

UNITED STATES OF AMERICA

DEPARTMENT OF ENERGY

OFFICE OF FOSSIL ENERGY

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DRIFTWOOD LNG LLC

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FE DOCKET NO. 16-144-LNG

ORDER DISMISSING INDUSTRIAL ENERGY CONSUMERS OF AMERICA'S  
MOTION TO INTERVENE AND PROTEST AND  
ACCEPTING LATE-FILED COMMENTS

APRIL 10, 2019

## **I. INTRODUCTION AND BACKGROUND**

This proceeding involves an application (Application)<sup>1</sup> by Driftwood LNG LLC (Driftwood LNG), filed with the Department of Energy’s Office of Fossil Energy (DOE/FE) on September 28, 2016, for authorization under section 3 of the Natural Gas Act (NGA) to export domestically produced liquefied natural gas (LNG).<sup>2</sup> DOE/FE gave public notice of the Application (Notice of Application) in the *Federal Register* on January 12, 2017, and invited interested persons to submit comments, motions to intervene, notices of intervention, and/or protests addressing the Application no later than March 13, 2017.<sup>3</sup> DOE/FE stated in the Notice of Application that all responsive filings “must meet the requirements specified by the regulations in 10 CFR part 590.”<sup>4</sup> Although DOE/FE received one comment in response to the Notice of Application,<sup>5</sup> it received no notices of intervention, motions to intervene, or protests in response to the Notice of Application.

In DOE/FE Order No. 3968,<sup>6</sup> DOE/FE granted the portion of Driftwood LNG’s Application requesting authority to export LNG to any country with which the United States has entered into a free trade agreement (FTA) requiring national treatment for trade in natural gas (FTA countries).<sup>7</sup> The portion of the Application requesting authority to export LNG to any

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<sup>1</sup> Driftwood LNG LLC, Application for Long-Term Authority to Export LNG to FTA and Non-FTA Countries, FE Docket No. 16-144-LNG (Sept. 28, 2016).

<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 FE in Redelegation Order No. 00-006.02, issued on November 17, 2014.

<sup>3</sup> Driftwood LNG LLC, Application for Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations, 82 Fed. Reg. 3,760 (Jan. 12, 2017).

<sup>4</sup> *Id.* at 3,761.

<sup>5</sup> Comment of Dan Ehlers, FE Docket No. 16-144-LNG (Mar. 13, 2017).

<sup>6</sup> *Driftwood LNG LLC*, DOE/FE Order No. 3968, FE Docket No. 16-144-LNG, Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Proposed Driftwood LNG Facility in Calcasieu Parish, Louisiana, to Free Trade Agreement Nations (Feb. 28, 2017).

<sup>7</sup> *See* 15 U.S.C. § 717b(c). 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.

other country with which trade is not prohibited by U.S. law or policy (non-FTA countries) is still pending in the above-captioned docket.<sup>8</sup>

On March 5, 2018, Driftwood LNG submitted a “Supplement to Long-Term Authorization and Application for Long-Term Authorization” (Supplement).<sup>9</sup> In the Supplement, Driftwood LNG seeks to amend the non-FTA export volume requested in the Application—specifically, to decrease the requested volume to reflect the optimized LNG production capacity of Driftwood LNG’s proposed export facility to be constructed in Calcasieu Parish, Louisiana.<sup>10</sup> On November 1, 2018, DOE/FE provided public notice of the Supplement in the *Federal Register* (Notice of Supplement), and invited interested persons to submit comments, motions to intervene, notices of intervention, and/or protests addressing the Supplement no later than November 21, 2018.<sup>11</sup> DOE/FE reiterated in the Notice of Supplement that all responsive filings “must meet the requirements specified by the regulations in 10 CFR part 590.”<sup>12</sup> Further, DOE/FE stated that “[b]ecause the public previously was given an opportunity to intervene in, protest, and comment on Driftwood LNG’s pending Application, DOE/FE may disregard comments or protests that do not bear directly on the Supplement—specifically, Driftwood LNG’s proposed decrease of its requested non-FTA export volume.”<sup>13</sup>

In response to the Notice of Supplement, the Industrial Energy Consumers of America (IECA) submitted a filing, entitled “Notice of Intervention, Protest, and Comment” (Pleading), on

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<sup>8</sup> See 15 U.S.C. § 717b(a).

<sup>9</sup> Driftwood LNG LLC, Supplement to Long-Term Authorization and Application for Long-Term Authorization, FE Docket No. 16-144-LNG (Mar. 5, 2018).

<sup>10</sup> *Id.* This Order pertains only to the non-FTA portion of Driftwood LNG’s application proceeding, including the Supplement.

<sup>11</sup> Driftwood LNG LLC, Supplement to Application for Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations for a 20-Year Period, 83 Fed. Red. 54,922 (Nov. 1, 2018).

<sup>12</sup> *Id.* at 54,923.

<sup>13</sup> *Id.*

November 20, 2018.<sup>14</sup> IECA’s Pleading does not directly address the Supplement. Rather, IECA argues that Driftwood LNG’s pending Application to export LNG—and U.S. LNG exports in general—are not consistent with the public interest under NGA section 3(a).<sup>15</sup> IECA, which previously had not sought to intervene, also states that it “wishes to intervene and be made a party to this proceeding, with all of the rights attendant to such status pursuant to 10 C.F.R. 590.303(b).”<sup>16</sup>

When IECA filed its Pleading with DOE/FE on November 20, 2018, it did not include a certificate of service with its Pleading, as required by 10 C.F.R. §§ 590.103(b) and 590.302(a). Nor did IECA serve a copy of the Pleading on the applicant, Driftwood LNG, as required by 10 C.F.R. §§ 590.103(b), 590.107, 590.302(a), and 590.304(d). DOE/FE subsequently informed IECA that its Pleading lacked a certificate of service. On December 12, 2018, IECA responded by re-filing the Pleading with a certificate of service attached,<sup>17</sup> and, for the first time, by serving the Pleading on Driftwood LNG.

DOE’s regulations at 10 C.F.R. §§ 303(d) and 304(e), respectively, provide that motions to intervene and protests may be filed at any time following the filing of an application, but not later than the date fixed for filing in the applicable FE notice or order, unless a later date is permitted by the Assistant Secretary for good cause shown. Yet, as described above, IECA did not complete filing and service of its request to intervene and protest in this proceeding until approximately one year and nine months after the due date set forth in the Notice of Application

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<sup>14</sup> Industrial Energy Consumers of America, Notice of Intervention, Protest, and Comment, FE Docket No. 16-144-LNG (Nov. 20, 2018) [hereinafter IECA Pleading] (document #11 in docket).

<sup>15</sup> *See id.* at 1-7.

<sup>16</sup> *See id.* at 7. Although IECA styled its Pleading to include, in part, a “Notice of Intervention,” IECA was seeking to intervene under 10 C.F.R. § 590.303(b), which involves a motion to intervene. A notice of intervention is available only to state commissions, as specified in 10 C.F.R. §§ 590.303(a) and 590.102(p).

<sup>17</sup> Industrial Energy Consumers of America, Notice of Intervention, Protest, and Comment, FE Docket No. 16-144-LNG (Dec. 12, 2018) [hereinafter Updated IECA Pleading] (document #12 in docket, containing certificate of service dated Dec. 12, 2018).

(March 13, 2017, *see supra* at 2) and 23 days after the due date set forth in the Notice of Supplement (November 21, 2018, *see supra* at 3).<sup>18</sup>

On December 20, 2018, Driftwood LNG filed an “Answer in Opposition to Late Filed Motion to Intervene, Protest, and Comment” (Answer) in which it opposed IECA’s Pleading on both substantive and procedural grounds.<sup>19</sup> In regard to the procedural issues, as further described *infra*, Driftwood LNG asks DOE/FE to reject the Pleading because it was filed out of time due to late service.

Upon review, DOE/FE finds that IECA did not comply with the applicable filing and service requirements contained in DOE’s regulations necessary to obtain intervenor status and to submit a protest in the current proceeding. For the reasons given in the following discussion, DOE/FE also finds that IECA has not demonstrated good cause to grant it intervenor status or to accept IECA’s protest pursuant to 10 C.F.R. §§ 590.303(d) and 590.304(e), respectively. Accordingly, DOE/FE dismisses IECA’s request for intervenor status and its protest.

Additionally, because IECA’s comments do not address the Supplement but pertain to issues bearing on the Application and to LNG exports generally, DOE/FE reasonably could disregard the comments as straying beyond the scope of the Notice of Supplement.<sup>20</sup> However, as explained *infra*, in order to ensure a complete record for purposes of evaluating the public interest under NGA section 3(a),<sup>21</sup> DOE/FE will accept the comments contained in IECA’s Pleading. The substantive merits of those comments will be addressed in a subsequent order.

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

<sup>19</sup> Driftwood LNG LLC, Answer in Opposition to Late Filed Motion to Intervene, Protest, and Comment, FE Docket No. 16-144-LNG (Dec. 20, 2018) [hereinafter Driftwood LNG Answer]. In this Order, we address only the procedural arguments raised by Driftwood LNG in opposition to IECA’s Pleading.

<sup>20</sup> *See supra* at 3 & note 13.

<sup>21</sup> 15 U.S.C. § 717b(a).

## **II. PROCEDURAL ARGUMENTS BY DRIFTWOOD LNG AND IECA**

### **A. Driftwood LNG's Answer**

In its Answer, Driftwood LNG asserts that DOE/FE should reject IECA's Pleading because: (i) IECA's filing of the Pleading was not completed until December 12, 2018, when IECA served Driftwood LNG with the updated Pleading containing the certificate of service; and (ii) IECA has failed to show good cause for its late filing.<sup>22</sup> According to Driftwood LNG, "[t]his is not a case of misunderstanding or oversight of DOE/FE's filing and service requirements," as "IECA has demonstrated a persistent pattern of willful failure to serve its pleadings [in other proceedings]."<sup>23</sup> Driftwood LNG specifically refers to DOE/FE Docket No. 11-161-LNG, in which DOE/FE denied IECA's late-filed motion to intervene.<sup>24</sup> Moreover, Driftwood LNG maintains that IECA has not attempted to show that it made a good faith effort to timely file the Pleading.<sup>25</sup> Driftwood LNG adds that IECA's Pleading does not claim to take a position on the merits of the Supplement, yet permitting IECA's late intervention would convert the docket into a contested proceeding.<sup>26</sup>

### **B. IECA's Response**

On December 27, 2018, IECA filed a response to Driftwood LNG's Answer.<sup>27</sup> IECA states that it did not serve its Pleading on Driftwood LNG when it filed the Pleading on November 20, 2018, "because the information was not available ... from the DOE/FE website ...

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<sup>22</sup> Driftwood LNG Answer at 1.

<sup>23</sup> *Id.* at 3.

<sup>24</sup> *See Freeport LNG Expansion, L.P., et al.*, DOE/FE Order No. 3357, FE Docket No. 11-161-LNG, Order Conditionally Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Freeport LNG Terminal on Quintana Island, Texas, to Non-Free Trade Agreement Nations, at § IX.A (Nov. 15, 2013).

<sup>25</sup> Driftwood LNG Answer at 3.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> Industrial Energy Consumers of America, Answer to Driftwood LNG LLC Claim that IECA Late Filed Motion to Intervene, Protest, and Comment, FE Docket No. 16-144-LNG (Dec. 27, 2018) [hereinafter IECA Answer].

that would inform IECA, and identify other parties to the proceeding, that would need to be served.”<sup>28</sup>

IECA states that, on December 12, 2018, “DOE/FE became aware of this fact” and “provided IECA with the list of parties and their contact information.”<sup>29</sup> According to IECA, “[w]hen IECA received the information from DOE/FE, it prompted [*sic*] served the other parties on December 12, 2018.”<sup>30</sup>

In sum, IECA argues that it is “faultless,” as “[i]t cannot serve other parties if it is not informed by DOE/FE who the other parties are.”<sup>31</sup> According to IECA, “there is no justification as to why the IECA [Pleading] should not be accepted ....”<sup>32</sup>

### **C. Driftwood LNG’s Supplemental Answer**

On December 28, 2018, Driftwood LNG filed a Supplemental Answer responding to IECA’s Answer.<sup>33</sup> Driftwood LNG states that IECA “mistakenly attempts to justify its failure to serve the IECA Pleading” by stating that “the [service] information was not available to IECA from the DOE/FE website ....”<sup>34</sup> To rebut IECA’s argument, Driftwood LNG quotes DOE/FE’s regulations, which state (in pertinent part) that “a person filing a protest shall serve a copy of all documents filed with FE upon all parties” (10 C.F.R. § 590.107(a)), and that, “[w]hen the parties are not known ... service requirements under paragraph (a) of this section may be met by serving a copy of all documents on the applicant ....” (*id.* § 590.107(b)).<sup>35</sup>

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<sup>28</sup> *Id.* at 1.

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

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

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.*

<sup>33</sup> Driftwood LNG LLC, Supplemental Answer in Opposition to Late Filed Motion to Intervene, Protest, and Comment, FE Docket No. 16-144-LNG (Dec. 28, 2018) [hereinafter Driftwood LNG Supp. Answer].

<sup>34</sup> *Id.* at 1 (quoting IECA Answer at 1).

<sup>35</sup> *Id.* at 1-2.

Citing these regulations, Driftwood LNG asserts that IECA was “clearly aware of the Driftwood parties upon which service was to be made.”<sup>36</sup> Driftwood LNG notes that its Supplement included a statement that all correspondence and communications, including all service of pleadings, should be directed to Driftwood LNG’s counsel, who were identified in the Supplement.<sup>37</sup> Driftwood LNG thus contends that, “[p]rior to the availability of an official service list, IECA was under an obligation to serve Driftwood and had the information necessary to do so.”<sup>38</sup>

### **III. DISCUSSION AND CONCLUSIONS**

After reviewing the arguments made by Driftwood LNG and IECA, we find that IECA failed to comply with DOE/FE’s filing and service requirements in several respects. First, in violation of 10 C.F.R. §§ 590.103(b) and 590.302(a), IECA did not include a certificate of service with its Pleading submitted to DOE/FE on November 20, 2018. Second, IECA did not serve a copy of the Pleading on the Applicant on or before November 20, 2018, as required by 10 C.F.R. §§ 590.103(b), 590.107, 590.302(a), and 590.304(d).

IECA does not contest these lapses but asserts “there is no justification as to why the IECA comments should not be accepted and [IECA made] a party to this proceeding.”<sup>39</sup> We disagree. DOE’s regulations in section 590.107(b) speak to the situation at hand:

When the parties are not known, *such as during the initial comment period following publication of the notice of application*, service requirements under paragraph (a) ... may be met by *servicing a copy of all documents on the applicant* and on FE for inclusion in the FE docket in the proceeding.<sup>40</sup>

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<sup>36</sup> *Id.* at 2.

<sup>37</sup> *Id.* (citing Supplement).

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

<sup>39</sup> IECA Answer at 2.

<sup>40</sup> 10 C.F.R. § 590.107(b).

Although IECA was on notice of these service requirements, IECA concedes that it neither included a certificate of service with its Pleading filed on November 20, 2018, nor served Driftwood LNG on that date.<sup>41</sup> Yet, contrary to IECA’s arguments, IECA had the information necessary to comply with DOE/FE’s service requirements as of that date. IECA’s Pleading opposed Driftwood LNG’s Supplement, and the Supplement itself identified Driftwood LNG’s counsel expressly for “service of pleadings.”<sup>42</sup> Therefore, IECA’s failure to serve its Pleading on Driftwood LNG on November 20, 2018, was due to its own inaction, not to a lack of available information.

Nonetheless, IECA claims that it is “faultless” because it “cannot serve other parties if it is not informed by DOE/FE [as to] who the other parties are.”<sup>43</sup> This attempt to shift blame to DOE/FE is misguided. As explained above, IECA had an independent obligation to serve Driftwood LNG and had the information necessary to do so—well before DOE/FE notified IECA (as a courtesy) that its Pleading lacked a certificate of service.

Although IECA’s arguments suggest a lack of knowledge about DOE/FE’s regulations, we note that IECA has complied with the service requirement under the same regulations in other LNG export proceedings.<sup>44</sup> It is thus not credible for IECA to claim that it was waiting to be informed by DOE/FE about the service list in this proceeding.

Finally, we note that IECA’s Pleading does not challenge the Supplement but contains comments and a protest aimed at Driftwood LNG’s underlying Application (and at U.S. LNG exports generally). If DOE/FE were to grant IECA’s request to intervene and accept the protest

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<sup>41</sup> See IECA Answer at 2.

<sup>42</sup> See, e.g., Driftwood LNG Supp. Answer at 2.

<sup>43</sup> IECA Answer at 2.

<sup>44</sup> See, e.g., Industrial Energy Consumers of America, Comments and Motion to Intervene, DOE/FE Docket No. 13-42-LNG (Sept. 23, 2013), available at:

[https://fossil.energy.gov/ng\\_regulation/sites/default/files/programs/gasregulation/authorizations/2013/applications/IECA13\\_42\\_lng09\\_23\\_13.pdf](https://fossil.energy.gov/ng_regulation/sites/default/files/programs/gasregulation/authorizations/2013/applications/IECA13_42_lng09_23_13.pdf) (IECA timely serving applicant Sabine Pass Liquefaction, LLC).

contained in the Pleading, DOE/FE would be permitting an intervention and protest challenging the Application filed approximately one year and nine months after the due date for such filings established in the Notice of Application. IECA has offered no good cause for permitting such a result.

For the foregoing reasons, the request to intervene and protest contained in the Pleading will be dismissed. To assist in our review of the public interest under NGA section 3(a), however, DOE/FE will accept IECA's Pleading in the form of comments only.<sup>45</sup> While we have grounds to dismiss the comments since they stray beyond the terms permitted by the Notice of Supplement, there is an offsetting benefit in ensuring that the record in this proceeding is complete. This will provide an opportunity for DOE/FE to evaluate IECA's arguments insofar as they bear on Driftwood LNG's proposed exports, but IECA will not have status as either an intervenor or protestor in this proceeding.

### **ORDER**

Pursuant to Section 3 of the Natural Gas Act, it is ordered that:

- A. IECA's requests to intervene and protest are dismissed; and
- B. IECA's Pleading is accepted in the form of comments.

Issued in Washington, D.C. on April 10, 2019.

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Shawn Bennett  
Deputy Assistant Secretary for Oil and Natural Gas  
Office of Fossil Energy

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<sup>45</sup> We note that, under 10 C.F.R. § 590.103(b), "[s]ervice of each document must be made not later than the date of the filing of the document." Even though IECA's Pleading was served out of time, we find good cause to accept the Pleading in the limited form of comments only. 15 U.S.C. § 717b(a).