations is extended. Like FERC, DOE conducts its own evaluation of the facts and issues submitted in the record, but DOE’s evaluation focuses on whether any particular authorization to export, in context of all other authorizations, would be inconsistent with the public interest. To conclude that an authorization meets this standard, and not to prejudice future applications that may request authorization with certain assumed cumulative exports that are authorized, DOE sets a reasonable timeline for the commencement of exports. DOE may extend a commencement deadline if good cause is shown, and any extension is informed by, but not dispositively determined by, FERC’s decision on whether to extend the construction and in-service deadline for the facilities at issue. DOE must consider its unique interest in the deadline when weighing the reasons for the delay against the need for the deadline.

DOE and FERC may inform each other’s decisions, particularly on related matters like the approval of LNG processing facilities and the physical export of LNG, but neither is required to follow the other’s decisions in lockstep. In practice, for non-FTA LNG export proceedings with a related proceeding at FERC, DOE considers FERC’s decision alongside the other set of

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<sup>160</sup> *See id.* at 18.

<sup>161</sup> 15 U.S.C. § 717b(e); *see also id.* § 717a(11) (definition of LNG terminal); *Sierra Club v. Fed. Energy Regulatory Comm’n*, 827 F.3d 36, 40 (D.C. Cir. 2016) (observing that, while DOE “maintains exclusive authority over the export of natural gas as a commodity,” DOE has delegated to FERC the authority to approve or deny an application for the siting, construction, operation, or expansion of an LNG terminal under NGA section 3(e)).

<sup>162</sup> 15 U.S.C. § 717b(a).

factors DOE considers, such as unique circumstances for delay. As explained above, DOE will not extend a commencement deadline unless and until FERC extends a service deadline, but once FERC has done so, DOE accounts for FERC's reasoning in deciding whether to extend its own commencement deadline. FERC extensions need not, and do not, *guarantee* DOE extensions. The agencies can reach functionally and practically inconsistent decisions that remain consistent with their independent statutory and regulatory authority, as is the case here.

Based on the totality of the record and the dearth of facts submitted in support of the Second Extension Request, DOE's denial of LCE's Second Extension Request was therefore reasonable and supported by the record.

#### **D. LCE's Second Extension Request was Not Evaluated Under a Heightened Standard**

LCE asserts that DOE applied a heightened standard of review to its Second Extension Request.<sup>163</sup> Relatedly, LCE asserts that DOE treated it differently than other similarly situated applicants, specifically, PALNG.<sup>164</sup> Lastly, in the alternative, LCE contends that DOE evaluated its Second Extension Request under the Policy Statement.<sup>165</sup> For the following reasons, DOE disagrees.

##### **1. DOE Did Not Apply a Heightened Evidentiary Standard to LCE's Second Extension Request**

LCE alleges that DOE applied a heightened evidentiary standard for its "unprecedented second extension" request without notice.<sup>166</sup> LCE argues that DOE deviated from past practice

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<sup>163</sup> Request for Rehearing at 29.

<sup>164</sup> *Id.* at 29-34.

<sup>165</sup> *Id.* at 27-28.

<sup>166</sup> *Id.* at 29-34.

and that LCE had “no reason to expect” that its Second Extension Request would require “increased specificity” or “significant progress toward the physical completion” of its Liquefaction Project.<sup>167</sup> LCE claims that it had “every reasonable expectation that the same standard would apply to first and second extension requests.”<sup>168</sup> LCE also complains that DOE “refused to grant” its Second Extension Request even though, as with its First Extension Request, FERC granted a corresponding extension, no facts affecting the public interest or original authorization had changed, and the Liquefaction Project would likely fail without the extension.<sup>169</sup>

Prior to the Policy Statement, the plain language of section 3(a) of the NGA and DOE’s precedent provided every authorization holder sufficient notice of what was required of them when seeking to amend the commencement date of their authorization. Modifications to export authorizations may be made “for good cause shown” and in consideration of the factors discussed in section IV.C above.<sup>170</sup> When LCE applied for its Second Extension Request, it had possessed its authorization for nearly six years under Order No. 3324-A and nearly five years under Order No. 4011.<sup>171</sup> LCE has already received a 28.5-month extension for Order No. 3324-A and a 17.5-month extension for Order No. 4011. Therefore, LCE has a total of nearly nine and a half years to commence exports for Order No. 3324-A, and nearly eight and a half years for Order No. 4011.<sup>172</sup> LCE’s Second Extension Request sought to nearly double the commencement time that DOE determined was both flexible enough to accommodate

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<sup>167</sup> *Id.* at 31.

<sup>168</sup> *Id.*

<sup>169</sup> Request for Rehearing at 25, 29.

<sup>170</sup> 15 U.S.C. § 717b(a).

<sup>171</sup> *See supra* notes 4 and 5.

<sup>172</sup> *See* Denial Order at 14.

unexpected delays and consistent with the public interest.<sup>173</sup> No authorization holder had requested a second extension to its export commencement deadline before LCE did so.<sup>174</sup> Even though all authorization holders currently exporting from the seven large-scale export facilities in the U.S. commenced exports within their original seven-year commencement period, LCE's Second Extension Request sought to have more time to commence exports than any other LNG project.<sup>175</sup> It is worth noting that if LCE's First Extension Request had asked for an extension out to 2028, we would have been reasonable to say no based on the facts above. As discussed, one of DOE's primary considerations, pre-Policy Statement, is the additional time necessary for the authorization holder to commence exports. This factor increases in significance for each additional year beyond the original seven-year date, regardless of whether an extension request seeks one very long extension or multiple shorter ones. Our pre-Policy Statement standard accounts for the full scope of what is requested.

DOE did not apply a heightened evidentiary standard to LCE's Second Extension Request. Instead, in a case of first impression, DOE appropriately applied the NGA's section 3(a) good cause standard to a *new* set of facts to determine whether it was "necessary and appropriate" to grant a second extension.<sup>176</sup> For an authorization holder that 1) was nearly six years into its original seven-year commencement deadline by the time it applied for its Second Extension Request, 2) changed its expected date of operation no fewer than seven times, and 3) had already received an additional 28.5 months and 17.5 months to reach commencement, on Order Nos. 3324-A and 4011, respectively, the arguments set forth by LCE to demonstrate good

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<sup>173</sup> The second extension would have resulted in Orders No. 3324-A and 4011 having a total of 12.5 years and 11.5 years, respectively, to commence exports. *See also* Denial Order at 14-15.

<sup>174</sup> *See* Denial Order at 14-15.

<sup>175</sup> Denial Order at 16-17.

<sup>176</sup> 15 U.S.C. § 717b(a).

cause needed to reflect the magnitude of the request.<sup>177</sup> LCE's Second Extension Request did not. Rather, LCE provided *less* detail in its second request than in its first. For example, LCE states in its First Extension Request that it had issued an "Invitation to Tender" to prospective EPC bidders and incurred more than \$300 million in development costs, but LCE's Second Extension Request makes no mention of its EPC contractors or how much it incurred after DOE's approval of the first extension.<sup>178</sup> In addition, in LCE's First Extension Request, it described numerous actions it had taken to "actively progress[] the Project" following a unique challenge that resulted in an unexpected delay: the commercial merger in LCE's corporate ownership.<sup>179</sup> LCE explained that it had:

- 1) obtained all required federal, state, and local authorizations and permits;
- 2) secured all LNG export terminal land rights;
- 3) taken steps toward construction, such as tree-clearing and drilling of test piles;
- 4) completed front-end engineering and design; and
- 5) committed more than \$450 million in development costs.<sup>180</sup>

In contrast, LCE's Second Extension Request did not include a list of several steps it had taken towards completing the Liquefaction Project. The First Extension Request shows that LCE understood the level of detail that could establish good cause for an export commencement deadline extension. As LCE's second request was less specific and more cursory, DOE reasonably presumed that LCE had less evidence to establish good cause for the second extension than for the first extension.

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<sup>177</sup> See *supra* note 122. See also Denial Order at 14.

<sup>178</sup> See First Extension Request at 7. DOE notes that LCE submitted those facts in its Request for Rehearing, and they are addressed *infra* in Section IV.E.

<sup>179</sup> First Extension Request at 6.

<sup>180</sup> *Id.* at 5-7.

Finally, even assuming, *arguendo*, that DOE did apply a heightened evidentiary standard to LCE's request, such an action would not have been unreasonable or arbitrary.<sup>181</sup> LCE had no reasonable expectation of a second extension; DOE had not established by precedent that *second* extensions will be treated the same as first extensions, especially when the request would take the total time to commence construction to nearly double the amount of time deemed (and proven) sufficient to construct facilities and commence exports. Holding applicants to a higher standard when they ask for a second extension than when they ask for a first is not arbitrary – it is prudent. It is needed to ensure a reasonable administration of the program and to balance the harms to the program of successively later in time extensions with the benefits to the authorization holder.

## **2. DOE Reviews the Merits of Each Authorization Holder's Extension**

### **Application**

LCE asserts that DOE treated it differently than other authorization holders, specifically PALNG, whose first extension request was approved.<sup>182</sup> LCE claims that DOE found its Second Extension Request contained “generalized statements” but approved PALNG's application which “invoked similar generalized statements.”<sup>183</sup> LCE further states that in granting PALNG's application, DOE “acknowledged FERC's extension” and took “administrative notice” of facts in

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<sup>181</sup> See *Williams Nat. Gas Co. v. FERC*, 3 F.3d 1544, 1554–55 (D.C. Cir. 1993) (explaining that in determining whether a rule announced in an administrative adjudication may be given retroactive effect, “there has emerged [a] basic distinction ... between (1) new applications of law, clarifications, and additions, and (2) substitution of new law for old law that was reasonably clear” and holding that retroactivity in the former case is “‘natural, normal, and necessary,’ a corollary of an agency's authority to develop policy through case-by-case adjudication rather than rulemaking”) (citations omitted) (citing *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1152 (D.C. Cir. 1986)). See also *Am. Tel. & Tel. Co. v. FCC*, 454 F.3d 329, 332–34 (D.C. Cir. 2006) (explaining that in administrative adjudications, as in judicial adjudications, retroactivity is the norm and an agency may apply new policy to a new situation) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

<sup>182</sup> Request for Rehearing at 29-31.

<sup>183</sup> *Id.* at 30.



the public domain when evaluating PALNG's request but did not do so in LCE's case.<sup>184</sup> LCE accuses DOE of dissimilar treatment of "substantially similar applications."<sup>185</sup>

First, LCE's arguments presume that its Second Extension Request and PALNG's Extension Request, were "substantially similar." They were not. DOE's review involves the consideration of "any unique delays and challenges" faced by the authorization holder and the amount of additional time necessary to commence exports.<sup>186</sup> Contrary to LCE's assertions, PALNG proffered several specific reasons to demonstrate why good cause existed to grant its first extension request.<sup>187</sup> Of note, within four years of obtaining its authorization, PALNG executed an EPC contract with a third-party contractor and secured FID.<sup>188</sup> LCE has yet to do either of those things. In addition, LCE was seeking to extend its commencement date by a total of five years past its initial date (after already receiving extensions of 28.5 months and 17.5 months), whereas PALNG was only seeking to extend its commencement date by 25 months.<sup>189</sup> It is reasonable to consider the total time elapsed since authorization in evaluating an extension request, whether the request is for a single lengthy extension or multiple extensions. Therefore, with notably different facts, LCE's comparison of itself to PALNG is uneven.

Second, LCE's assertion that DOE failed to acknowledge or accord any consideration to FERC's extension of its construction and in-service deadline, as it did in PALNG's request, is

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<sup>184</sup> *Id.* at 30-31.

<sup>185</sup> *Id.* at 31.

<sup>186</sup> Policy Statement, 88 Fed. Reg. at 25,275-76.

<sup>187</sup> See Port Arthur LNG, LLC, Request for Extensions for Long-Term Authorizations to Export Liquefied Natural Gas, Docket Nos. 15-53-LNG, *et al.* (Nov. 18, 2022) (requesting a 25-month extension, citing adverse market conditions and logistical issues associated with the COVID-19 pandemic). The applicant noted several concrete steps it had taken in the meantime, including that it had obtained all federal, state, and local authorizations necessary for construction; executed an EPC contract with a third-party contractor; relocated a state highway and collocated utilities, access roads, and a dock; conducted site preparation activities, removed abandoned pipelines and utilities within the project site; and expended more than \$220,000,000 on its liquefaction project.

<sup>188</sup> See PALNG Extension Order at 6-7, 12-14.

<sup>189</sup> *Id.* at 4.

also inaccurate.<sup>190</sup> Just as in all prior requests to extend an export commencement deadline, DOE noted and acknowledged several times in the Denial Order that FERC had extended LCE’s construction and in-service deadline.<sup>191</sup> As noted in section IV.C above, while DOE has always looked to FERC’s deadline extensions in reviewing requests to extend export commencement deadlines, DOE’s decisions are not bound by FERC’s determinations.<sup>192</sup>

### **3. DOE Did Not Review LCE’s Second Extension Request Under its Policy Statement**

LCE contends that “DOE applied a version of the Policy Statement’s new, more rigorous standard to LCE’s extension request.”<sup>193</sup> LCE argues that it was “plainly improper” for DOE to consider the Policy Statement in LCE’s Denial Order, given LCE’s “undisputed lack of notice.”<sup>194</sup> LCE argues further that even proceeding under the new Policy Statement, DOE should have granted LCE’s request because it “provided DOE with ample evidence” to meet both parts of the Policy Statement’s required demonstration.<sup>195</sup>

As explained in Section IV.C, DOE reviewed LCE’s Second Extension Request under the pre-Policy Statement standard and applied historical factors to demonstrate good cause; not under the Policy Statement.<sup>196</sup> DOE considered LCE’s Second Extension Request, its unique situation, the progress it had made toward commencing construction, and the additional time it requested and found that the facts LCE submitted did not rise to good cause warranting an extension.<sup>197</sup> Moreover, as explained in the Denial Order, our decision therein was consistent

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<sup>190</sup> Request for Rehearing at 26-27.

<sup>191</sup> *See* Denial Order at 4, 5, 6, 7, 18.

<sup>192</sup> *See supra* at 31-32.

<sup>193</sup> Request for Rehearing at 27-28.

<sup>194</sup> *Id.* at 28.

<sup>195</sup> *Id.*

<sup>196</sup> *See also* Denial Order at 19.

<sup>197</sup> *Id.*

with the Policy Statement.<sup>198</sup> Therefore, even assuming *arguendo* that LCE's request was evaluated under the Policy Statement, DOE's decision based on the record before it would have been the same.

**E. Even Considering Information LCE Failed to Submit in its Second Extension Request and the New Facts it Raises – DOE Reaffirms its Order Denying LCE's Second Extension Request**

In addition to the facts and arguments presented in its Second Extension Request, which are addressed earlier in this section IV, in its Request for Rehearing LCE sets forth additional facts and provides new information that did not appear in its Second Extension Request. The purpose of a rehearing is to provide an opportunity for parties to challenge a DOE action when they are aggrieved for the first time, and for DOE to consider such a challenge before the action is subject to judicial review. Considering the complete record and facts presented, including LCE's Second Extension Request and Request for Rehearing, DOE maintains its finding that LCE has not shown good cause for a second extension of its export commencement deadline, as required by NGA section 3(a).

**1. Information LCE Failed to Submit**

Throughout its Request for Rehearing, LCE provided additional information about the progress it was making towards completing the Liquefaction Project and the challenges it faced. LCE described in more detail the impact of the COVID-19 pandemic on the Liquefaction Project, which included Shell's withdrawal from the Liquefaction Project; supply chain shortages of LNG critical equipment; and the need to solicit updated bids from EPC contractors.<sup>199</sup> LCE also noted that since the approval of the First Extension Request, it had spent \$50 million, received approval from FERC to make major modifications to the Trunkline pipeline that will

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<sup>198</sup> *Id.*

<sup>199</sup> Request for Rehearing at 18-19.

feed the Liquefaction Project, and conducted site clearing work.<sup>200</sup> LCE asserted that this information was in its semi-annual reports, which, as discussed in Section IV.C above, it believes DOE should have taken administrative notice of in making its decision.<sup>201</sup>

DOE has reviewed the above facts and reaffirms its finding that a second export commencement extension is not warranted. As discussed above, it is not DOE's responsibility to scour upstream corporate ownership change reports, FERC reports, or semi-annual reports for any facts that could be used to demonstrate good cause. However, even when we reviewed this information, DOE found that it only demonstrates LCE's inconsistent, at best, effort to advance the Liquefaction Project. For example, LCE notes that Shell's withdrawal from the Liquefaction Project was one of the many challenges it faced. However, if this were such an important factor, then it should not have taken more than two years from Shell's withdrawal for LCE to inform DOE of the upstream ownership change.<sup>202</sup> LCE emphasizes its semi-annual reports in particular, but a search for additional facts in LCE's semi-annual reports revealed many inconsistent statements regarding when LCE expected the project to be operational. As we noted in Section IV.D.1 above, LCE changed its expected date of operation no fewer than seven times in its semi-annual reports.<sup>203</sup> In LCE's April 2021 semi-annual report, well into the COVID-19 pandemic and six months after LCE received its first commencement extension, LCE stated that it expected the Liquefaction Project to be operational in 2024—well before the December 16,

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<sup>200</sup> *Id.* at 21-23.

<sup>201</sup> *Id.* at 25.

<sup>202</sup> Shell's withdrawal was effective April 1, 2020, but LCE did not file its Notice of Change in Control until May 17, 2022. Lake Charles Exports, LLC, Notice of Change in Control, Docket Nos. 11-59-LNG and 16-110-LNG (May 17, 2022), <https://www.energy.gov/sites/default/files/2022-06/Notice%20of%20change%20in%20control%20Lake%20Charles%20Exports%20LLC.pdf>. This late filing was out of compliance with Ordering Paragraph P in Order Nos. 3324-A and 4011.

<sup>203</sup> See Semi-Annual Reports for Lake Charles Exports, LLC, Docket No. 11-59-LNG, <https://www.energy.gov/fecm/articles/semi-annual-reports-lake-charles-exports-llc-fe-dkt-no-11-59-lng-order-3324> (last viewed June 21, 2023).

2025 export commencement deadline in its current authorization.<sup>204</sup> In a string of broken predictions, earlier semi-annual reports indicated the Liquefaction Project would be operational in 2019, 2020, 2021, 2022, 2023, and 2024.<sup>205</sup> With LCE updating its expected export commencement date this many times, and most recently not indicating a date it expects to be operational, we are unable to find convincing evidence that LCE would actually commence exports, if its deadline were extended again. Other shifting facts include LCE’s statements concerning its EPC contractors. LCE stated in its October 2014 semi-annual report that an “Invitation to Tender” was “issued to three EPC contractor consortia,”<sup>206</sup> and stated in its April 2015 semi-annual report that bids had been received and were being evaluated.<sup>207</sup> In subsequent semi-annual reports from 2015 to 2018, LCE stated that it was reviewing the EPC terms and conditions in preparation for a bid revalidation process.<sup>208</sup> In fact, four consecutive semi-annual reports provided the exact same update, stating that “[w]ork continues with two bidding consortia to do further engineering and risk reduction work and there have been further reviews of the EPC terms and conditions in preparation for a bid revalidation process” and adding that “[e]ngineering work for the relocation of the Communications Facilities has been completed.”<sup>209</sup> Given the length of time that LCE has previously spent in review and revalidation of EPC bids,

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<sup>204</sup> See Lake Charles Exports, LLC, Semi-Annual Report, Docket No. 11-59-LNG, at 2 (Apr. 6, 2021) ([https://www.energy.gov/sites/default/files/2021-04/LCE%20SAR%204\\_2021.pdf](https://www.energy.gov/sites/default/files/2021-04/LCE%20SAR%204_2021.pdf)).

<sup>205</sup> Semi-Annual Reports for Lake Charles Exports, LLC, Docket No. 11-59-LNG – Order 3324, <https://www.energy.gov/fecm/articles/semi-annual-reports-lake-charles-exports-llc-fe-dkt-no-11-59-lng-order-3324> (last viewed June 21, 2023).

<sup>206</sup> Lake Charles Exports, LLC, Semi-Annual Report, Docket No. 11-59-LNG, at 3 (Oct. 1, 2014), [https://www.energy.gov/sites/default/files/2014/10/f18/20141001\\_TLNG%20EXPORT%20DOE\\_FE%20Order%20No%203252%20Semi-Annual%20Report.pdf](https://www.energy.gov/sites/default/files/2014/10/f18/20141001_TLNG%20EXPORT%20DOE_FE%20Order%20No%203252%20Semi-Annual%20Report.pdf).

<sup>207</sup> Lake Charles Exports, LLC, Semi-Annual Report, Docket No. 11-59-LNG, at 2 (Apr. 1, 2015), <https://www.energy.gov/sites/default/files/2015/04/f21/Apr%202015%20Lake%20Charles%20Semi-Annual%20Report.pdf>.

<sup>208</sup> See Semi-Annual Reports for Lake Charles Exports, LLC, Docket No. 11-59-LNG, <https://www.energy.gov/fecm/articles/semi-annual-reports-lake-charles-exports-llc-fe-dkt-no-11-59-lng-order-3324> (last viewed June 21, 2023).

<sup>209</sup> See *id.*

well before the COVID-19 pandemic, and the observed pattern of milestones coming and going, DOE cannot assume that the more recent review of EPC bids will progress faster or now result in the selection of an EPC contractor.

LCE also notes in their Request for Rehearing that they have begun site clearing work; however, DOE notes that in LCE's April 2017 semi-annual report it identified "[s]ome preliminary site work was undertaken in order to facilitate the main construction."<sup>210</sup> Therefore, it seems that site clearing work has been occurring for quite some time. It is not until LCE's October 2021 semi-annual report, more than a year after the start of the COVID-19 pandemic, that LCE mentions evaluating pandemic driven scheduling impacts - equipment availability, supply chain constraints, etc.<sup>211</sup> At a minimum, LCE had to provide enough evidence to give DOE a reasonable expectation that exports would, in fact, begin by the extended export commencement deadline, despite challenges experienced to date. Even considering the material provided by LCE in its Second Extension Request, including all the semi-annual reports, LCE has not provided enough material to give DOE adequate confidence that it could meet the second commencement extension after failing to meet the first. Therefore, it has not shown good cause for an extension.

DOE also notes that LCE was one of only two large-scale U.S. LNG projects with DOE non-FTA authorization that did not take timely advantage of DOE's 2020 policy statement invitation to extend non-FTA authorizations to 2050.<sup>212</sup> LCE did not apply for an extension of

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<sup>210</sup> Lake Charles Exports, LLC, Semi-Annual Report, Docket No. 11-59-LNG, at 1 (Apr. 3, 2017), <https://www.energy.gov/sites/default/files/2017/04/f34/Lake%20Charles%20SAR%20April%202017.pdf>.

<sup>211</sup> Lake Charles Exports, LLC, Semi-Annual Report, Docket No. 11-59-LNG, at 1 (Oct. 1, 2021), [https://www.energy.gov/sites/default/files/2021-10/20211001\\_LCE%20DOE\\_FE-OrderNos\\_3324\\_3324-A\\_SemiAnnualReport.pdf](https://www.energy.gov/sites/default/files/2021-10/20211001_LCE%20DOE_FE-OrderNos_3324_3324-A_SemiAnnualReport.pdf).

<sup>212</sup> U.S. Department of Energy, Extending Natural Gas Export Authorizations to Non-Free Trade Agreement Countries Through the Year 2050; Notice of Final Policy, Statement and Response to Comments, 85 Fed. Reg. 52,237 (Aug. 25, 2020).

its export term until May 2022, although nearly all other U.S. large-scale non-FTA authorization holders applied under the policy statement within six months of its issuance in July 2020.<sup>213</sup>

This delay, coupled with other observations, suggests that LCE has not taken the same level of care and effort in maintaining its authorization as other similarly situated authorization holders.

As noted above and explained in the Denial, DOE's seven-year commencement deadline was designed to “provide authorization holders with a buffer against challenging circumstances.” Further, LCE has already been afforded an extension to the original commencement deadline of seven-years' timeline with their first extension request.<sup>214</sup> Therefore, guided by our longstanding rationale for the export commencement period and having re-considered the record before us, including the information LCE identified in its Request for Rehearing, as well as the amount of time already granted to develop and construct the Liquefaction Project and to commence exports, DOE is not persuaded that LCE has demonstrated good cause to justify a commencement extension.

## **2. New Information Provided by LCE**

In its Request for Rehearing, for the first time in any filing with DOE, LCE asserts that its Liquefaction Project will have a carbon capture and sequestration (CCS) component.<sup>215</sup> This is a new development that was not previously reported in any semi-annual report with DOE or FERC. DOE believes that CCS will be a part of achieving a clean and equitable energy economy and hopes that future LNG export projects, including Lake Charles, consider including a CCS component, which can reduce greenhouse gas emissions associated with LNG exportation.

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<sup>213</sup> Lake Charles Exports, LLC, Application to Amend Export Term for Existing Long-Term Authorizations Through December 31, 2050, Docket Nos. 11-59-LNG and 16-110-LNG (May 24, 2022).

<sup>214</sup> 2020 LCE Extension Order.

<sup>215</sup> See Request for Rehearing at 4, 22.

However, adding CCS to a liquefaction project would necessitate amendments to LCE's DOE authorizations at a minimum,<sup>216</sup> if not also to the FERC authorization for the siting, construction, and operation of the Liquefaction Project. LCE has filed no such amendment. Since LCE has yet to officially file this significant modification with DOE, it would be improper for us to consider it in this proceeding. We look forward to evaluating the CCS component when LCE submits an amendment to its authorization with these additional facts.

## **V. CONCLUSION**

On the basis of the findings and conclusions set forth above, DOE denies LCE's Request for Rehearing of DOE/FECM Order Nos. 3324-C and 4011-B denying LCE's application for second extension of deadline to commence exports of liquefied natural gas to non-free trade agreement countries. We note, however, that LCE's existing export commencement deadline granted in its first extension request (as well as its underlying authorization) to December 16, 2025, remains in effect for both Order Nos. 3324-A and 4011, as amended.<sup>217</sup> In addition, should LCE be unable to commence exports by December 16, 2025, it is welcome to submit a new non-FTA application, which would be evaluated under current policies with the most recent market information.

## **VI. ORDER**

Pursuant to sections 3 and 19 of the Natural Gas Act, and for the reasons set forth above, it is ordered that:

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<sup>216</sup> See 10 C.F.R. § 590.204.

<sup>217</sup> See 2020 LCE Extension Order (extending commencement deadlines to December 16, 2025).



A. LCE's Request for Rehearing is denied.

Issued in Washington, D.C., on June 21, 2023.



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