From:	Schimelpfenig, Emily K.
To:	Tran, Tu
Cc:	Maag, Kirk B.
Subject:	[EXTERNAL] Comment Submission re: Proposed Collection of Information, FE-746R "Natural Gas Imports and Exports."
Date:	Tuesday, March 14, 2023 9:36:31 PM
Attachments:	image001.png DOE Comment Letter (1)(118829000.1).pdf

Good evening Tu Tran,

I hope this email finds you well. Please find attached comments regarding the Proposed Collection of Information, FE-746R "Natural Gas Imports and Exports."

Best regards,

Emily

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March 14, 2023

VIA EMAIL (tu.tran@hq.doe.gov)

United States Department of Energy (FE–34)
Attn: Tu Tran
Office of Fossil Energy and Carbon Management
1000 Independence Avenue SW
Washington, DC 20585

Re: Proposed Collection of Information, FE–746R ''Natural Gas Imports and Exports''

Dear Tu Tran:

On January 13, 2023, the Department of Energy ("**DOE**") invited public comment on its proposed collection of information for the FE-746R Monthly Report of Natural Gas Imports and Exports ("**Proposal**"). *See* 88 Fed. Reg. 2350 (Jan. 13, 2023). These Comments are submitted by Northwest Natural Gas Company, Avista Corporation, Cascade Natural Gas Corporation, Intermountain Gas Company, Montana-Dakota Utilities Co., Great Plains Natural Gas Co., a division of Montana-Dakota Utilities Co., and Puget Sound Energy, Inc. (the "**Utilities**"). Each of the Utilities is a natural gas distribution utility in the West or Pacific Northwest regions of the United States and actively participates as both a buyer and a seller in the natural gas markets in the United States and Canada. Each of the Utilities reports information to DOE's Energy Information Administration ("**EIA**") using the FE-746R Monthly Report.

DOE has the authority to collect data from "all persons owning or operating facilities or business premises who are engaged in any phase of energy supply or major energy consumption." 15 U.S.C. § 772(b). Under this authority, DOE requires importers and exporters of natural gas, including LNG, to submit monthly reports of all import and/or export transactions using Form FE-746R. DOE's current instructions for Form FE-746R (the "**Current Instructions**") exempt from public disclosure under the Freedom of Information Act ("**FOIA**") "price at import or export point for all forms of natural gas imported and exported, including LNG." The Proposal would modify the instructions for Form FE-746R (the "**Proposed Instructions**"). Under the Proposed Instructions, only LNG export prices would be exempt from public disclosure.

The Proposal purports to allow the Utilities' confidential commercial information to be made available to the public, resulting in competitive harm to the Utilities, their contract counterparties, and other market participants. This could also result in harm to consumers through anticompetitive behavior in the market. As such, the Utilities urge DOE to modify the Proposal to preserve the current scope of assurances regarding the information that is exempt from disclosure to maintain the confidentiality of confidential commercial information that is reflected in the Current Instructions.

The Proposal states that DOE will use existing FOIA exemptions "to protect prices of LNG exports, but not other natural gas price data." 88 Fed. Reg. at 2351. This is a dramatic reduction in the scope of exemptions regarding the confidentiality of natural gas prices. For example, the Current Instructions provide that the price of both ***imports and exports*** for ***all forms*** of natural gas, including LNG, will be protected from public disclosure under FOIA. But the Proposed Instructions purport to protect only ***export*** prices for ***LNG*** from public disclosure. The Proposal provides no explanation for this change.

These Comments explain that the proposed change in the Proposal to the scope of assurances regarding exemptions for natural gas import and export prices is contrary to the plain meaning of confidential commercial and financial information under an existing FOIA exemption and inconsistent with FOIA's purpose of promoting transparency and quality in reporting to federal agencies. Moreover, the Proposal does not adequately evaluate the business impact of the Proposal or provide a reasoned explanation for dramatically reducing the scope of assurances regarding confidentiality. The Utilities urge DOE not to reduce the scope of assurances regarding exemptions for natural gas import and export prices as described in the Proposal.

I. THE PRICE OF NATURAL GAS, INCLUDING LNG, AT IMPORT AND EXPORT IS CONFIDENTIAL BUSINESS INFORMATION PROTECTED UNDER 5 U.S.C. § 522(B)(4).

FOIA gives any person the right to request access to federal records, including records submitted to an agency. However, the FOIA statute provides nine exemptions that protect certain categories of information from public disclosure. Most relevant here is 5 U.S.C. § 522(b)(4) ("**Exemption 4**"), which exempts from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged and confidential." The Supreme Court has interpreted this provision to apply to commercial or financial information that is "both customarily and actually treated as private by its owner and provided to the government under the assurance of privacy." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (finding that SNAP redemption data from individual grocery retailers could not be disclosed because it was confidential commercial information); *see also Renewable Fuels Ass'n v. EPA*, 519 F. Supp. 3d 1, 10 (D.D.C. 2021).

A. The Utilities and other market participants customarily and actually treat natural gas import and export prices as confidential.

The natural gas price information protected by the Current Instructions is exactly the type of information that is both customarily and actually treated as confidential by its owner. Under the Natural Gas Act, the Utilities and their contract counterparties consider this natural gas price information to be highly confidential. The Utilities' purchase and sale contracts for natural gas typically allow disclosure of their pricing terms only when required by law. The confidentiality provision set forth in the North American Energy Standards Board's Base Contract for Sale and Purchase of Natural Gas—the most common contract form used in the industry—would extend to pricing information. The Utilities are also obligated to their counterparties to seek the broadest possible protections from the disclosure of confidential information, and pricing terms are often the single-most sensitive and confidential terms in these natural gas purchase and sale contracts. Pricing information also receives confidential treatment from state public utility commissions, such as the Oregon Public Utilities Commission and Washington Utilities and Transportation Commission. In most cases, natural gas pricing information is only disclosed to state public utility commissions under the provisions of a confidentiality order issued by the state agency.

B. Exemption 4 is intended to protect confidential commercial and financial information regardless of whether DOE provides assurances that it will be kept confidential.

The Supreme Court has not specifically addressed the question of whether the United States *must* assure confidential treatment for Exemption 4 to apply. *Food Mktg. Inst.*, 139 S. Ct. at 2363 ("Can privately held information lose its confidential character for purposes of Exemption 4 if it's communicated to the government without assurances that the government will keep it private? As it turns out, there's no need to resolve that question in this case."). Subsequent cases have addressed this question and held that Exemption 4 applies regardless of whether the United States specifically assured submitters that their information will be kept private. *See Renewable Fuels Ass'n*, 519 F. Supp. 3d at 11-12 ("This Court will not and indeed cannot, be the first" to require this potential second prong to be met.); *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 113 (D.D.C. 2019). *But see N.Y. Times Co. v. U.S. Food & Drug Admin.*, 529 F. Supp. 3d 260, 286-87 (S.D.N.Y. 2021) (holding that when the government clearly expresses its intention to make public the collected records, there is no assurance of privacy necessary for exemption from disclosure). The United States has argued in other cases that government assurances of confidential treatment are not required for Exemption 4 to apply. *Renewable Fuels Ass'n*, 519 F. Supp. 3d at 11-12.

FOIA protects confidential business and financial information from disclosure, regardless of whether the government assures that the information will be kept private, and the Trade Secrets Act prohibits the government from disclosing information that falls within the scope of Exemption 4. *See McDonnell Douglas Corp. v. Widnall*, 57 F.3d 1162, 1164 (D.C. Cir. 1995) (holding that the Trade Secrets Act prohibits the government from disclosing information that would fall within the scope of Exemption 4 under FOIA); *see also Sealed Appellee #1 v. Sealed Appellant*, No. 98-20538, 1999 WL 1067548, at *1 (5th Cir. Oct. 14, 1999). A person who submits confidential commercial information has a private right of action under the Administrative Procedure Act to prevent the disclosure of that information. *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 (1979) (holding that FOIA itself does not afford a submitter any right to enjoin agency disclosure, but a submitter can seek recourse under the Administrative Procedure Act); *see also Am. Farm Bureau Fed'n v. EPA*, 836 F.3d 963, 970 (8th Cir 2016) ("A party aggrieved by an actual or impending disclosure . . . may bring a reverse FOIA action under the APA and obtain relief if the agency's decision to disclose the information is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (internal quotation marks and citation omitted)); *Ryan L.L.C. v. Dep't of the Interior*, No. 22-10373, 2022 WL 17250186, at *1 (5th Cir. Nov. 28, 2022) ("[A] district court may review an agency's decision to release information pursuant to FOIA, but it can set aside that decision [only] if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (internal quotation marks and citation omitted; alterations in original)). DOE's own regulations require notice to and an opportunity to comment from the submitter of confidential information when determining whether to disclose such information. 10 C.F.R. § 1004.11(a), (c)(3), (d). Here, the pricing information for which the Utilities seek to retain confidential treatment falls within Exemption 4 because the information is both customarily and actually treated as private and confidential, and DOE is prohibited under the Trade Secrets Act from disclosing such information.

II. DOE SHOULD PRESERVE THE CURRENT LANGUAGE REGARDING THE TREATMENT OF CONFIDENTIAL INFORMATION SO THAT OTHER CONFIDENTIAL COMMERCIAL AND FINANCIAL INFORMATION REMAINS WITHIN THE SCOPE OF THE FOIA EXEMPTIONS.

A. Under DOE's FOIA implementing regulations, import and export pricing information would be exempt from disclosure.

DOE has adopted regulations to govern implementation of FOIA. DOE's criteria for determining the applicability of Exemption 4 include whether the information is:

> 1) held in confidence by the person to whom it pertains;
> 2) customarily held in confidence;
> 3) transmitted to and received in confidence;
> 4) available in public sources;
> 5) likely to impair the ability to obtain similar information in the future if disclosed; and
> 6) likely to cause substantial harm to the competitive position of the person from whom it was obtained if disclosed.

10 C.F.R. § 1004.11(f).

Here, by applying the criteria above, it is clear that Exemption 4 applies and that the prices of natural gas imports and exports are exempt from public disclosure. As noted above, the information is customarily and actually held, transmitted, and received in confidence by the Utilities and their contract counterparties and is not available in public sources. Disclosure could also impair the United States' ability to obtain similar information in the future. Although the submission of Form FE-746R is mandatory, DOE's unwillingness to assure confidential treatment of confidential commercial information in this context could erode regulated entities' willingness to participate in other types of voluntary disclosure programs going forward. Finally, disclosure of natural gas import or export pricing information is likely to cause substantial harm to the competitive position of the submitter because such disclosure would likely affect competition in the natural gas markets and the prices charged or accepted by market participants, including the Utilities and their counterparties in natural gas transactions.

The Proposal purports to limit the circumstances under which DOE will hold the private, commercial natural gas pricing information in confidence. But DOE has historically considered this private, commercial natural gas pricing information to be confidential. And many other state and federal regulatory agencies still treat natural gas pricing information as confidential, including U.S. Customs and Border Protection, the Oregon Public Utility Commission, and the Washington Utilities and Transportation Commission.

The Federal Energy Regulatory Commission ("**FERC**") has determined that wholesale sales of natural gas, which include those reported to the EIA in Form FE-746R, are made under blanket sales certificates. Sales under the blanket certificates are made at negotiated market-based rates, not under a tariff or subject to other regulatory approval.[1] Therefore, the purchases and sales of natural gas are highly competitive and the prices at which such purchases and sales are made are treated by all market participants as highly confidential.

In addition, FERC requires natural gas market participants to submit FERC Form No. 552 ("**Form 552**") if either of their natural gas sales or natural gas purchases in the reporting year were greater than 2.2 million MMBtu. Due to the sensitivity of natural gas pricing information, the data reported in Form 552 are reported in the aggregate and no pricing detail is included in the report.[2]

For all of these reasons, DOE should continue to consider all natural gas import and export pricing information to be confidential and exempt from disclosure because of the sensitive nature of the information and the competitive harm that would result in the market from its disclosure.

B. The Utilities strongly support the Current Instructions because they preserve a competitive market for participants.

Until seeking comment on the Proposal, DOE has always provided assurances that natural gas import and export price information would be treated as exempt from disclosure under FOIA and, therefore, remain confidential. Indeed, the Current Instructions expressly exempt from disclosure the "price at import or export point for all forms of natural gas imported and exported, including LNG." The Proposal would upend the status quo without reasoned explanation and in a way that will undermine competition in the energy and natural gas market. The public disclosure of confidential pricing information could lead to anticompetitive behavior within the market, potentially harming market participants and consumers.

Disclosure of specific prices for natural gas imported and exported is especially problematic since the counterparty's name is also disclosed in Form FE-746R. Disclosing the price for the gas imported and exported in those transactions would harm the very nature of the contracting parties' relationship which is based, at least in part, on the expectation of confidentiality. In addition, disclosure of pricing information could reduce opportunities for specially negotiated reduced-price opportunities, where the actions taken by buyers or sellers could be unfairly judged because other counter-balancing terms are not reported. This could lead to a reduction in

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[1] *See* 18 C.F.R. § 284.284 for interstate pipelines and § 284.402 for other sellers.

[2] *See Transparency Provisions of Section 23 of the Natural Gas Act*, 121 FERC ¶ 61,295, P 83 (2007) ("[B]ecause the [Form 552] filing requires aggregated information and does not require reporting of price information or of transaction-specific information, the annual reporting requirement adheres to Congress's other directive 'to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors that can be facilitated by untimely public disclosure of transaction-specific information.'" (citation omitted)).

the number of available counterparties for certain natural gas buyers and sellers. This, in turn, could lead to higher natural gas or other energy prices due to lower liquidity in the marketplace.

There is no clear value to disclosing the price for individual natural gas import or export transactions since most parties already participate in industry price reporting (as overseen by FERC) where only aggregate average pricing is disclosed. As mentioned earlier in these Comments, state utility regulators have access to the terms of individual gas purchase and sale transactions, including price, but those regulators treat such price information as highly confidential.

III. THE UTILITIES DO NOT OPPOSE EXTENSION OF THE INFORMATION COLLECTION PROGRAM, BUT THEY DO OPPOSE THE PROPOSED CHANGES TO THE DISCLOSURE SECTION THAT WOULD NARROW DOE'S ASSURANCES REGARDING EXEMPTION UNDER FOIA AND PROTECTION FROM DISCLOSURE OF CONFIDENTIAL COMMERCIAL INFORMATION.

The Proposal would extend the program that collects information regarding natural gas imports and exports. DOE is seeking comment on the necessity of the Proposal and the impact analysis, clarity on the type of information collected, and mitigation of burdens. None of these questions address the biggest change that will result from the Proposal—the change to significantly narrow the scope of information that will be exempt from FOIA disclosure. Before DOE proposed such a significant, market-disrupting change, it should have specifically sought input from affected parties on the potential impacts of the proposed change.

For years, DOE has assured submitters of natural gas import and export information that the price information provided in their reports is confidential commercial information exempt from disclosure under FOIA. However, the Proposal completely reverses this position without seeking and considering input from those affected by the change. DOE has provided no explanation for this change and has not actively solicited feedback from those affected by the change. The Utilities urge that DOE decline to incorporate the changes in the Proposal related to "disclosure" and to retain the assurances regarding confidentiality for pricing of all forms of imported or exported natural gas that are reflected in the Current Instructions.

The Utilities welcome further discussion with DOE on the Proposal. Contact information for each of the Utilities is included on Attachment A to this letter.

[*Signatures on following pages.*]

Sincerely,

Dave Weber
VP, Gas Supply and Utility Support Services
Northwest Natural Gas Company

Sincerely,

/s/ Justin Dorr

Justin Dorr
Manager Natural Gas Resources
Avista Corporation

Sincerely,

Scott Madison
EVP, Business Development/Gas Supply
Cascade Natural Gas Corporation

Scott Madison
EVP, Business Development/Gas Supply
Intermountain Gas Company

Scott Madison
EVP, Business Development/Gas Supply
Montana-Dakota Utilities Co.

Scott Madison
EVP, Business Development/Gas Supply
Great Plains Natural Gas Co., a division of Montana-Dakota Utilities Co.

Sincerely,

/s/ Phil Haines

Phil Haines,
Director Energy Supply
Puget Sound Energy, Inc.

Attachment A

Contact Information

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Cascade Natural Gas Corporation
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Intermountain Gas Company
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Montana-Dakota Utilities Co.
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Great Plains Natural Gas Co., a division of Montana-Dakota Utilities Co.
Name: Kevin Connell
Phone: (701) 222-7760
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Puget Sound Energy, Inc.
Name: Phil Haines
Phone: (425) 462-3471
Email: Philip.Haines@PSE.com

From: Tran, Tu
To: Schimelpfenig, Emily K.
Cc: Maag, Kirk B.
Subject: DOE Response to the Utilities Comments on Form FE-746R, Agency Information Collection Extension, 88 Fed. Reg. 2350
Date: Tuesday, May 2, 2023 4:30:00 PM

Dear Emily Schimelpfenig,

Thank you for submitting comments on behalf of Northwest Natural Gas Company, Avista Corporation, Cascade Natural Gas Corporation, Intermountain Gas Company, Montana-Dakota Utilities Co., Great Plains Natural Gas Co., a division of Montana-Dakota Utilities Co., and Puget Sound Energy, Inc. (the "Utilities") in response to the January 13, 2023 notice issued by the U.S. Department of Energy, Office of Fossil Energy and Carbon Management. The notice announced changes to Form FE-746R, OMB Control Number 1901-0294. DOE published this notice in the Federal Register on January 13, 2023 at 88 Fed. Reg. 2350 and received the Utilities comments by email on March 14, 2023.

DOE uses Form FE-746R to collect critical information on U.S. natural gas trade from authorized importers and exporters of natural gas, including importers and exporters of liquefied natural gas (LNG). The notice proposes to change the confidentiality policy for select information reported on Form FE-746R using the exemption under the Freedom of Information Act (FOIA) to protect certain price information reported on Form FE-746R, LNG export prices, and for all other price information reported on Form FE-746R to be considered public information.

The Utilities oppose the proposed changes as they allow confidential commercial information to be made available to the public which could result in competitive harm to the Utilities, their contract counterparties, and other market participants. The Utilities, request DOE to modify the proposal to retain the current scope of assurances regarding information that is exempt from disclosure, as is reflected in the current form instructions.

DOE appreciates the Utilities comments. Based on comments filed in support of the protection of individual submissions of price data submitted on Form FE-746R, DOE's final proposal does not make changes to the existing data collection. DOE will use the exemptions under the FOIA to maintain the protection of transaction-level price data for all forms of natural gas imported and exported, including LNG, to the extent that it satisfies the criteria for exemption under the Freedom of Information Act (FOIA), 5 USC §552, as amended, and the Department of Energy (DOE) regulations, 10 CFR §1004.11, implementing the FOIA. Price data will not be published at a transaction level for all forms of natural gas imported and exported, including LNG. The final proposal balances the public interest to be served by publishing significant amounts of aggregate price data but retaining protection for transaction-level data that would cause competitive harm to natural gas importers and exporters.

A Federal Register Notice will be published in the near future when Form FE-746R is submitted to the Office of Management and Budget for their review.

If you have further questions or concern regarding Form FE-746R, please feel free to contact me.

Sincerely,
Tu Tran
Economist
U.S. Department of Energy
202-235-5873