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December 22, 2005

Mr. Kenneth Wade  
Office of Nuclear Energy  
U.S. Department of Energy  
Forrestal Building  
1000 Independence Avenue, S.W.  
Washington D.C. 20585

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

Dear Mr. Wade:

Southern Nuclear Operating Company ("Southern") appreciates the opportunity to provide comments to the U.S. Department of Energy ("DOE" or the "Department") regarding its Notice of Inquiry ("NOI") on implementing the standby support provisions set forth in section 638 of the Energy Policy Act of 2005 ("EPAct"). Southern commends the DOE for soliciting public participation relative to the implementation of section 638 of the EPAct. Southern urges the Department to promulgate regulations that will accurately reflect the intent of Congress in enacting this important legislation and that will implement the standby support provisions in a way that will encourage investment in a new fleet of nuclear reactors. In this regard, Southern endorses and adopts the comments of the Nuclear Energy Institute ("NEI") as supplemented by the comments attached to this letter.

Southern's comments are directed toward the provisions of section 638 that it views as most important to the fulfillment of the clear intent of Congress to encourage new investment in nuclear power plants. In order to accomplish this goal, standby support contracts must be sufficiently definite, provide realistic protection from regulatory delays, and be reasonably priced given the magnitude of the risk and the amount of protection provided.

Southern appreciates the Department's efforts and looks forward to the issuance of the Notice of Proposed Rulemaking relative to the implementing regulations for the standby support provisions of section 638 of the EPAct.

Very truly yours,

A handwritten signature in black ink that reads "Louis B. Long". The signature is written in a cursive, flowing style.

Louis B. Long  
Southern Nuclear Operating Company  
Vice President, Technical Support

**SOUTHERN'S COMMENTS**  
**IN RESPONSE TO DOE'S NOTICE OF INQUIRY FOR STANDBY SUPPORT**

As noted by DOE in the NOI, the “overriding purpose of section 638 is to facilitate the construction and full power operation of new advanced nuclear facilities by providing risk insurance” that mitigates “financial disincentives and uncertainties” that are beyond the project sponsor’s control. (NOI at p.4). To ensure that the standby support contracts adequately cover such disincentives and uncertainties, and provide coverage that is economically feasible, the implementing regulations should address the issues and concerns raised by the comments filed by NEI and Southern’s supplemental comments as set forth below.

Definitions

Section 638 of the EAct leaves several terms undefined that are key to the effective implementation of its provisions. The definition of these terms will determine, *inter alia*, eligibility for standby support and parameters of compensable delays. In addition to NEI’s comments, which provide a comprehensive discussion of definitions that should be supplied by regulation, Southern encourages the Department to adopt the following definitions in the rulemaking:

**“Commencement of Construction”** – Section 638(d) authorizes DOE to provide coverage to a project after it (1) receives combined operating license (“COL”) and (2) commences construction. As noted by DOE, “commencement of construction” is not defined in Part 52 nor section 638. (NOI at p.18) Moreover, as DOE noted in the NOI, “[t]he 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.” (NOI at p.18). In order to enable potential developers of nuclear power plants to assess the risks involved in making substantial investments in advance of physical construction activities, the term “commencement of construction” should be defined in a clear and unambiguous way. The term should be defined to provide that “commence of construction” as used in subsection (d) occurs only when a sponsor has unmistakably made an irrevocable decision to proceed with construction. Specifically, Southern suggests that “commencement of construction” be defined as when a sponsor begins pouring safety-related concrete for the reactor vessel base mat. By the time such construction activities have commenced, the sponsor will have expended substantial resources in preparing and defending its application for a COL and in acquiring construction resources and long lead time items necessary for the construction of a nuclear power plant. Such an objective manifestation of the intent to construct a new nuclear power plant will provide adequate assurance that the sponsor will construct the plant as intended by Congress.

**“Full Power Operation”** – The purpose of section 638 is to provide financial protection against the inability of a project sponsor to place a new nuclear plant in commercial operation, thus covering its costs and earning a return on its investment, because of regulatory and other delays that are beyond the control of the sponsor. Compensable delays under section 638(c)(1) occur when a covered plant is prevented from achieving “full power operation” because of an enumerated delay in the regulatory process or litigation. In order for the statute to fulfill Congress’ intent in this regard, “full power operation” (*i.e.*, the condition signifying the

termination of a covered delay) should be defined so that it coincides with a project sponsor's ability to generate meaningful revenue from the facility.

In its NOI, DOE has expressed the intent to follow the NRC's definition in 10 C.F.R. Part 2 of "full power operation" to be operation at five percent or greater. (NOI at p.15). This interpretation would not serve the purpose of section 638, which is to compensate the sponsor for the inability to earn revenue from the operation of the facility. To the contrary, the NRC definition in 10 C.F.R. Part 2 is for the purpose of preventing the commencement of operation of the reactor even for testing without NRC approval. For the purposes of section 638 "full power operation" should be defined as a level of operation that is feasible for commercial operation.

### Compensable Delays

Section 638(c)(1)(A) provides that contracts for standby support will compensate project sponsors for delays caused by "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...." Section 638 does not, however, specify what the schedules for resolving these issues or for conducting preoperational hearings are. Similarly, other than the reference to the 180 day period between the notice of the intent to load fuel and fuel loading set forth in 10 C.F.R. § 52.103, NRC regulations do not provide any schedule for the resolution of the matters noted in section 638. It is critical to the carrying out of Congress' intent in enacting section 638 that realistic, definite schedules for the review and approval of ITAAC and for the conduct of preoperational hearings be included in the contracts executed in accordance with section 638. While not binding on NRC, these schedules should provide the basis upon which claims under the contracts by project sponsor would be compensable by DOE.

The exact schedule set forth in the contract should be mutually determined by DOE and the project sponsor at the time of contracting, and should be based on such factors as the date the COLA was docketed and the number of COLs that have been issued at the time the contract becomes enforceable. The schedules should include major milestones such as the date for completion of the various ITAAC noted in the COL, the date scheduled for fuel loading, and the date scheduled for the commencement of commercial operation. In order to effectuate the intent of Congress that the coverage provided under section 638 encourage investment in new nuclear plants, the contracts should clearly provide that the failure to meet one of the milestone dates is presumptive of a compensable delay, subject to clear and convincing evidence that the delay is covered by one of the exclusions to coverage provided for in section 638(c)(2), such as delays that are the fault of the project sponsor. To ensure the schedules are legally binding and useful for contract interpretation purposes, the agreed-upon schedule should be attached and included by reference as part of the standby support contract.

Similarly, litigation or administrative hearings that delay the accomplishment of milestones set out in the contract should entitle the project sponsor to recovery. According to the NOI, DOE intends to interpret "litigation" 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." (NOI at p.15). To accomplish Congress' purpose of section 638, which is to reduce the financial risks and

uncertainties for project sponsors, the term “litigation” should be defined broadly to include all administrative hearings, including hearings under Part 51.103 of the Commission’s regulations. Southern further suggests that litigation delays should be covered whether or not the proceedings are initiated by the sponsor, a governmental agency or a third party.

As noted by DOE in the NOI, the COL process is “undefined and untested,” and determination of fault concerning preoperational hearings could be difficult and subject to multiple interpretations. (NOI at p.14). As a result, interpreting covered delays to include all delays resulting from the conduct of preoperational hearings would enhance the reliability of the standby support provided by section 638. Moreover, in the event that DOE asserts that the exclusion from coverage based on “the failure of the sponsor to take any action required by law or regulation,” should preclude coverage for delays caused by litigation or the conduct of hearings, coverage should be excluded only where the evidence is conclusive that the project sponsor failed to take such action and that it could not have cured the defect in a timely manner had the litigation or hearing been concluded promptly.

#### Scoring and Supporting Appropriations

In order for standby support contracts to fulfill Congress’ intent to encourage investment in new nuclear plants, the cost of such programs, whether to the project sponsor or the federal government, must be commercially reasonable given the amount of coverage provided. Accordingly, the cost of standby support coverage should be scored in accordance with insurance principles, taking into account the magnitude of the risk and limits of liability under the contracts. For example, the cost of contracts for the two initial reactors, which cover damages of up to the first \$500 million in delay impact, should not exceed \$5 million per year (100 basis points). This cost is consistent with other government-sponsored insurance programs such as the Overseas Private Investment Corp. (“OPIC”). Because of the additional statutory limitations on coverage for the \$250 million policies (*i.e.*, six-month delay before costs are covered, only covers 50% of costs, etc.), these premiums should be priced at a significantly lesser cost. To determine pricing, DOE should review similar insurance programs provided by other federal governmental agencies and develop a pricing structure that is comparable to programs that have successfully been able to attract participants in the past. A requirement that either Congress or the project sponsor fund the standby support contracts at a high percentage of the amount of coverage, such as 20%, will render the standby support contracts economically unfeasible and frustrate the intent of Congress in enacting section 638.

#### Contract Administration – Covered and Excluded Costs

Costs excluded from coverage under section 638 should be further clarified in the implementing regulations. Such clarifications are necessary for lenders and investors to determine pricing and allocation of risks. Section 638(d)(1) states that the costs to be paid by DOE pursuant to the standby support contracts “are the costs that result from a delay covered by the contract.” Section 638(d)(5) describes costs covered by the Standby Support Grant Account as costs that result from delays “including” debt service. DOE has noted that this provision could be interpreted to (i) limit covered costs to only debt service, or (ii) to include costs in addition to debt service. (NOI at p.17). Because the costs of a covered delay would likely include significant costs beyond debt service, the implementing regulations and contracts should

define covered costs to include the full range of costs covered under the contracts. As noted by DOE, the Standby Support Program is “intended to reduce the financial disincentives and uncertainties for utilities that are beyond their control so that they will invest in the construction of new nuclear facilities.” (NOI at p.4). Such “financial disincentives and uncertainties” clearly extend beyond the coverage of debt service. For example, covered delays under section 638(d)(5) would almost certainly result in increased site overhead and increased labor and supervision costs. In this regard, the inclusive language of section 638(d)(5) was not intended to be limited to only debt service, but should cover the full range of costs that could result from covered delays as evidenced by Congress’ use of the term “including” in subsection (d)(5). To further the sponsor’s ability to manage risks related to delay costs, DOE’s clarification of covered costs should include specific examples of costs that are included and excluded under the contract.