December 23, 2005

Mr. Kenneth Wade
Project Manager
Office of Nuclear Energy (NE-30)
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

SUBJECT: Standby Support for Certain Advanced Nuclear Facilities (70 *Fed. Reg.*, 71107, November 25, 2005)

Dear Mr. Wade:

Constellation Energy Group, Inc. ("Constellation") appreciates the opportunity to provide comments on the Notice of Inquiry and Request for Comments (NOI) published by the Department of Energy (70 *Fed. Reg.*, 71107, November 25, 2005). This NOI sought comments and information from the public to assist the Department in deciding how to implement Section 638 of the Energy Policy Act of 2005. Section 638 of the Energy Policy Act authorizes the Secretary of Energy to enter into standby support contracts with sponsors of advanced nuclear power facilities to provide risk insurance for certain delays attributed to facility licensing or litigation.

Constellation is the nation's leading competitive supplier of electricity to large commercial and industrial customers and the nation's largest wholesale power seller. Constellation owns a diversified fleet of more than 100 generating units located throughout the United States, totaling approximately 12,000 megawatts of generating capacity. Our portfolio based on electricity produced is approximately 50 percent nuclear. We own and operate the Calvert Cliffs nuclear plant in Maryland, and the Nine Mile Point and Ginna nuclear stations in New York State.

Recently, we announced our intention to apply to the Nuclear Regulatory Commission (NRC) for a combined construction and operating license (COL). This followed our announcement in early fall of our partnership with AREVA, and the formation of UniStar Nuclear. The UniStar Nuclear venture is a new and unique business framework to develop and deploy a standardized fleet of new nuclear power plants in North America.

The standby support contracts and other incentives provided in the Energy Policy Act are critical to our ability to develop and deploy new nuclear power plants. We look forward to working with the Department of Energy, the NRC and others on implementation of the advanced nuclear

facilities related provisions in the Energy Policy Act, such as the section 638 standby support that is the focus of the Department's NOI.

Constellation's comments are divided into two sections. The first section (Attachment A) provides Constellation's position on the major issues that must be addressed in implementing regulations to ensure that the risk insurance achieves its statutory objectives. The second section (Attachment B) provides comments on the specific questions posed by the Department in the NOI.

As a general matter, the Department's regulations should focus on establishing the framework for implementation of the standby support program. The regulations should address issues such as the process for entering into and determining the effectiveness of such contracts, clarifying the statutory eligibility criteria, establishing the procedures for determining the pricing and scoring of coverage, and establishing the procedures for claim management and dispute resolution. The specific terms of coverage and other terms and conditions should be addressed in standardized contracts.

While we recognize that time is short to meet the statutory deadline of issuing an interim final rule by May 2006, we believe that it is critical for the Department to issue for public comment a draft rule or provide other mechanisms for additional input before issuance of the interim final rule. We believe that the Department did a very good job of identifying a number of issues related to implementation of Section 638 in the NOI, but there is far to go in the implementation process from issue identification to final regulations. Additional public input in the regulatory process is critical to putting in place a program that will be effective in achieving the objective of facilitating the investment in, and the construction and operation of, advanced nuclear facilities. An effective program also should include standardized contracts, and such contracts should be developed with public input and should be made available for review and comment in addition to the regulations.

Sincerely,

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ATTACHMENT A

General Implementation Issues for Title VI, Section 638 Standby Support for Certain Nuclear Plant Delays

The primary objective of Section 638 is to facilitate the investment in, and the construction and operation of, advanced nuclear facilities by reducing the risk of regulatory uncertainty (including litigation challenges) that could delay commercial operation of a new nuclear power plant. To best achieve this objective, Section 638 should be implemented through well-defined regulations that are equitable to sponsors and investors, and which do not unduly discriminate in favor of or against any particular advanced reactor design.

A. Certainty for Project Investors

As the Department stated in its Notice of Inquiry, "the overriding purpose of section 638 is to facilitate the construction and full power operation of new advanced nuclear facilities by providing risk insurance for such projects." This risk insurance is needed not only to reduce financial disincentives and uncertainties for project sponsors, but also for project lenders. Accordingly, to achieve their purpose standby support contracts must be "bankable." They must be clear and unambiguous, have efficient and effective dispute resolution, and need to be assignable to project lenders.

B. The Implementing Regulations Must Provide Objective Criteria for Entering Into and Determining the Effectiveness of Section 638 Contracts.

Section 638 coverage is limited to a total of six reactors, with the first 2 reactors receiving 100% coverage for the covered costs of delay (but not more than $500 million per contract) and the next four reactors receiving 50% coverage (but not more than $250 million per contract, and only costs incurred after the first 180 days of delay). Thus, the primary focus of the regulatory implementation process will be determination of project selection and status in the queue for effectiveness of the standby support provided under Section 638—both as to coverage as one of the initial six reactors, and as to coverage at either 100% under Section 638(d)(2), or 50% under Section 638(d)(3).

Since the availability and coverage scope of the Section 638 contracts are limited, appropriate sponsor eligibility and queue allocation are critical. Queuing problems encountered in other areas of energy regulation (*e.g.*, generator interconnections) must be avoided. In this regard, contract eligibility and the queuing process should promote the statutory objective of achieving timely commercial operation of new nuclear power plants and eliminate situations where contracts and coverage are misallocated to projects that either do not proceed or, once commenced, are suspended for reasons other than Section 638 covered delays. Therefore, the implementing regulations must provide objective criteria to (i) determine sponsor eligibility to enter into a contract, (ii) determine project status in the queue, (iii) establish a mechanism for a

project to become a member of or advance in the queue if a higher-queued project does not proceed, and (iv) provide rollover in coverage from the 50% to 100% level, to the extent initial projects are not delayed and thus do not trigger the coverage.

1. Contract Eligibility Should Be Determined at the Time of Submitting a Sufficient Application for COL.

Under Section 638(a)(4), only persons who have "applied for or been granted a combined license" can be a sponsor eligible to enter into a Section 638 contract. The definition of "applied for" thus should require that a sponsor have submitted a combined construction and operating license ("COL") application that the Nuclear Regulatory Commission ("NRC") accepts as sufficient for docketing, rather than an application submitted for timing purposes, yet deemed insufficient for review by the NRC. This approach would mitigate problems associated with line "squatting" or the first-in-time approach, and allocate standby support protection to those sponsors and projects that appear to be the most prepared and likely to achieve commercial operation absent regulatory or litigation delay.

Regulations also should recognize the inherent risks of development and nuclear licensing processes, in that there are likely to be far more sponsors who submit COLs than there are sponsors who ever receive, or begin construction pursuant to, an approved COL. Therefore, in order to promote the end-state of having six new commercially operating reactors, regulations should allow for a "pool" of sponsors initially eligible to enter into a contract based solely on the statutory criteria of having a COL application submitted and docketed at the NRC and the statutory criteria of having received a COL and commenced construction (as discussed below) as the factors determining status in the "queue" and effectiveness of the final standby support contract.

2. Queue Status Should Be Determined as of the Date of Pouring of Safety-Related Concrete.

Section 638 (d)(2)-(3) determines both queue eligibility and queue positions for the first six reactors that receive combined licenses and on which construction is commenced. The conditions to effectiveness of coverage (*i.e.*, queue position) thus include both the receipt of the COL and commencement of construction. The term "commencement of construction" should be defined in the regulations as "the commencement of pouring of safety-related concrete." For the avoidance of doubt, the phrase "pouring of safety-related concrete" should be further defined as "placement of concrete for the nuclear island base mat." Given the degree of early site preparation, organization and commitment that sponsors would undertake to reach the point at which they pour safety-related concrete, this approach would best further the intent of the legislation by ensuring that only "real" projects with a high likelihood of achieving commercial operation receive one of the six queue positions. Further, by aligning the conditions for effectiveness of coverage to the conditions for the effectiveness of financing, this approach should facilitate the financing process.

3. Queue Positions Should Roll to Lower or Non-Queued Sponsors Upon Default.

Either a failure to satisfy the conditions to effectiveness of a contract within a specified time period, or abandonment or suspension of construction for an extended period (*e.g.*, 180-360 days) for reasons other than a covered delay or a force majeure, should result in the loss of coverage (termination of the contract). This concept would advance statutory intent by enabling a lower-, or non-queued sponsor, who is prepared to pursue the construction of an advanced nuclear facility, the opportunity to obtain coverage and advance in the queue or assume the newly open position in the queue in order to arrive at the six covered units.

As discussed further in Attachment B, contract termination while necessary, should not be easily triggered and should be subject to lender cure and step in rights.

4. Unutilized Higher Queue Coverage Should Roll to Lower-Queued Sponsors.

It is possible that the first two projects covered under 638(d)(2) will reach full power without incurring delay (thereby not utilizing the funds to cover such delay). If so, the next project(s) in the queue should be eligible for the full coverage levels under 638(d)(2). This rollover in coverage level would continue, for example, through to the fifth and sixth project, if projects three and four also failed to utilize the full coverage that had been "rolled" to them under 638(d)(2). Rollover in coverage would not, however, extend beyond the first six units to reach commercial operation.

C. Regulations Should Promote the Benefits of Diversity in Reactor Design.

In identifying the criteria of designs eligible for coverage, the implementing regulations should seek to (i) facilitate planning and investment by clarifying which designs are eligible, and (ii) promote increased safety, efficiency, and reliability through competitive processes.

Pursuant to Section 638(b)(1) standby support coverage is available only for "advanced nuclear facilities" and the six reactors receiving coverage can consist of not more than three different reactor designs. An "advanced nuclear facility" is defined in Section 638(a)(1) as "any nuclear facility the reactor design for which is approved after December 31, 1993, by the Commission (and such design or a substantially similar design of comparable capacity was not approved on or before that date)."

In this regard, the implementing regulations should:

- not preclude consideration of three different new reactor designs;
- not provide a "no later than" date for design approval;
- clarify that a reactor design for which a design certification is pending at the time the COL application is submitted by a sponsor is eligible (*i.e.*, should reflect the ability to proceed with design certification and COL on a parallel process);

- clarify the meaning of "substantially similar" to specify that no reactor design that obtains its own NRC design certification after December 31, 1993, shall be considered "substantially similar" to a design approved on or before such date; and
- specify that no more than four facilities of the same reactor design (regardless of reactor vendor) can qualify for coverage.

By following the foregoing guidelines, the implementing regulations will create a more competitive, less exclusionary environment that will consider at least two (and not necessarily preclude a third) new reactor designs. Consequently, reactor vendors will be incentivized to continue considering improvements to diverse designs, which should provide the concomitant benefits of increased reactor safety, efficiency, and reliability.

D. Procedures to Determine Appropriations Should Be Developed With Proper Industry Input, Allow for Multi-Year Money, and Be Backed By the Full Faith and Credit of The United States.

Procedures for establishing the budget cost of the program under the Federal Credit Reform Act of 1990 ("FCRA") for appropriations and program fee purposes need to be developed with the Office of Management and Budget ("OMB"). Models for determining the "risk premia" and "subsidy cost" already exist both in the public sector (e.g., Overseas Private Investment Corporation) and the private sector with respect to pricing and subsidy cost for analogous political risk insurance.

Coverage for risks under the standby support coverage should be priced similar to this other insurance against sovereign political risk. Accordingly, we do not believe it is necessary to reinvent the process for making the subsidy cost calculation. In the event the Department and OMB proceed with a separate process for determining the subsidy cost of standby support coverage, it would be critical to obtain input from the insurance industry, nuclear energy industry experts and other interested parties in developing the process. Factors on which such input should be sought include the methods for (i) calculating the probability and expected length (severity) of delay, and (ii) estimating the cost of principal and interest, incremental cost of replacement power and other costs of such a delay at the time the contract is entered into.

Appropriations for the program should be "multi-year" money. That is, such funds should be available for obligation for five to ten years. This is necessary not only to provide a multi-year period for entering into the contracts and obligating the funds initially, but also to maintain the availability of such funds for replacement contracts in the event any of the initial six contracts is terminated and the funds for such contract are de-obligated.

Lenders and other investors providing financing for these projects are unlikely to accept funding or appropriations risk for the coverage provided under this program. In other words, lenders and investors are not likely to accept the risk that there may be insufficient funds in the accounts at the time a covered payment is triggered or the risk that Congress would not appropriate in a timely manner additional funds to cover such an insufficiency. An insufficiency

could result either because the budget cost as estimated at the time the contract was entered into was too low or because the number or extent of delays covered is greater than estimated. Accordingly, in the event there are insufficient funds in the account to meet a covered cost, payment should be made from the permanent indefinite appropriations financing account. The implementing regulations should clarify this access to permanent indefinite appropriations. In addition, it is likely that lenders and other investors will want clarification through an Attorney General Opinion (or other similar comfort) that the obligations under Section 638 are "full faith and credit" obligations of the United States.

E. Contract Coverage Should Be Clearly Defined To Facilitate Financing.

The implementing regulations and the contract terms and conditions must provide certainty and clarify key aspects of contract coverage in order to meet the requirements of lenders and investors (*i.e.*, to be "bankable"). In addition, while Section 638 authorizes the Secretary to enter into such contracts with sponsors, the regulations and contracts must permit assignment of the contracts to project lenders in support of financing for the new plants. The Department also should be prepared to enter into third party consents or direct agreements with such lenders as part of the financing process. A standard form consent should be drafted with the input of project finance experts as part of the implementation process.

1. Covered Delays Should Be Clearly Defined and Administered in a Manner That Avoids Protracted Litigation and Further Delay.

Section 638(c)(1) provides that the Secretary will pay specified costs under a covered contract if full power operation is delayed by:

> (A) the failure of the Commission to comply with schedules for review and approval of inspections, tests, analyses, and acceptance criteria established under the combined license or the conduct of preoperational hearings by the Commission for the advanced nuclear facility; or
> (B) litigation that delays the commencement of full-power operations of the advanced nuclear facility.

The implementing regulations should provide that each contract will establish an agreed upon schedule for review and approval, with any deviations by the Commission from such agreed schedule as the basis for coverage. Further, to ensure schedule certainty, all schedules should be finalized at least ninety days prior to queue eligibility (*i.e.*, pouring of safety-related concrete). Moreover, because timely payment of covered delays will be critical to the completion of the projects and will be a requirement of lenders and investors, the implementing regulations should provide for (i) an efficient claims management process with defined time frames of 30-60 days after claim submittal for claim determination and (ii) binding, expedited third party arbitration of disputes under the covered contract (rather than protracted administrative adjudication).

Clarity also should be given to the meaning of "full power operation" so that the regulations accomplish the intended statutory purpose; *i.e.*, providing coverage for delay in the ability of a sponsor to complete construction, all required testing, and the commencement of commercial operation. In addition, "litigation" needs to be defined so as to include all administrative hearings, including without limitation any hearing under Part 52.103 of the Commission's regulations.

2. Exclusions Should Be Clearly Defined to Provide Certainty.

Exclusions from coverage under Section 638(c)(2) and issues such as concurrent delays should be clarified in the implementing regulations and contracts. Definitional certainty in this area is necessary for lenders and investors to determine allocation and pricing of risk. In particular, the treatment of standard concepts such as "force majeure" as it relates to the statutory exceptions should be clarified. Additionally, the definition of "normal business risks" need to be qualified so as to not exclude from coverage things such as intervening events that result in regulatory changes.

3. Covered Costs Should Be Inclusive Rather Than Exclusive.

Section 638(d)(1) states that the costs to be paid by the Secretary pursuant to such a contract "are the costs that result from a delay covered by the contract." Moreover, Section 638(d)(5) provides that the types of covered costs listed in that subsection are inclusive, rather than exclusive. Because the costs of a covered delay likely would include significant costs beyond principal and interest and the incremental cost of replacement power as listed in (d)(5)(A) and (B), the implementing regulations and contracts should define the full range of costs covered under the contracts.

Other costs of delay include costs of demobilization and remobilization, idle time costs incurred in respect of equipment and labor, increased general and administrative costs, and escalation costs for the completion of construction. In addition, to the extent that litigation or changes in regulation or government initiated modifications to the COL result in required redesign, alteration, additions or improvements to the project, then the additional costs associated with such redesign or alterations should be covered.

Lastly, with respect to the listed covered costs, the implementing regulations and contract should define the "fair market price of power purchased." To provide financing certainty, "fairness" cannot be left to an after-the-fact or subjective determination. The price paid should be presumed fair if reference can be made to a binding bilateral contract or a published market price index, and the government would bear the burden of proving otherwise.

ATTACHMENT B

Comments on Specific Questions in the Notice of Inquiry

1. **Question:** *[W]hether the implementation of section 638 would be facilitated by the Department further clarifying, either in regulations or in the standby support contracts themselves, these terms [i.e., advanced nuclear facility, sponsor, and combined license] or any other terms set forth in section 638 (such as "the fair market price of power" in subsection (d)(5)(B)). If a commenter believes that it would be more appropriate for certain clarifications and definitions to be provided in regulations instead of the contracts themselves, or vice versa, the commenter should explain why.*

   Comment: A number of terms set forth in Section 638 should be clarified or further defined. These terms include "advanced nuclear facility", "sponsor" and "fair market price of power." The terms "advanced nuclear facility" and "sponsor" should be defined in the regulations instead of the contracts because they address the issue of project eligibility. Greater clarity with respect to project eligibility early in the project development and selection process through regulations would facilitate implementation of section 638.

   With respect to the definition of "advanced nuclear facility", the implementing regulations should:

   - not preclude consideration of three different new reactor designs;
   - not provide a "no later than" date for design approval;
   - clarify that a reactor design for which a design certification is pending at the time the COL application is submitted by a sponsor is eligible (*i.e.*, should reflect the ability to proceed with design certification and COL on a parallel process);
   - clarify the meaning of "substantially similar" to specify that no reactor design that obtains its own NRC design certification after December 31, 1993, shall be considered "substantially similar" to a design approved on or before such date; and
   - specify that no more than four facilities of the same reactor design (regardless of reactor vendor) can qualify for coverage.

   By following the foregoing guidelines, the implementing regulations will create a more competitive, less exclusionary environment that will consider at least two (and not necessarily preclude a third) new reactor designs. Consequently, reactor vendors will be incentivized to continue considering improvements to diverse designs, which should provide the concomitant benefits of increased reactor safety, efficiency, and reliability.

   With respect to the definition of "sponsor", the regulations should require that a sponsor

have submitted a COL application that the NRC accepts as sufficient for docketing, rather than an application submitted for timing purposes, yet deemed insufficient for review by the NRC. Requiring that a COL application be accepted by the NRC as sufficient would mitigate problems associated with line "squatting" or the first-in-time approach, and allocate standby support protection to those sponsors and projects that appear to be the most prepared and likely to achieve commercial operation absent regulatory delay.

The definition of the "fair market price of power purchased" should be clarified in the implementing regulations or in a standard form contract. To provide financing certainty, "fairness" cannot be left to an after-the-fact or subjective determination. The price paid should be presumed fair if reference can be made to a binding bilateral contract or a published market price index, and the government would bear the burden of proving otherwise. If would be preferable to clarify this definition in the regulations as well. However, the objectives of uniform treatment of contract holders and certainty for development and closing of the financing could be achieved through a standardized contract so long as the form of such standardized contract is developed early in the program process.

2. **Question:** *[The NOI stated that the Department's initial view was to enter into binding agreements with sponsors that submit COL applications to the Commission, at any time on or after such an application is submitted. These agreements between the Department and project sponsors would not themselves be standby support contracts, but would commit the Department to enter into standby support contracts under section 638 with the sponsors of the first six reactors for which a COL is granted and construction commenced.] In commenting on this potential approach, consideration should be given as to what provisions might be included in the agreements to deal with issues such as calculating the amount of funding, if any, from the sponsors and taking into account the extent to which appropriated funds are available. The Department requests comments on whether, at the time the Department and the sponsors enter into the binding agreement or at any another specified time, the sponsors should be required to deposit funds in an escrow account to cover all or some of the anticipated funding requirements of the contract. The Department also welcomes comments on whether other options would be more effective in achieving the objectives of section 638, and, if so, what regulatory or contractual provisions would be useful in implementing these options.*

Comment: As discussed in Attachment A, since the availability and coverage scope of Section 638 contracts are limited, appropriate sponsor eligibility and queue allocation are critical. The long lead times and business decision process associated with project development and financing do not match the statutory timing for determining effectiveness and level of coverage (which is tied to COL receipt and start of construction). Accordingly, it is necessary for the regulations to establish a two stage process involving (i) a "conditional pool" of projects eligible for standby support based solely on the statutory criteria of having a submitted and docketed COL application for

an advanced nuclear facility (as defined in the statute and regulations), followed by (ii) determination of the final status in the "queue" and effectiveness of the final standby support contract based on the statutory criteria of having received a COL and commenced construction (as further defined in the regulations). Establishing a pool of eligible projects and being able to join the pool at an early stage followed by a determination of queue status and effectiveness of the standby support contract at a subsequent stage would facilitate the process of project development and financing. The Department's concept of entering into a preliminary binding agreement at any time on or after a COL application is submitted and docketed followed by the definitive standby support contract for first six sponsors to obtain a COL and commence construction establishes such a two stage process.

We would support such a concept as long as the preliminary agreement and the Department's obligation to enter into the final standby support contract:

- are binding on DOE without conditions;
- attach the form of standby support contract;
- are not contingent on subsequent appropriations; and
- are subject to specific enforcement

The two stage approach can be achieved either (i) as contemplated by the Department through a preliminary binding agreement and a subsequent definitive standby support contract, or (ii) through execution of one definitive and binding agreement that would contain conditions to effectiveness of the standby support obligations. Those conditions to effectiveness would be the same as the conditions to entering into the definitive contract in the two agreement approach (i.e., receipt of COL, commencement of construction, position as one of the first 6 to achieve the foregoing, not more than 3 reactor designs, and payment of any required insurance premia).

In either approach, while the regulations should clarify the statutory criteria for eligibility[1] (i.e., eligibility for the pool) and the criteria for issuance or effectiveness of the standby support contract[2] (i.e., queue status), the regulations or implementation process should not contain additional eligibility criteria not enumerated in the statute.

A requirement for the deposit of sponsor funds in an escrow account is unnecessary and would result in an unproductive expenditure of time and additional expense. Any funding requirements under the contract could be adequately addressed by requiring payment of such funds as a condition precedent to issuance of the definitive standby support agreement. This would address any concerns relating to meeting Energy Policy Act and Federal Credit Reform requirements that funds be deposited prior to the Secretary entering into a standby support contract. Any concerns about a sponsor's

[1] Such as definition of sponsor and advanced nuclear facility, as discussed above.
[2] Such as definition of commencement of construction, as discussed below.

ability to fund a required payment are more than adequately addressed through the NRC licensing process and by requiring payment as a condition to effectiveness. An escrow account mechanism is unnecessarily cumbersome and would increase project costs without any significant benefits.

3. **Question**: *The Department requests comments on whether to utilize an application process. For example, should the Department require a fee to accompany the application, and, if so, how much should the fee be and should it be refundable? Should the application process be used to assist in determining the amount of funding needed prior to entering into a contract? Should the applicant/sponsor be required to submit an analysis showing the proposed "cost" of the standby support contract? Should the application process be open to all sponsors or should there be criteria to exclude certain entities or to select among applicants? What level of detail should the Department institute in any application process? The Department requests comments on the advantages and disadvantages of a detailed application process, including comments on the content and how best to implement such an application process.*

Comment: Any application process should be limited to providing the Department with notification of intent to obtain standby support coverage and information needed to demonstrate that the sponsor has met the eligibility criteria to enter into the preliminary agreement (i.e., docketed COL application). The cost and time involved in licensing and constructing an advanced nuclear facility are already prohibitive without adding another layer of regulatory burden and delay through an application process and fees. Indeed, such a process would be in conflict with Congressional intent in enacting Section 638.

The application process should be open to all sponsors that have submitted a COL application that the NRC accepts as sufficient for docketing. There should not be any criteria to exclude certain entities or select among applicants beyond those contained in the statute. Sufficient criteria and screens are in place as a result of the process for preparing and docketing a COL application and the process outlined in the NOI for entering into the definitive standby support contract (i.e., contracts provided to the sponsors of the first six reactors for which a COL is granted and construction commenced, subject to the statutory requirement limiting contracts to not more than three different designs). Any application process that goes beyond these minimal notification requirements risks establishing another government decision process that itself could create delays and would be inconsistent with the statutory scheme that establishes the clear and limited criteria for eligibility.

4. **Question:** *The Department also requests comments on whether the regulations or the contracts themselves should provide DOE with the right to cancel a contract should a sponsor not proceed diligently to construct a facility that has received a COL and on which construction has commenced. Because the Act only allows DOE to enter into standby support contracts "that cover a total of 6 reactors," should DOE be able to cancel a contract in certain circumstances, thereby potentially "freeing up" one or more*

of the authorized spots so that DOE could enter into a standby support contract with another sponsors? If so, what are the circumstances that should allow DOE to do so? DOE requests comments on all aspects of this issue.

Comment: Because the availability and coverage scope of section 638 contracts are limited, DOE should have the right to cancel a contract in the event a project is abandoned or construction is suspended for an extended period (e.g., 180-360 days) for reasons other than a covered delay or a force majeure. Any appropriated funds obligated with respect to a contract that is cancelled should be de-obligated and made available for another contract. Accordingly, appropriations for the program should be "multi-year" money. Such funds should be available for obligation for an extended period (5 to 10 years) in light of the extended construction period for such projects and to ensure the availability of such funds for replacement contracts in the event of a contract termination.

While contract termination should not occur easily, DOE should have the right to terminate a contract where a project has been abandoned or in the case of an uncovered or otherwise unexcused, extended suspension of construction. This concept would advance the statutory objective by making the unused slot for standby support coverage available to a sponsor who is prepared to pursue construction of an advanced nuclear facility in order to arrive at the statutory six covered units. This mechanism should be utilized to allow both (i) a project sponsor that did not have standby support coverage to obtain one of the six contracts, and (ii) in the case the terminated contract was one of the initial two receiving 100% coverage under section 638(d)(2), the project sponsor with the more limited coverage under section 638(d)(3) and who is next in the queue to obtain the full 100% coverage under (d)(2).

Project lenders should have the right to cure or step in and complete the project (or transfer the projects to an eligible sponsor that would complete the project) prior to the Department's exercise of any termination rights. The cure period should be sufficient to encompass any time required to obtain a transfer or issuance of the COL to the substitute sponsor as long as such substitute sponsor was diligently pursuing the COL process at the NRC.

5. **Question:** *[Statutory provisions allow acceptance of non-federal funds, but provide that such funds can only be used to pay covered costs. The Department anticipates that any unexpended funds would be deposited into the general Treasury at the end of the program.] The Department requests comment as to what extent, if any, these provisions will affect participation in the program.*

Comment: The requirement to deposit unexpended funds into the Treasury, in and of itself, should not affect participation in the program. However, participation in the program could be affected if the estimated cost of the program and the required amount of non-federal funds is too high.

In this regard, Section 638 (b)(2)(C)(ii) should not be interpreted to require that the total amount of the incremental cost of power (cost of coverage) be deposited into the Standby Support Grant Account on a $1 for $1 basis (as compared to the Federal Credit Reform Act estimate of the subsidy cost/estimated risk of loss). Such a result would make this aspect of the standby support unusable and could not be what Congress intended. Similarly, Section 638(d)(4)(A) appears to condition payment of the covered costs relating to incremental cost of power on sufficiently of funds. This would unacceptably require lenders/sponsors to assume the risk of the adequacy of the funds in the account (which would depend on events from unrelated contracts or on subsequent Federal appropriations). These provisions related to the Grant Account would significantly restrict participation in the power purchase coverage and therefore impact overall participation in the program if not addressed. Consistent with Federal Credit Reform Act treatment of other Federal guarantees and insurance, the Department should either (i) work with Congress to obtain technical corrections, (ii) in the regulations interpret the word cost in Section 638(b)(2)(c)(ii) as estimated cost/subsidy cost as provided under credit reform, or (iii) obtain adequate Federal funding to cover the costs.

6. **Question:** *The Department also requests comment on what is the appropriate mix between government appropriations, sponsor payments, and a combination of both.*

Comment: Since the risk of delay or litigation covered under the standby support program relates solely to the government's licensing process, the cost of such coverage should be covered entirely by government appropriations. The uncertainties and risks from the licensing process and the potential for litigation related to such process are major impediments to the development and operation of new nuclear power plants. These are risks created by the government regulatory process which the government is in the best position to control or mitigate and which the government should bear.

7. **Question**: *The Department must decide whether to calculate the funding on a generic basis that would result in the same funding for each facility or on a facility specific basis that would result in different funding for each facility. The Department also must decide whether to differentiate between the initial two facilities and the subsequent four facilities. The Department requests comments on how it should exercise this discretion and, in particular, what factors it should consider in determining both the overall amount of funding and the portion, if any, required from the sponsor.*

Comment: The Department working with OMB, industry and other interested parties should develop a standardized methodology for calculating the expected cost. As discussed in Attachment A, the Department and OMB should use existing public and private sector models for estimating the cost of this political risk coverage. While this methodology would be applied to each contract in a uniform manner, the expected cost of each contract could vary. For example, while the risk of delay and expected duration of delay should be uniform across the six projects, the amount of the costs covered (such as, principal and interest) could be facility specific depending on the expected capital

cost of the facilities. Moreover, because coverage for the subsequent four facilities is limited to 50% of covered costs and includes a 180-day waiting period, the expected cost and required funding for the contracts covering the subsequent four facilities should be significantly less than that of the initial two facilities.

The Department should develop a subsidy cost estimation model and make that model readily available to project sponsors.

8. **Question:** *Whether, if a sponsor participates in the section 638 risk insurance program, and any loan guarantee program for which the sponsor may be eligible pursuant to Title XVII of the Act, and/or the production tax credits for advanced nuclear facilities in section 1306 of the Act, there should be any adjustment in the amount paid to the Department by the sponsor to participate in more than one program or in the amounts that a sponsor can receive under more than one program.*

Comment: There is no statutory language in the Energy Policy Act nor any legislative history indicating any intention by Congress to limit any of those programs if project sponsors participate in more than one program. Accordingly, participation in the different programs established under the Energy Policy Act of 2005 should not limit the eligibility or the amounts that a sponsor can receive under any of these programs. The objective of these programs is to facilitate and encourage the construction and full power operation of new advanced nuclear facilities. The programs provide different types of incentives which are complementary, not exclusive.

In the event that a project obtains standby support coverage under section 638 and a loan guarantee under Title XVII, the cost of the loan guarantee should be adjusted to reflect the reduced risk of default on the underlying debt obligation as a result of the standby support. Adjusting the subsidy cost of the loan guarantee in this circumstance would avoid double counting the risk of regulatory or litigation delay where such risk is covered under a section 638 standby support contract.

9. **Question:** *[Given the complexity of the ITAAC review process, a back-loading of submissions to the Commission toward the end of the 180-day period might cause the Commission to be unable to complete its audit process prior to the fuel loading date. Thus, while a delay in operation might initially appear to be attributable to delays by the Commission, in fact the delay might be more attributable to a sponsor's relatively late completion and submittal of the ITAACs. The Department notes that these issues likely could be satisfactorily addressed through Commission regulations, audit procedures or guidance as they currently exist, or modified as appropriate and necessary.] If no changes were made to the Commission's current regulations or procedures, however, the Department requests comments on how to address this situation either through the Department's section 638 regulations or through the standby support contracts.*

Comment: Existing NRC procedures adequately address this issue. Any delay in the ITAAC process should be covered except in the event the NRC suspends ITAAC review within the 180 day period because of the action or inaction of the applicant.

10. **Question:** *The Department also believes it is possible that even if there is an ITAAC-related delay attributable to Commission regulatory delays, such a delay in the regulatory schedule might not be the cause of any delay in the full power operation of a nuclear facility that does in fact occur. For example, other factors (such as construction or engineering delays) might contribute to or be the primary cause of the delay. The Department requests comment on how best to establish whether the Commission failed to comply with the ITAAC schedules and, if so, whether such delay by the Commission is in fact the cause of a delay in full power operation. Specifically, are there any objective, unambiguous triggers that the Department could include in a regulation or in individual contracts to better ascertain whether a delay should be attributable to the Commission and thus covered by the contacts.*

Comment: It is not practical to expect to be able to determine cause and develop unambiguous triggers in advance through regulations or contract language. Rather the standards should be set consistent with the statute and an efficient and expedited claims management process should be established with defined time frames of 30-60 days for claims processing with expedited, third-party arbitration of any disputes.

In this regard, once the sponsor has demonstrated that a delay in full power operations resulted from a covered delay, then the Department, as the insurer, should have the burden of showing that such delay or a portion of such delay should be excluded from coverage on the basis of concurrent or contributory delays resulting from one of the statutory exclusions.

11. **Question:** *The Department requests comment as to how best to treat delays that are caused by other governmental agencies [e.g., emergency planning process at FEMA or at state and local governments] and thus may be beyond the control of the Commission.*

Comment: Delays in the NRC's making necessary determinations to permit full power operations should be covered regardless of whether the delay was caused by other Federal agencies or state and local governments. The issue is not control or fault but whether delay resulted from the regulatory process or litigation.

12. **Question:** *The Department is inclined to interpret subsection (c)(1)(A) as meaning that a "covered delay" includes any delay caused by the conduct of preoperational hearings by the Commission. The Department requests comments on this interpretation, how best to implement it, any alternatives, and all other aspects of subsection (c)(1)(A). In particular, given the potential interpretation that some portion of a delay caused by a preoperational hearing might not be considered a "covered" delay, the Department requests comments on whether a regulatory delay should only be considered a "covered*

delay" after a certain time period, as specified by contract or regulation. If so, what time period would be appropriate?

Comment: "Covered delay" should include any delay resulting from the conduct of preoperational hearings. The Department should confirm this interpretation in the regulations as such interpretation is consistent with the plain reading of statute and statutory intent.

13. **Question:** *The Department is inclined to interpret the term "litigation" in subsection (c)(1)(B) as meaning only litigation in state, federal, or tribal courts, including appeals of Commission licensing decisions, and excluding administrative litigation that occurs at the Commission as part of the COL process. The Department requests comment as to what type of litigation delays should be covered by the Program.*

Comment: Covered delays from litigation should include any litigation that results in a delay after the effectiveness of the standby support contract, regardless of whether such litigation is a judicial or administrative proceeding and regardless of whether such litigation commenced before or after issuance of the COL.

14. **Question:** *Although the term "full power operation" is not defined in section 638 or 10 CFR part 52, the Commission generally considers this to be operation at five percent or greater. (See 10CFR 2.340(g)(1); and Statement of Policy on Issuance of Uncontested Fuel Loading and Lower Power Testing Operating Licenses, 46 FR 47906, September 30, 1981). The Department intends to follow the Commission practice but nevertheless requests comments on how to incorporate this interpretation of "full power operation" into the regulations carrying out section 638.*

Comment: Interpreting "full power operation" as "operation at five percent or greater" would be inconsistent with the plain meaning of those words and statutory intent. The purpose of the standby support coverage is to reduce the regulatory and litigation uncertainty that has inhibited the development and financing of new nuclear plants by providing coverage during the period from issuance of the COL and commencement of construction through completion of construction and all required testing and commencement of commercial operation. Coverage should not stop at five percent operation. This level is clearly not "full power" operation and project sponsors and lenders continue to face substantial risk that regulatory or litigation delays could delay commercial operation. The term "full power operation" should be defined as operation at the facilities rated power level [sum certain megawatts thermal], which is the power level for which the NRC has performed the safety analysis. It should not be defined as just operation at five percent or greater.

15. **Question:** *Exclusions. Subsection (c)(2) expressly precludes the Secretary from paying costs resulting from three general areas: "(A) the failure of the sponsor to take any action required by law or regulation; (B) events within the control of the sponsor; or (C)*

normal business risks." The Department requests comment on how best to interpret and apply this subsection, including examples of each category of exclusion. The Department particularly invites the public to respond to the following questions. What areas of laws and regulations are likely to be involved? What events should be considered within the control of the sponsor and what events should be considered beyond its control? What should be considered a normal business risk, and thus not coverable under the Program? How should these exclusions be implemented with respect to the expressly covered delay caused by the "conduct of preoperational hearings"? In other words, for example, if a sponsor's alleged failure to take an action required by law is the reason that the Commission holds a preoperational hearing, is the delay caused by that hearing a covered delay or an excluded delay? For each of these questions, the Department requests that commenters provide examples.

Comment: It is not practical to anticipate or provide examples of exclusions in advance through regulations or contract language. Rather, the standards should be set consistent with the statute and an efficient and expedited claims management process should be established with defined time frames of 30-60 days for claims processing with expedited, third-party arbitration of any disputes.

Once the sponsor has demonstrated that a delay in full power operations was a covered delay, then the Department, as the insurer, should have the burden of showing that such delay or a portion of such delay should be excluded from coverage on the basis of one of these exclusions.

16. **Question:** *The Department requests comments on how this term [i.e., due diligence] should be used in the context of a standby support contract, whether it should be further defined in the regulations or contracts, specific examples of situations that commenters believe should or should not come within the term, and how the Department should determine due diligence by the sponsor.*

Comment: Due diligence should be defined with respect to commercially reasonable efforts. Once the sponsor has demonstrated that a delay in full power operations was a covered delay, then the Department, as the insurer, should have the burden of showing that sponsor failed to use commercially reasonable efforts to shorten and end the covered delay.

17. **Question:** *Subsection (d) provides for the coverage of costs that result from a delay during construction and in gaining approval for full power operation, specifically (A) principal and interest and (B) incremental cost of purchasing power to meet contractual agreements. The Department requests comments on how these costs should be documented, especially the extent to which they are used in calculating the funding needed prior to entering into a contract.*

Comment: Project sponsors should provide reasonable documentation of covered costs as part of the claims management process. Such costs would be documented under normal corporate financial and accounting procedures.

18. **Question:** *The Department request comment on whether those are the only costs that should be covered under the contracts and whether the Grant Account and the Program Account are restricted to covering a particular type of cost (i.e., the cost on which funding is based).*

Comment: Section 638(d)(1) states that the costs to be paid by the Secretary pursuant to such a contract "are the costs that result from a delay covered by the contract." Moreover, Section 638(d)(5) provides that the types of covered costs listed in that subsection are inclusive, rather than exclusive. Because the costs of a covered delay likely would include significant costs beyond principal and interest and the incremental cost of replacement power as listed in (d)(5) (A) and (B), the implementing regulations and contracts should include the full range of costs covered under the contracts.

Other costs of delay include costs of demobilization and remobilization, idle time costs incurred in respect of equipment and labor, increased general and administrative costs, and escalation costs for the completion of construction. In addition, to the extent that litigation or changes in regulation or government initiated modifications to the COL result in required redesign, alteration, additions or improvements to the project, then the additional costs associated with such redesign or alterations should be covered.

Section 638 (b)(2)(B) establishes the Program Account and the Grant Account, and Section 638 (b)(2)(C) requires that there be sufficient funds in the Program Account and the Grant Account to cover the costs enumerated in (d)(5)(A) and (d)(5)(B), respectively. Accordingly, there is no restriction on using these accounts to fund other covered costs as long as Federal Credit Reform Act requirements are met. Therefore, the Program Account can be used to cover these additional costs so long as the subsidy cost of such coverage is deposited into the Program Account in advance of such coverage.

19. **Question:** *The Department requests comment on the following issues: if there are two reactors being constructed by one sponsor at one location/facility, should there be two contracts in order for the sponsor to receive up to $500 million in coverage per reactor? Should a sponsor be precluded from entering into a contract that includes more than one reactor?*

Comment: Section 638(b)(1) refers to contract coverage for a total of 6 reactors, Section 638(d) differentiates coverage for the first 2 and next 4 reactors, and other provisions refer to delays in full power operation of the advanced nuclear facility. The NRC licensing process is also reactor specific. Accordingly, there should be a separate contract for each reactor covered regardless of whether such reactor is at the same location of another covered reactor.

20. **Question:** *The Department requests comment about the term "commencement of construction" given that neither part 52 nor section 638 defines this term. The commencement of construction of a facility may be defined in several ways, including activities such as the planning and design of a reactor facility, a firm purchase order for a reactor facility, or preparation of a site in anticipation of facility construction. On the other hand, under part 52, the Commission will issue a COL only upon finding that applicable regulatory requirements have been met, and that "there is reasonable assurance that the facility will be constructed and operated in conformity with the license, the provisions of the Atomic Energy Act, and the Commission's regulations." 10 CFR part 52.97. The Department believes it is reasonable to interpret "commencement of construction" in a manner consistent with Commission practice and requests comments on what would be the element of such an interpretation.*

Comment: Consistent with prior NRC practice, the term "commencement of construction" should be defined in the regulations as "the commencement of pouring of safety-related concrete." For the avoidance of doubt, the phrase "pouring of safety-related concrete" should be further defined as "placement of concrete for the nuclear island base mat." Given the degree of early site preparation, organization and commitment that sponsors would undertake to reach the point at which they pour safety-related concrete, this approach would best further the intent of the legislation by ensuring that only "real" projects with a high likelihood of achieving commercial operation receive one of the six queue positions. Further, by aligning the conditions for effectiveness of coverage to the conditions for the effectiveness of financing, this approach should facilitate the financing process

21. **Question:** *The Act does not require any particular dispute resolution mechanism or procedure, and therefore the Department requests comment on how disputes between sponsors and the Department should be resolved, and what dispute resolution provisions should be included in the applicable regulations or contracts.*

Comment: The claim management and dispute resolution process are critical to the efficacy and acceptability of the standby support contracts as a mechanism to address the uncertainties and risks associated with licensing of new nuclear power plants. Accordingly, the claims management and dispute resolution process must be swift, designed to promote certainty, and reduce (not increase) risk. If the claims management and dispute resolution process do not achieve those goals, the contracts will not be acceptable to lenders and investors and the statutory objectives will not be achieved.

The regulations and contracts should (i) establish an efficient and expedited claims management process with defined time frames of 30-60 days for claims processing; and (ii) require alternative dispute resolution through final, binding arbitration with third-party arbiters expert in the area of construction contract litigation and/or nuclear licensing and construction. Such arbitration should be conducted on an expedited or fast-track basis using existing, established commercial arbitration rules and procedures.

22. **Question:** *Apart from the Commission's statutory reports, the Department requests comments on the need to require any other reporting by the sponsor or others to the Department to assist the Department in its monitoring responsibilities, including the content, timing and impact of such reporting. Similarly, the Department requests comment on any other reporting or monitoring activities it should engage in to fulfill its responsibilities under the contract.*

Comment: Additional reporting would be duplicative and unnecessary. DOE should have access to NRC reporting to extent necessary. Contracts should contain customary notice requirements in the event of filing of litigation or in the event of a delay triggering coverage.

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