

UNITED STATES OF AMERICA

DEPARTMENT OF ENERGY

OFFICE OF FOSSIL ENERGY

BEAR HEAD LNG CORPORATION and
BEAR HEAD LNG (USA), LLC

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FE DOCKET NO. 15-14-NG

OPINION AND ORDER DISMISSING APPLICATION FOR
IN-TRANSIT SHIPMENTS OF CANADIAN-SOURCED NATURAL GAS
AND DIRECTING SUBMISSION OF INFORMATION
CONCERNING IN-TRANSIT SHIPMENTS
RETURNING TO THE COUNTRY OF ORIGIN

DOE/FE ORDER NO. 3769

FEBRUARY 5, 2016

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I. INTRODUCTION

On January 23, 2015, Bear Head LNG Corporation and Bear Head LNG (USA), LLC (collectively, Bear Head LNG)¹ filed an application (Canadian NG Application or Application)² with the Office of Fossil Energy (FE) of the Department of Energy (DOE or the Department) under section 3 of the Natural Gas Act (NGA)³ requesting long-term, multi-contract authorization to import by pipeline up to 250 billion standard cubic feet per year (Bcf/yr) of natural gas from Canada (equivalent to 0.7 Bcf per day (Bcf/d)) for subsequent export by pipeline to Canada. Although Bear Head LNG seeks authority to import this natural gas into the United States, Bear Head LNG explains that “the Application only contemplates the transport of Canadian natural gas, travelling by pipeline through the United States on its way back to Canada.”⁴ According to Bear Head LNG, it “seeks the necessary DOE/FE authorization to access Canadian gas supplies that necessarily must be imported by pipeline from Canada to the United States to reach demand markets in Nova Scotia through the [Maritimes & Northeast Pipeline]” (M&N Pipeline).⁵

Bear Head LNG requests this authorization for a 25-year term to commence on the earlier of the date of first import or 10 years from the date the authorization is granted. Bear Head LNG

¹ Bear Head LNG Corporation is a Canadian company incorporated pursuant to the laws of Nova Scotia. Bear Head (USA) is a Delaware limited liability company. *See infra* § II.A.

² Bear Head LNG Corporation & Bear Head LNG (USA), LLC, Application for Authorization to Import Natural Gas from, for Subsequent Export to Canada (Jan. 23, 2015).

³ 15 U.S.C. § 717b. The authority to regulate the imports and exports of natural gas under section 3 of the NGA has been delegated to the Assistant Secretary for FE in Redelegation Order No. 00-006.02, issued on November 17, 2014.

⁴ Canadian NG App. at 6.

⁵ *Id.* at 2. The M&N US Pipeline system is a 690-mile long cross-border pipeline owned and operated by Maritimes & Northeast Pipeline, L.L.C., a Delaware limited liability company in the United States, and by Maritimes’s Canadian pipeline affiliate, Maritimes & Northeast Pipeline Limited Partnership, in Canada. The M&N Pipeline transports natural gas from a point near Goldboro, Nova Scotia, to the Canadian-United States border and through the northeastern states of Maine and New Hampshire, with one terminus in Dracut, Massachusetts, and another in Beverly, Massachusetts. *See id.* at 6 n.15.

further requests this authorization to import natural gas for subsequent export on its own behalf and as agent for other entities.

As discussed below, this Opinion and Order dismisses the Canadian NG Application because we find that Bear Head LNG's proposed "in-transit" shipments of Canadian-sourced natural gas solely between Canadian points to be outside the Department's jurisdiction under section 3 of the NGA. DOE/FE will, however, require Bear Head LNG to report relevant data regarding any in-transit shipment returning to the country of origin, as explained below.⁶

II. BACKGROUND

A. Description of Applicants

Bear Head LNG Corporation is a Canadian company incorporated pursuant to the laws of Nova Scotia. Bear Head LNG (USA), LLC is a Delaware limited liability company. Both have their principal place of business in Houston, Texas, and both are wholly-owned indirect subsidiaries of Liquefied Natural Gas Limited (LNGL).

⁶ Additionally, on February 25, 2015, Bear Head LNG filed an application in FE Docket No. 15-33-LNG requesting long-term, multi-contract authorization to export natural gas from the United States to Canada and, after liquefaction in Canada, to re-export the U.S.-sourced natural gas in the form of liquefied natural gas (LNG) to other countries in a combined total volume equivalent to 440 Bcf/yr of natural gas (1.2 Bcf/d). In relevant part, Bear Head LNG requested authority to re-export the U.S.-sourced natural gas in the form of LNG to both: (i) any country with which the United States has, or in the future enters into, a free trade agreement (FTA) requiring national treatment for trade in natural gas (FTA countries), and (ii) any other country with which trade is not prohibited by U.S. law or policy (non-FTA countries).

On July 17, 2015, in DOE/FE Order No. 3681, DOE/FE granted the FTA portion of that application in the full volume requested pursuant to NGA section 3(c), 15 U.S.C. § 717b(c). *See Bear Head LNG Corp. & Bear Head LNG (USA), LLC*, DOE/FE Order No. 3681, FE Docket No. 15-33-LNG, Order Granting Long-Term, Multi-Contract Authorization to Export Natural Gas to Canada and to Other Free Trade Agreement Nations (July 17, 2015).

Concurrently with the issuance of this Order, in DOE/FE Order No. 3770, DOE/FE is granting the non-FTA portion of that application pursuant to NGA section 3(a), 15 U.S.C. § 717b(a)—albeit in a reduced volume of 296 Bcf/yr of natural gas (0.81 Bcf/d) to reflect the existing capacity of the M&N US Pipeline. *See Bear Head LNG Corp. & Bear Head LNG (USA), LLC*, DOE/FE Order No. 3770, FE Docket No. 15-33-LNG, Opinion and Order Granting Long-Term, Multi-Contract Authorization to Export U.S.-Sourced Natural Gas by Pipeline to Canada for Liquefaction at the Proposed Bear Head LNG Project to be Located in Nova Scotia, Canada, and to Re-Export in the Form of Liquefied Natural Gas to Non- Free Trade Agreement Nations (Feb. 5, 2016).

LNGL is a publicly listed Australian company based in Perth, Australia. According to Bear Head LNG, LNGL's objective is to develop LNG projects in both Australia and international markets, focusing on mid-scale LNG projects that use its Optimised Single Mixed Refrigerant (OSMR[®]) process.⁷ In addition to the Bear Head Project, LNGL's portfolio includes 100 percent ownership of both the proposed Magnolia LNG Project to be located in Louisiana, and the Fisherman's Landing LNG Project to be located in Australia.

B. Description of Request

Bear Head LNG seeks long-term, multi-contract authorization to ship up to 0.7 Bcf/d of Canadian-sourced natural gas from the United States-Canada border through natural gas pipelines located in the United States for purposes of returning the natural gas to Canada. Bear Head LNG states that it is requesting this import authority to access Canadian natural gas supplies for shipment to markets in Nova Scotia, Canada, through the M&N Canada Pipeline.

Bear Head LNG anticipates that the Canadian natural gas would enter the United States at various existing (or future) points at the United States-Canada border along the Western Canada-Northeast and Western Canada-Midwest pipeline corridors, which traditionally have linked western and central Canadian supply areas to U.S. northeast and Midwest demand regions. After passing through the United States, the Canadian natural gas would be delivered back into Canada at a point on the United States-Canada border near Calais, Maine/St. Stephen, New Brunswick on the M&N US Pipeline. Bear Head LNG states that there are no existing pipeline corridors wholly within Canada that would allow the delivery of western and central Canadian natural gas directly into Nova Scotia.⁸

⁷ See Canadian NG App. at 4.

⁸ See *id.* at 1 n.3.

C. Liquefaction Project

According to Bear Head LNG, the proposed import of natural gas and the anticipated movement of natural gas to Nova Scotia, Canada, through the M&N Pipeline is connected to the development of a proposed Canadian natural gas liquefaction facility called the Bear Head LNG export terminal (Bear Head Project or the Project) being developed by Bear Head LNG.

Bear Head LNG states that the Project is situated at a 255-acre site owned by Bear Head Corp. within the Point Tupper/Bear Head Industrial Park, near the town of Hawkesbury, on the Strait of Canso in Richmond County, Cape Breton, Nova Scotia. Bear Head LNG states that the Project will include the following major components: four LNG liquefaction trains with OSMR[®] technology, LNG ship berthing marine facilities, and two LNG storage tanks, each with a volume of approximately 180,000 cubic meters. Each of the four liquefaction trains will have a nominal production capacity of two million metric tons per annum (mtpa), for a total LNG production capacity of eight mtpa of natural gas.

Bear Head LNG states that “[t]he Project is proposed for the purpose of exporting North American LNG to foreign markets,”⁹ and indicates that the Canadian natural gas subject to this requested authorization is intended for use as feedstock for the production of LNG at the Project.¹⁰

D. Source of Natural Gas

Bear Head LNG states that approval of this Application will enable it to access a diverse supply of competitively-priced natural gas from the Western Canadian Sedimentary Basin (WCSB), as well as from the Mackenzie Delta, Eagle Plain, and Peel Plateau in the Northern Gas region. According to Bear Head LNG, the WCSB is one of the largest natural gas producing

⁹ *Id.* at 4-5.

¹⁰ *See id.* at 6.

basins in North America. Bear Head LNG states that the WCSB has more than 10 major points of entry where WCSB supplies can enter the U.S. interstate pipeline system, many of which could bring WCSB supplies to the M&N US and Canada Pipelines to serve the Bear Head Project. Additionally, Bear Head LNG states that it may be able to source natural gas from the Central Canadian regions of Ontario and Quebec.¹¹

III. CURRENT PROCEEDING BEFORE DOE/FE

A. Notice of Application

Bear Head LNG filed the Canadian NG Application on January 23, 2015. DOE/FE issued a Notice of Application on April 10, 2015, and the Notice of Application was published in the Federal Register on April 16, 2015.¹²

The Notice of Application invited public comment on the Canadian NG Application, and specifically requested comment “on whether section 3(c) ... or section 3(a) of the NGA ... provides the appropriate standard for review of the Application.”¹³ The Notice of Application described Bear Head LNG’s assertion that DOE/FE should grant the requested authorization under section 3(c) of the NGA, 15 U.S.C. § 717b(c), because Canada is a nation with which the United States has a FTA requiring national treatment for trade in natural gas.¹⁴

In response to the Notice of Application, DOE/FE received one response—a Motion to Intervene filed by Northeast Energy Solutions, Inc. (NEES).¹⁵

¹¹ Canadian NG App. at 7.

¹² Bear Head LNG Corporation and Bear Head LNG (USA), LLC; Application for Long-Term, Multi-Contract Authorization to Import Natural Gas From, for Subsequent Export to, Canada for a 25-Year Term, 80 Fed. Reg. 20,484 (Apr. 16, 2015) [hereinafter Bear Head LNG Notice of Application].

¹³ *Id.* at 20,485.

¹⁴ *See id.*

¹⁵ Northeast Energy Solutions, Inc., Motion to Intervene, FE Docket No. 15-14-NG (June 15, 2015) [hereinafter NEES Mot.].

B. Northeast Energy Solutions, Inc.’s Motion to Intervene

NEES states that it is a nonprofit corporation comprised of energy, land, environmental, end-user, and related economic interests. NEES states that it serves as an educational resource and advocacy group to ensure that economically viable and environmentally responsible energy projects account for its members’ interests.

Motion to Intervene. NEES states that it has a direct and substantial interest in this proceeding, and that its interests will be directly affected by the outcome of this proceeding.

Addressing the appropriate standard of review, NEES asserts that DOE/FE should review the Canadian NG Application under section 3(a) of the NGA, rather than section 3(c). NEES acknowledges that, if the Canadian NG Application is solely an application to import natural gas from a FTA country (*i.e.*, Canada), the Application must be deemed in the public interest and granted under section 3(c) without modification or delay. NEES contends, however, that Bear Head LNG has failed to establish that the Application is entitled to review under NGA section 3(c) due to its “ambiguous reference of delivery to undefined ‘export’ and ‘foreign’ markets.”¹⁶

NEES argues:

Because the Application is filed in connection with the Project, which is involved with unspecified export markets, there is not enough information provided ... with respect to the identity of the foreign markets to establish [that] Section 3(c) of the NGA is the appropriate standard of review.¹⁷

According to NEES, “[w]ithout further clarification, Bear Head LNG has failed to meet the standard of review under section 3(c) of the NGA.”¹⁸

Request for Additional Procedures. Pursuant to DOE/FE’s regulations (10 C.F.R. § 590.206), NEES asks DOE/FE to direct additional procedures concerning the Canadian NG

¹⁶ *Id.* at 3.

¹⁷ *Id.*

¹⁸ *Id.*

Application, including the filing of supplemental written comments, written interrogatories, and/or other discovery procedures, a conference, verbal presentation, and/or adjudication. Alternatively, under 10 C.F.R. § 590.310, NEES requests an opportunity to submit and to receive answers to written interrogatories.

In support of these requests, NEES contends that “there are numerous unanswered assertions” in the Application, including “the vagueness with respect to the underlying purpose of [the Application] and its inclusion of unspecified foreign markets in its project scope.”¹⁹ In NEES’s view, these aspects of the Application hinder a thorough, deliberative review of Bear Head LNG’s import proposal. NEES asserts that DOE/FE will be “better enabled” to make a determination on the Application if NEES is afforded the opportunity for additional procedures, including interrogatories directed to Bear Head LNG.²⁰

IV. DISCUSSION

A. Procedural Matters

NEES’s motion to intervene was unopposed. The motion is therefore deemed granted pursuant to DOE/FE’s regulations set forth at 10 C.F.R. § 590.303(g).

Upon review of the Application and NEES’s arguments, we find that NEES’s request for additional procedures should be dismissed. The record in this proceeding is both complete and adequate to support our findings regarding the Department’s jurisdiction, as discussed herein.

B. Jurisdictional Determination and Dismissal of Application

Bear Head LNG’s Application indicates that the purpose of the requested authorization is to supply Canadian-sourced natural gas for use as feedstock at the Bear Head Project in Nova Scotia, Canada. According to Bear Head LNG, the Application “only contemplates the transport

¹⁹ *Id.*

²⁰ NEES Mot. at 3.

of Canadian natural gas, *travelling by pipeline through the United States on its way back to Canada.*²¹ Consequently, our understanding is that Bear Head LNG is not proposing to deliver natural gas to commercial markets in the United States. Rather, the Canadian natural gas will only temporarily pass through the United States, and the full volume of Canadian natural gas approved under the requested authorization—less any line losses and/or natural gas that may be consumed as fuel during the transit process—will be delivered back to Canada where it will be liquefied at the Project for subsequent export as LNG. DOE/FE notes that this type of shipment is commonly referred to as an “in-transit shipment.”

In the Notice of Application, DOE/FE invited comment on whether the Application should be reviewed under Section 3(a) of the NGA or, as the Applicant had proposed, Section 3(c). Since then, however, DOE/FE has come to consider the more fundamental question whether in-transit shipments of Canadian-sourced natural gas between Canadian points are imports or exports at all for purposes of Section 3 of the Natural Gas Act.²² For the reasons that follow, we conclude that they are not.

The Natural Gas Act does not define “import” or “export.”²³ At their most expansive, these words could be read to capture any transit of natural gas across the U.S. border. Or, more narrowly, Congress may have intended the word “import” to refer to foreign-sourced natural gas that has entered the United States for consumption in the United States, and the word “export” to refer to U.S.-sourced natural gas that has exited the United States for consumption in a foreign

²¹ Canadian NG App. at 6 (emphasis added).

²² In the past, DOE/FE has acted on applications for authority both to import natural gas from Canada and to export natural gas to Canada for purposes of consumption in Canada. Those applicants may have intended to use that authority, in whole or in part, to conduct in-transit shipments returning to the country of origin as defined in this Order. The question of the Department’s jurisdiction over in-transit shipments was not, however, considered explicitly in those proceedings. To the extent that past DOE/FE orders have implicitly indicated that such authority lies in NGA section 3(c), this Order marks a change from that practice.

²³ See 15 U.S.C. § 717a (Definitions).

nation. Looking to the structure of NGA section 3, we conclude that Congress likely did not intend the words “import” and “export” to capture *any* movement of natural gas across the U.S. border, but rather intended to leave some discretion to the Federal Power Commission (the Department’s predecessor in administering NGA section 3) on that question. We reach this conclusion based on the observation that NGA section 3 requires a public interest review and an opportunity for hearing for any application to import or export natural gas. Having imposed these procedures,²⁴ Congress must have understood some limits to the words “import” and “export,” and must have intended these procedures to apply only to those categories of shipments that, by their nature, could have a material effect on the U.S. public interest.

The shipment of Canadian-sourced natural gas between Canadian points—which DOE/FE defines below as an “in-transit shipment returning to the country of origin”—is categorically unlikely to have a material impact on the U.S. public interest. In terms of the supply-demand balance for natural gas in the United States, in-transit shipments between Canadian points are no different than shipments within Canada itself. Such shipments are not generally understood to affect the welfare of either consumers or producers of natural gas in the United States. While it is true that in-transit shipments between Canadian points may affect the U.S. natural gas pipeline system, there are existing federal and state regulatory regimes outside of NGA section 3 to address any economic or environmental issues that may arise in connection with those shipments. The Federal Energy Regulatory Commission serves both as the economic regulator for interstate natural gas pipelines and is responsible for conducting environmental

²⁴ In-transit shipments intended for consumption in Canada would not have to undergo these procedures pursuant to NGA section 3(c) because Canada is a FTA country. As this Application illustrates, however, not all in-transit shipments will be consumed in the country of origin. In the present case, the natural gas will be liquefied in Canada and transported in the form of LNG to both FTA and non-FTA countries. As DOE/FE has previously held, we “look to the trade status of the country in which the natural gas or LNG is delivered for end use” to determine whether section 3(a) or 3(c) applies. *Bear Head LNG*, DOE/FE Order No. 3681, at 4.

reviews and assessing the public convenience and necessity for the siting, construction, and operation of new or modified interstate pipelines.²⁵ Intra-state pipelines are regulated by the states both for economic and environmental consideration under the state police power.

Finally, DOE/FE notes that, in 1977, the United States and Canada entered the *Agreement Between the Government of the United States of America and the Government of Canada Concerning Transit Pipelines* (1977 Agreement).²⁶ This Agreement—entered into more than a decade before the United States entered the United States-Canada Free Trade Agreement (the precursor to the North American Free Trade Agreement) and before Congress sought to differentiate between FTA and non-FTA countries in NGA section 3—generally espouses a *laissez-faire* policy between the two governments for in-transit shipments of hydrocarbons.

For these reasons, DOE/FE concludes that in-transit shipments returning to the country of origin are not imports or exports within the meaning of section 3 of the Natural Gas Act. For purposes of this Order, DOE/FE defines “in-transit shipment returning to the country of origin” as those shipments of natural gas through the United States between points of a single foreign nation that are physical and direct. “Physical” means that the natural gas will be transported between two cross-border points. Thus, exchanges by backhaul, displacement or other virtual shipments do not qualify as in-transit shipments for purposes of this Order. “Direct” means that the natural gas must not be diverted for other purposes but must travel a commercially reasonable path between foreign points consistent with an intention merely to transit through the United States. And, consistent with the U.S. Customs and Border Patrol regulations concerning

²⁵ See 15 U.S.C. § 717f (NGA section 7); 42 U.S.C. § 15801, *et seq.* (Energy Policy Act of 2005).

²⁶ 28 U.S.T. 7449 (signed Jan. 28, 1977; date-in-force Oct. 1, 1977).

in-transit shipments,²⁷ to qualify as “in-transit” the natural gas must enter and exit the United States within a 30-day period.

Having determined that in-transit shipments returning to the country of origin fall outside the Department’s jurisdiction under NGA section 3, DOE/FE is dismissing Bear Head LNG’s Application. Pursuant to DOE/FE’s authority under section 16 of the Natural Gas Act, 15 U.S.C. § 717o, however, and in aid of the Department’s jurisdiction under section 3, DOE/FE is directing Bear Head LNG to submit information relating to any in-transit shipments it makes. Specifically, for any calendar month in which it makes in-transit shipments on its own behalf or on behalf of other entities, Bear Head LNG shall be required to report: (1) the volumes of natural gas delivered into the United States, (2) the entity that has title to the natural gas on first entry into the United States, (3) the points of entry into the United States, (4) the name of the U.S. pipelines used at the points of entry to and exit from the United States, (5) the points of exit from the United States, (6) the entity that has title to the natural gas at the point of exit from the United States, and (7) the volumes of natural gas delivered at the points of exit. Insofar as there is a discrepancy between the volumes delivered into the United States and the volumes delivered to the points of exit (*e.g.*, line losses and/or nominal volumes consumed as fuel during the transit process), Bear Head LNG also shall submit an explanation to DOE/FE to show that no deliveries into United States commercial markets have occurred. Further, although DOE/FE will not require monthly reporting of this information, Bear Head LNG shall maintain records of the pipelines used for each in-transit shipment for a period of one year after completion of each in-transit shipment and provide that information, upon request, to DOE/FE as a means of verification.

²⁷ See 19 C.F.R. §§ 18.31, 18.2(c)(2).

V. ORDER

Pursuant to section 3 of the NGA, it is ordered that:

A. The Canadian NG Application filed jointly by Bear Head LNG Corporation and Bear Head LNG (USA), LLC (collectively, Bear Head LNG) is dismissed.

B. Bear Head LNG shall file with the Office of Regulation and International Engagement, within 30 days following the last day of each calendar month, a report indicating whether in-transit shipments returning to the country of origin have been made. The first monthly report required by this Order is due not later than the 30th day of the month following the month of first completion of an in-transit shipment. In subsequent months, if completion of in-transit shipments has not occurred, a report of “no activity” for that month must be filed. If completion of in-transit shipments has occurred, the report must give the following details of each in-transit shipment returning to the country of origin describing: (1) the volumes of natural gas delivered into the United States, (2) the entity that has title to the natural gas on first entry into the United States, (3) the points of entry into the United States, (4) the name of the U.S. pipelines used at the points of entry to and exit from the United States, (5) the points of exit from the United States, (6) the entity that has title to the natural gas at the point of exit from the United States, and (7) the volumes of natural gas delivered to the points of exit. If there is a discrepancy between the volumes of natural gas delivered for in-transit shipment at the points of entry into the United States as compared to the volumes delivered to the points of exit from the United States, Bear Head LNG also shall submit to DOE/FE an explanation to show that no deliveries into United States commercial markets have occurred.

(Approved by the Office of Management and Budget under OMB Control No. 1901-0294.)

C. Bear Head LNG shall maintain records of the transit pipelines used for each in-transit shipment returning to the country of origin for a period of one year after completion of the in-transit shipment, and provide that information to DOE/FE upon request.

D. All monthly report filings shall be made to U.S. Department of Energy (FE-34), Office of Fossil Energy, Office of Regulation and International Engagement, P.O. Box 44375, Washington, D.C. 20026-4375, Attention: Natural Gas Reports. Alternatively, reports may be e-mailed to ngreports@hq.doe.gov, or may be faxed to Natural Gas Reports at (202) 586-6050.

E. NEES's motion to intervene has been granted by operation of law. 10 C.F.R. § 590.303(g).

F. NEES's request for additional procedures is dismissed.

Issued in Washington, D.C., on February 5, 2016.



Christopher A. Smith
Assistant Secretary
Office of Fossil Energy