Department of Energy
Washington, DC 20585

October 17, 2013

The Honorable Lisa Murkowski
United States Senate
Washington, DC 20510

Dear Senator Murkowski:

Thank you for your letter of August 2 regarding exports of liquefied natural gas (LNG) to non-free trade agreement (non-FTA) countries. You have expressed an interest in better understanding the Department of Energy's (DOE) authority to modify or rescind prior approvals under two provisions of the Natural Gas Act (NGA) and under the Energy Policy and Conservation Act.

The Department takes very seriously the investment-backed expectations of private parties subject to its regulatory jurisdiction. As we have stated consistently, DOE would not rescind a previously-granted authorization except in the event of extraordinary circumstances or use this authority as a price maintenance mechanism. As further discussed in the enclosure that addresses your specific questions, DOE has not rescinded an LNG export authorization over the objections of the authorization holder.

Your letter included eleven questions related to this issue, which we address below.

Q1. Has DOE used authority under section 3(a) of the NGA to issue a supplemental order modifying or rescinding authority granted? If so, how many times, and generally, under what circumstances?

A1. DOE has no record of having vacated or rescinded an authorization to import or export natural gas over the objections of the authorization holder. DOE's records indicate that supplemental orders vacating prior authorizations to import or export natural gas, including LNG, have been issued only in circumstances where the authorization holder had not utilized its authorization for several years following the issuance of the authorization and either had requested the authorization be vacated, had gone out of business, or was non-responsive to our inquiries. In all of these cases, DOE honored the request of any company that had been contacted by DOE that requested their authorization remain effective.

On December 22, 2011, DOE vacated an authorization issued in 1989 to Yukon Pacific Company, L.P. for the export of LNG. *See* Order No. 350-C, DOE/FE Docket No. 92-35-LNG. Order No. 350-C was issued at the request of the authorization holder. The authorization holder had never utilized the authorization and had no plans to do so at the time it was vacated.

In 2005 and 2006, DOE issued two orders that vacated a total of 163 two-year blanket authorizations for the import and export of natural gas. *See* 70 Fed. Reg. 48,943 (Aug. 22, 2005) and 71 Fed. Reg. 10,026 (Feb. 28, 2006). As in *Yukon Pacific*, these authorizations had never been used. In addition, most of the authorization holders in these cases had not complied with the terms of their authorizations by filing required activity reports and did not respond to DOE's attempts to contact them.

In other cases, authorizations have been vacated at the request of an authorization holder who had requested a new, expanded, or modified authorization. In these cases, authorizations were vacated to avoid duplicative import and export authority.

DOE has no other records of an order being vacated or rescinded. However, DOE has issued other supplemental orders that modified authorizations. In all of these cases, however, the modification was made at the request of the applicant to correct an error or to finalize a conditional order. For example, supplemental orders have been issued to revise the terms and conditions of the underlying contract for which the authorization holder applied. *See* Transcontinental Gas Pipe Line Corporation, October 31, 1984, DOE/ERA Opinion and Order No. 46A (granting amendments to the conditional authorization to import natural gas from Canada).

Q2. Has DOE used authority under section 16 of the NGA to issue a supplemental order modifying or rescinding authority granted? If so, how many times, and generally, under what circumstances?

A2. The circumstances under which DOE has used its authority to issue supplemental orders rescinding prior authorizations are described in the preceding answer. This authority arises under sections 3 and 16 of the NGA.

Q3. Under any of the above authorities, how would a suspension or revocation proceeding be initiated? Could a third party petition for suspension or revocation?

Section 19(a) of the NGA provides that parties to a proceeding in which an order has been issued have 30 days to seek rehearing. Section 19(b) of the NGA provides that if the application for rehearing is denied, the parties have 60 days to seek court review. Thus, parties to a proceeding may initiate a request to suspend or revoke an order as part of their request for rehearing or petition for court review. However, only parties to a proceeding may submit such a request to suspend or revoke a non-final order.

With respect to final orders that are no longer subject to judicial review, a request to suspend or revoke an authorization to import or export natural gas may be initiated by the submission of a pleading prepared in accordance with the general filing requirements set forth at 10 C.F.R. § 590.103. *See* 10 C.F.R. § 590.501(b) ("if an order is sought to be vacated, reversed, or modified by reason of matters that have arisen since the issuance of the final opinion and order, conditional order, or emergency interim order, the matters

relied upon shall be set forth with specificity in the application. The application shall also comply with the filing requirements of [10 C.F.R. § 590.103].”). Neither the NGA nor DOE regulations limit the submission of a request to suspend or revoke a final order to parties in the prior authorization proceeding.

Q4. Would DOE be required to hold a hearing on the proposed suspension or revocation?

DOE would hold an adjudicatory proceeding that would give parties an opportunity to be heard in writing. In practice, this provides all persons who would or likely could be aggrieved by agency action with the ability to present their views to the agency.

Q5. What is DOE statutorily required to consider when evaluating a suspension or revocation?

The NGA does not set forth specific criteria for evaluating requests to suspend or revoke previously issued authorizations, except that section 16(a) of the NGA authorizes DOE to take such action as it may find necessary or appropriate to carry out the provisions of the statute. As described above, however, we take very seriously the investment-backed expectations of private parties and would not rescind a previously granted authorization except in the event of extraordinary circumstances.

Q6. If DOE has initiated revocation procedures in the past, what factors were considered? Was the section 3(a) license revoked?

Please see the response to #1, above.

Q7. Would the same public interest test applied for approval be applied for revocation?

Please see the response to #5 above.

Q8. Is the “cumulative impact” of natural gas exports a factor DOE considers in the context of its revocation authority?

No. DOE has stated that it will consider the cumulative impact of prior authorizations when considering whether to grant new applications for LNG export authority. The analytical process DOE employs in considering new applications, however, need not be the same as it would employ if presented with a petition to rescind a previously-granted authorization. As noted above, DOE would not rescind a previously granted authorization, except in extraordinary circumstances.

Q9. Explain how the Administrative Procedures Act would affect a procedure where DOE sought to modify or revoke an authorization to export LNG.
As it does in all NGA Section 3 proceedings, DOE would ensure an opportunity to be heard in writing and would comply with the other requirements for informal adjudications contained in the Administrative Procedure Act, 5 U.S.C. § 554.

Q10. Describe any emergency authorities that could be used by DOE to revoke an authorization to export LNG.

DOE's authority over LNG exports derives from the NGA. Independent of DOE's authority under the NGA, the President has authority under section 103 of the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6212, by rule, to restrict the export of natural gas, among other commodities, under such terms and conditions as he determines to be appropriate and necessary in order to carry out the purposes of EPCA. The President delegated this authority to the Secretary of Commerce in Executive Order No. 11912, 41 Fed. Reg. 15825 (April 13, 1976).

Q11. If DOE's authorization order includes a reference to the agency's authority under sections 3 and 16 of the NGA to modify or revoke an approval, and the authorization holder does not appeal that reference in the order, has the authorization holder accepted DOE's authority and relinquished future arguments against DOE on that issue?

No. A mere reference in an authorization order to DOE's statutory authority to modify or rescind past orders would not, without more, be grounds for rehearing or appeal. Therefore, the failure to contest the reference would not waive any argument in the event that the modification/rescission authority was used at a later time through a separate order.

I hope that the above answers are responsive to your inquiry. Should you have any questions, please contact me or Ms. Jaime Shimek, Deputy Assistant Secretary for Senate Affairs at (202) 586-5450.

Sincerely,

Paula A. Gant
Deputy Assistant Secretary
Office of Oil and Natural Gas