NUCLEAR ENERGY INSTITUTE

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Mr. Kenneth Wade
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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 (71 *Fed. Reg.* 28200, May 15, 2006)

Dear Mr. Wade:

On behalf of the U.S. nuclear energy industry, the Nuclear Energy Institute[1] appreciates the opportunity to provide comments on the Interim Final Rule (the Rule) published by the Department of Energy (71 *Fed. Reg.*, 28200, May 15, 2006). In this Rule, the Department establishes regulations and requirements in a new 10 CFR Part 950 to implement Section 638 of the Energy Policy Act of 2005.

Section 638 of the Energy Policy Act provides "Standby Support for Certain Nuclear Plant Delays." This section authorizes the Secretary of Energy to provide risk insurance that would cover certain costs in the event that licensing or litigation delay commercial operation of a nuclear power plant. For the first two reactors, the insurance provides 100 percent coverage of covered delay costs up to a $500-million limit starting on the first day of delay. For the second four reactors, the insurance provides 50 percent coverage of covered delay costs up to a $250-million limit after the first six months of delay.

Covered delays include (1) Nuclear Regulatory Commission (NRC) failure to meet schedules for review and approval of inspections, tests, analyses and acceptance criteria (ITAAC); (2) any delay caused by the conduct of pre-operational hearings; and (3) litigation. Covered costs include debt service and other costs that result from a delay in commercial operation, in addition to any incremental costs incurred by the project

[1] NEI is responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory aspects of generic operational and technical issues. NEI members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

developer if the developer must purchase power to meet an electricity supply obligation that would otherwise have been met by the new nuclear plant.

The Department of Energy deserves credit for having made considerable progress in developing a regulatory framework to implement this complex legislation. The nuclear energy industry recognizes that implementation of the Standby Support legislation raises a number of complicated issues. Given the scope of the challenge, the Department's Rule is a worthy start toward a workable insurance program.

The Rule also has a number of serious flaws, however. Left uncorrected, these flaws may result in an insurance program that is unworkable, that will not be used by industry and that may, therefore, compromise current industry plans to build new nuclear power plants and, thereby, fail to meet the legislative intent.

The Cost of the Insurance
Is Not Addressed in the Interim Final Rule

The single most important weakness is the Rule's failure to provide any guidance as to the cost of the Standby Support risk insurance. As the Rule notes, "the Department has not completed an estimate of the cost of this risk insurance for the interim final rule" (71 *Fed. Reg*. 28215, May 15, 2006). Unless and until industry and other stakeholders know what the insurance coverage will cost, it is simply impossible to reach any judgment about the value of the Standby Support Rule published in the *Federal Register* on May 15.

The companies planning to build new nuclear power plants, the corporate boards of directors that must approve those investments, and the financial institutions that will provide the construction financing must have confidence that the Standby Support program is a stable, predictable, credible program. It is impossible to judge from the Rule published on May 15 whether or not the insurance program meets those minimum criteria.

Certain members of the financial community share this view. In testimony before the Senate Energy Committee on May 22, 2006, James Asselstine, managing director of Lehman Brothers, said this of the Standby Support rule: "One missing element in the Department's implementing regulations is the methodology for determining the cost to the project sponsor of providing this delay risk insurance. This will be a component in calculating the overall project cost and in assessing the value and availability of the risk insurance protection."

Despite the shortcomings in the May 15 Rule, it is possible to change and improve terms, conditions and definitions in that Rule to ensure that the Standby Support program meets the legitimate needs and expectations of corporate boards and the financial community, and also provides the level of protection Congress intended against regulatory and litigation-related delays in commercial operation, over which the private sector has no control.

Throughout these comments, the Nuclear Energy Institute seeks to provide precise, well-defined suggestions and changes to the Rule published for comment on May 15. The nuclear energy industry urges the Department of Energy to incorporate these proposed changes in the final regulations, to be published August 8, 2006, so that the Standby Support insurance program is workable, and achieves the President's goal of protecting private sector investment in new nuclear plants against licensing and litigation risks that are largely controlled by the federal government.

Request for Additional Comment Opportunity On Issues Not Covered in the Interim Final Rule

Given the importance of the funding issues, and before it finalizes the Standby Support regulations, the nuclear energy industry requests that the Department of Energy provide an additional opportunity for stakeholder comment and input on those matters that should, by rights, have been addressed in the Interim Final Rule but were not—e.g., the "scoring" of the Standby Support contracts, the premium payments expected from project sponsors, the role of appropriations, etc. Failure to provide an opportunity for stakeholder comment on these essential elements of this rulemaking places the nuclear industry in an untenable position, forced to take the terms provided or reject them.

Need to Develop Standard Form of Contract

Similarly, while the nuclear energy industry agrees with the Department of Energy's assessment that it is not necessary to provide a sample contract at this time, the industry believes that it is critical that the Department develop expeditiously, with stakeholder comment and input, a standardized contract format. Only the actual terms and conditions of the Standby Support Contract will provide the level of transparency and predictability necessary for companies, their boards and the financial community to make timely determinations about the value and financeability of the Standby Support—determinations that must be made early in the investment decision process.

While the form of Standby Support Contract does not need to be included in the regulations, a standardized form of contract will provide the level of certainty needed for investment and financing decisions, expedite contract negotiations, ensure equal treatment among projects, and promote consistency in application and interpretation. Moreover, the form of Standby Support Contract should be an attachment to the Conditional Agreement. Accordingly, the industry urges the Department of Energy to provide a mechanism involving full opportunity for stakeholder comment and input under which a standardized contract is developed and made available well in advance of the time that the first Conditional Agreement is anticipated.

Organization of the Nuclear Energy Industry's Comments

NEI's comments are divided into two major sections:

I. The first section provides the nuclear energy industry's position on several major issues in the Rule, which are sufficiently important to deserve detailed discussion. In some cases, the nuclear energy industry fully supports the approach proposed by the Department in the Rule. In others, the industry identifies weaknesses in the approach taken by the Department in the Rule, and proposes adjustments and changes necessary to produce a workable insurance program.

II. The second section provides a detailed section-by-section assessment of the Rule, including additional suggested changes necessary to produce a rule that is workable from an industry perspective.

If you have questions about these comments, I can be reached via telephone at 202.739.8021 or via e-mail at rjm@nei.org. NEI staff and counsel are also available to meet with Department of Energy staff in a public forum to discuss and, if necessary, clarify any of the issues raised in this letter.

Sincerely,

I.
MAJOR ISSUES
IN THE INTERIM FINAL REGULATIONS

The risk insurance (or Standby Support) provided by Section 638 of the 2005 Energy Policy Act has a straightforward, simple purpose. The risk insurance is designed to protect private companies against delays in commercial operation of completed nuclear power plants resulting from the licensing process or litigation. A company that experienced a delay in commercial operation of a completed nuclear power plant would experience significant financial losses. The insurance provided by Section 638 of the Energy Policy Act of 2005 is designed to limit the financial impact on companies when those losses result from regulatory or litigation delays.

The insurance protection and insurance policies should, therefore, be as straightforward as the legislative intent and purpose.

In this section, the nuclear energy industry focuses on a number of key features of the Standby Support Rule. In some cases, the industry unequivocally endorses the Department's approach; in others, the industry identifies issues of concern, and the reasons for concern, and proposes straightforward solutions.

I.A. Major Areas of Agreement

(i) Conditional Agreements Precedent to Final Contracts

The nuclear energy industry fully endorses the two-step approach to executing Standby Support contracts established in the Rule. Under this approach, the Department would first execute Conditional Agreements with project sponsors. These would be converted to Standby Support contracts when the necessary conditions (receipt of construction and operating license (COL), start of construction, funds deposited in the Standby Support accounts, etc.) have been met.

This two-step approach recognizes the business reality associated with new nuclear power plant construction. Long before COL receipt and start of construction, a project developer will be seeking project approval from its board of directors and arranging construction financing. Decisions by corporate boards and lenders will obviously depend on whether or not the project in question will receive one of the six Standby Support contracts. To address this timing issue, the industry supports the Department of Energy's proposal to establish a "pool" of companies eligible for the Standby Support (*i.e.,* those that have docketed COLs). This "pool" would be eligible to execute Conditional Agreements, with conversion to a Standby Support contract and determination of a project's status in the "queue" based solely on fulfilling the conditions to effectiveness of the Standby Support (including receipt of the COL and commencement of construction).

This approach was first proposed in the Department's Notice of Inquiry on this program (70 *Fed. Reg.*, 71107, November 25, 2005). The nuclear energy industry is pleased that the approach carried through into the Rule.

(ii) The Full Faith and Credit of the U.S. Government Stands Behind the Standby Support Program Account

The Standby Support Program Account is subject to budget scoring protocols established by the Federal Credit Reform Act (FCRA) of 1990. Under FCRA requirements, the Standby Support Program Account will be funded based on the estimated long-term cost to the government of the insurance, which will be a percentage of the face value of the insurance contracts. Given this, the Standby Support Program Account will never contain the entire $500 million per project potentially necessary for full payment of claims under the first two contracts, or the $250 million per project potentially necessary for full payment of claims under contracts three through six, if such payments are necessary.[2]

The statutory language of the 2005 Energy Policy Act is not clear on what would happen if the Secretary must make full payment of claims under one or more of the six contracts. In its comments on the Department's Notice of Inquiry, NEI stated that "the Section 638 implementing regulations must clarify that claims under the Standby Support program will be handled under Federal Credit Reform Act procedures—*i.e.,* permanent indefinite budget authority exists to pay any claims, without any need for additional appropriation. The regulations should clarify, or the Department should obtain an Attorney General opinion, that the obligations under Section 638 contracts are 'full faith and credit' obligations of the United States."

NEI is pleased that the Department has accepted this approach in the Rule. The section-by-section analysis accompanying the Rule states (71 *Fed. Reg*. 28206, May 15, 2006) that:

> *"[T]he Department is required to pay any claims for covered costs under the Program Account, up to the available indemnification, without further appropriations to the Secretary for such payments. (See 2 U.S.C. 661d(c)).*
>
> *"Although section 638 does not contain an express directive regarding this obligation of the Department, such as a provision that the contract is backed by the full faith and credit of the United States, it is within the Department's discretion to interpret statutory intent where Congress is silent or unclear, and implement the statute according to its interpretation. The Department's interpretation of its need to pay covered costs under the Program Account is consistent with FCRA and the*

[2] This assumes, as is virtually certain, that project sponsors will elect coverage only for delay costs covered under the Standby Support Program Account. The terms associated with coverage for incremental costs available under the Standby Support Grant Account are so unrealistic that companies will seek to hedge those risks in some other fashion. This issue is discussed in more detail in Section II of these comments.

> *obligations of the federal government under other credit programs. Moreover, it is not necessary for Congress to include a provision specifying that the Department's obligation for such costs is backed by the full faith and credit of the United States .... Accordingly, the Secretary of the Treasury would be required to fund future obligations arising from the payment of covered costs under section 505(c) of FCRA, even though section 638 does not expressly use the term 'full faith and credit.'"*

The nuclear energy industry agrees with the Department's assessment of its statutory obligation. However, while the discussion in the section-by-section analysis is helpful, the industry requests that the Department include in the text of the final rule an unequivocal statement that payment of costs covered under Section 638(d)(5)(A) (that is, payment of costs covered under the Standby Support Program Account) is backed by the full faith and credit of the United States. We believe that such a statement in the regulations is necessary for financing purposes.

I.B. Major Areas of Concern

(i) The Cost of the Insurance Coverage: A Standard, Fixed Premium Is Essential

As noted above, the Rule published on May 15 is silent on the central issue of cost. The nuclear energy industry cannot provide a reasoned determination of the value of the Rule—e.g., whether it has value, whether it lacks value, whether it provides the necessary level of investment protection or not, etc.—without knowing what each of the six insurance contracts authorized by Section 638 of the Energy Policy Act of 2005 will cost.

The nuclear energy industry has identified only one approach to the issue of cost that would be workable and, more important, credible to investors. That approach is simple and straightforward, and involves a two-step calculation:

1. The Department should establish a standard premium for the insurance contracts, based on, and comparable to, the premium charged by other government agencies and the private sector for comparable sovereign risk insurance.
2. The Department should then establish a "loan cost" for the insurance contracts calculated under Federal Credit Reform Act procedures. This, too, should be a standard amount for the two $500-million contracts and the four $250-million contracts. If the loan cost is higher than the premium amount, the Department must cover the difference through appropriations.

Only such an approach would provide the certainty and predictability necessary to enable corporate decisions to invest in new nuclear generating capacity. Only such an approach would provide the Department and Congressional Appropriations Committees the certainty and predictability necessary to develop "out-year" appropriations estimates and funding targets.

The nuclear energy industry proposed this approach in its December 23, 2005, comments on the Department's Notice of Inquiry. Those comments stated:

> "The key to effectiveness of the Standby Support Program Account (which covers debt service and other unspecified costs) is the 'pricing' of the insurance contracts, the budget 'scoring' of those contracts, and the appropriations (and/or sponsor funding) necessary to allow the Secretary of Energy to execute contracts for coverage. If the insurance premium is set unreasonably or unrealistically high, project sponsors will not use the Standby Support coverage, and the implementing regulations will not have satisfied the statutory intent of Section 638.
>
> "The nuclear industry believes the Standby Support coverage should be priced similarly to other insurance against sovereign risks provided by other federal government agencies (*e.g.,* the Overseas Private Investment Corp. [OPIC]) and other public and private insurers. An analogous insurance program is OPIC risk insurance against so-called "creeping expropriation," which covers unlawful government action that deprives investors of property rights, but falls short of outright expropriation. This OPIC insurance carries an annual premium of 40-70 basis points of the face value of the coverage. Similar political risk insurance available from the commercial insurance market typically carries a slightly higher annual premium, in the range of 100 basis points of the face value of the coverage. Using 100 basis points as an example, a $500-million Standby Support policy would cost the project sponsor $5 million per year. Assuming a five-year construction period during which the coverage would be in force, the cost of a $500-million Standby Support contract would, therefore, be $25 million.[3] The cost of the second four $250-million Standby Support contracts would, of course, be significantly less than the nominal $25 million premium established above for the $500-million coverage.[4]"

[3] Under the statute, the entire "cost" of the Standby Support contract must be funded before the contract can be effective. Given this requirement, the industry would be prepared to waive standard insurance practice of an annual premium and prepay the entire cost of the insurance. Under this approach, the insurance contract could assume a five-year construction period as the norm, but could provide flexibility for monthly or annual extensions of the coverage period (and payment of the appropriate additional premium amount) or a reduction in the period of coverage (and a rebate of the appropriate premium amount), at the request of the insured.

[4] The $250-million coverage available for the third, fourth, fifth and sixth reactors is significantly less valuable than the $500-million coverage available for the first two reactors covered, because the third, fourth, fifth and sixth contracts require a six-month period before delay costs are covered, and cover only 50 percent of the covered costs. Given this significant reduction in coverage, the nuclear industry believes the $250-million contracts should carry a premium of 25-30 percent of the cost of the $500-million contracts.

In the section-by-section analysis accompanying the May 15 Rule, the Department dismissed this proposed approach: "The Department notes that there are significant differences between the risks being covered by the Standby Support Program and those covered by OPIC. OPIC and the traditional commercial insurance market pool the risk faced by potential insured entities. For instance, OPIC typically provides insurance coverage for scores of different projects at a given time. Accordingly, by distributing the risk among many projects, the insurer—whether OPIC or a commercial insurer—spreads the risk among many projects. OPIC uses a risk management strategy that diversifies risk based on sector and geographic location." (71 *Fed. Reg.* 28204, May 15, 2006.)

This assertion may be correct, but it is irrelevant.

The sole question for the Department and the industry is how to develop a reasonable and equitable premium for the six insurance contracts authorized. Sovereign risk insurance available through other government agencies and the private sector is, without question, a legitimate reference point to determine an appropriate premium for the Standby Support contracts.

The Department states "that there are significant differences between the risks being covered by the Standby Support Program and those covered by OPIC." This assertion is correct in one important respect: The U.S. government does not control the risks associated with OPIC-type insurance programs. In contrast, the federal government does largely control the risks of delay caused by breakdowns in the licensing process and litigation that might delay the commercial operation of a completed nuclear power plant.

In summary, the nuclear energy industry urges the Department to develop a reasonable standard premium for the two $500-million insurance contracts and the four $250-million insurance contracts, based on the only analogues available—namely, comparable sovereign risk insurance programs and policies.

The Rule published on May 15 appears to be moving in the opposite direction: There is no standard insurance premium, and the expected sponsor payment appears to be subject to a case-by-case, contract-by-contract determination dependent largely on the Department's success in obtaining appropriations:

> *"For the Department, the actual funding contribution anticipated under the Conditional Agreement is dependent on the extent to which Congress appropriates funds for a particular Standby Support Contract. For the sponsor, the actual funding contribution under the Conditional Agreement is dependent upon how much the sponsor anticipates contributing—which could be all, some or nothing—taking into account the fact that the Department's contribution is subject to Congressional appropriations. The Department believes such an approach is reasonable since, while there is no guarantee as to what amount of funds, if any, will be appropriated*

> *for funding either the Program or Grant Accounts for a particular Standby Support Contract, it is likely that one of the factors that will be considered in deciding whether to appropriate funds will be the extent to which the sponsor provided funds."* (71 *Fed. Reg*., 28205, May 15, 2006.)

Such a "best efforts" approach, under which the project sponsor has no assurance in advance of what the premium will be, or whether the premium might change over time, is neither reasonable nor workable, in the nuclear energy industry's view. The project sponsor's contribution is treated throughout the May 15 rule as a moving target, and that does not meet the industry's legitimate need for certainty and predictability.

(ii) "Litigation" And "Pre-Operational Hearings" As Sources of Covered Delays Are Defined Too Narrowly, and Do Not Meet the Legislative Intent

In the May 15 Rule, the Department defined litigation narrowly "to include only adjudication in State, federal, or tribal courts, including appeals of Commission decisions related to the combined license to such courts, and *excluding administrative litigation* that occurs at the Commission related to the combined license process. The Department believes this is the most reasonable interpretation of the term as used in the Act. Since the Act covers the risk of a pre-operational hearing, and Commission reviews of ITAAC, the Department assumed that the reference to litigation is to litigation outside the context of the Commission proceeding on the combined license." (71 *Fed. Reg*. 28210, May 15, 2006.) (*Emphasis added*.)

For the reasons discussed below, the nuclear energy industry does not believe the Department has a sound basis for assuming that the statutory reference to litigation applies narrowly to "litigation outside the context of the Commission proceeding on the combined license." Similarly, the nuclear energy industry does not believe the Department has a sound basis to interpret this term narrowly "to apply only to situations in which a sponsor is unable to continue construction or attain full power operation based on a court order, e.g., a stay of a permit, a Temporary Restraining Order (TRO), or an injunction." Furthermore, the Department's narrow definition excludes without discussion litigation at the local level and arbitration proceedings and orders.

In its May 15 Rule, the Department also took an unreasonably narrow view of the phrase "the conduct of pre-operational hearings by the Commission" in determining a cause of delay in commercial operation. The Department assumes that this phrase means only "the non-mandatory hearing conducted by the Commission in accordance with 10 CFR 52.103." (71 *Fed. Reg*., 28210, May 15, 2006.) The Department added that "it would be inappropriate and unnecessary to broaden the term to include all hearings taking place prior to operation or fuel load [because] ...

it is unlikely that any other hearing would be held by the Commission other than the one already expressly set forth at section 52.103."

Again, the nuclear energy industry does not believe the Department's reasoning in this area is correct. Unlikely or not, there are opportunities for "pre-operational" hearings and other proceedings that could delay fuel load and full-power operation, in addition to the non-mandatory hearing allowed under 10 CFR 52.103. The statute did not exclude such hearings from being treated as a cause of a covered delay and the basis of a claim for a covered cost. Any pre-operational hearing conducted after a COL is granted and construction begins, and thus coverage by a Standby Support Contract begins, could cause a delay in fuel load and full-power operation. Pre-operational hearings other than those provided for in 10 CFR 52.103 may be unlikely, but they are possible. Any amendment to the combined license (a change to the ITAAC, for example) requires the opportunity for a hearing (10 CFR 52.97(b)(2)). The nuclear industry believes the regulations must explicitly recognize these possibilities, and avoid narrow definitions of key terms like "litigation" that may frustrate the statutory intent.

Discussion. Section 638(c) of the Energy Policy Act of 2005 specifies the delays that are to be covered by Standby Support contracts. Section 638(c)(1)(A) specifically covers delays occasioned by NRC failure "to comply with schedules for review and approval of inspections, tests, analyses, and acceptance criteria established under a combined license" (COL) as well as delays caused by "the conduct of preoperational hearings." It is likely that delays caused by either of these two activities were of particular concern to Congress because past experience teaches that preoperational hearings could delay the scheduled date for plant operation. Similarly, the NRC's failure to complete its reviews in a timely manner could delay full-power operation. In either case, the likely result, without the coverage now provided for in Section 638(c), could be considerable disruption to the project and severe economic impact on its owners.

By enacting the provisions providing this coverage, Congress evidenced its unambiguous intent to guard against the potential disruption and economic consequences that would result from delay in full-power operation caused by either (i) the agency's implementation of the 10 CFR Part 52 licensing process associated with ITAACs or (ii) the agency's conduct of preoperational hearings. There is nothing to suggest that Congress intended to limit this coverage to the hearing provided for in 10 CFR 52.103. Rather, such a limitation would be contrary to Congress's intent to provide protection from delays resulting from the untested licensing process, and to remove this regulatory uncertainty as a barrier to the development of new nuclear power plants.

Section 638(c)(1)(B) complements the coverage in section 638 (c)(1)(A). Section (c)(1)(B) provides for coverage for delays in full power operation caused by

"litigation." It is clear from the plain language of the statute that Congress did not intend to condition this coverage in any way—not based on the type of litigation causing the delay, nor when or where it occurs, so long as the litigation delays the start of full-power operation. That is, given the extensive history of litigation-related delay in nuclear plant construction, Congress wisely elected, through enactment of Section 638(c)(1)(B), to direct the Department to provide coverage for delay in full-power operation caused by any litigation. And, while this coverage might be interpreted as overlapping to some degree with the coverage specified under Section 638(c)(1)(A), that overlap appears to have been intentional to assure complete coverage.

Taken together, Sections 638(c)(1)(A) and (B) address the two primary potential impediments to operation: delays caused by the agency's implementation of the untested Part 52 licensing process, including preoperational hearings, and delays caused by litigation. In promulgating implementing regulations, DOE should preserve Congress' approach to guarding against the possibility that the licensee must bear costs of delays caused by government or judicial activities beyond their control.

The industry provides the following recommendations to clarify the provisions of Section 950.14(a)(3) and (4) to ensure that each is consistent with and, importantly, does not undermine the statutory intent of Section 638.

Section 950.14(a)(3) specifies that, among the specific events covered by the standby support contract, is "the conduct of a pre-operational hearing in accordance with 10 CFR 52.103." As so limited, this provision does not provide the broad coverage intended under section 638(c)(1)(A). Even in the context of the 52.103 hearing, the provision is too limited. If the §52.103 pre-operational hearing is completed prior to fuel load, a Licensing Board could remand the question for further Staff action or a party could appeal a pre-operational hearing decision to the Commission. In either case, the result could be additional delay to plant operation. To address this deficiency, the Department should revise this provision of the Rule to make clear that a covered delay not only includes the initial Section 52.103 hearing, but also any Commission appeals or remands associated with that hearing. Moreover, as discussed above, the provision should be revised to cover any other pre-operational hearing by the NRC. With these clarifications, Section 950.14(a)(3) would more fully meet Congress' clear intent, as evidenced by Section 638(c)(1), to provide coverage for delays occasioned by pre-operational hearings and "litigation that delays the commencement of full power operations."

Further, the Department should revise Section 950.14(a)(4) because, in its current form, it introduces uncertainty and potentially undermines the broad coverage provided by the statute. As proposed, Section (a)(4) would exclude "administrative litigation that occurs at the Commission related to the combined license." The

language is imprecise and therefore potentially ambiguous, possibly leading to a variety of interpretations. It could be read to preclude coverage for the pre-operational hearing conducted pursuant to §52.103 or any appeals and remands to the Commission resulting from that hearing (because the pre-operational hearing is "related to the combined license"). Implementation of the regulation in this way would be directly at odds with Section 950.14(a)(3) and congressional intent as discussed above.

Section 950.14(a)(4) also could be interpreted to exclude only the administrative litigation and Commission appeals related to initial issuance of the combined license. However, this exclusion is unnecessary and, therefore, should be deleted from this section, because the standby support coverage is not in effect until the COL is issued and the project sponsor has started construction, as evidence by pouring of safety-grade concrete for the reactor building.

Finally, the exclusion in Section (a)(4) also should be deleted because, while it may be "unlikely," as the Department posits, that the hearing and appeal processes for the initial combined license will result in a delay in full-power operation, that result is not impossible. This could occur, for example, if administrative or judicial appeals on emergency planning issues led to further proceedings on the combined license without a stay of construction. These proceedings could delay full-power operation if they remained ongoing after the completion of construction and the preoperational hearing. Excluding a delay in this scenario would contradict Congress' intent in enacting Section 638, which was to provide coverage for any "litigation that delays the commencement of full power operations of the advanced nuclear facility," whether likely or not.

For all of the reasons stated, the Department should revise the definition of litigation and the discussion of litigation in Section 950.14(a)(4) by deleting the clause "excluding administrative litigation that occurs at the Commission related to the combined license."

The Department should also revise the discussion of litigation in the section-by-section analysis and the exclusion at Section 950.14(b)(2)(v) that limits litigation-related delays to only those situations where there is a court order prohibiting construction or full-power operation. There is no basis in the statute for this limitation. Litigation will frequently cause numerous and substantial delays that prohibit a company from proceeding even without an express order prohibiting construction or full-power operation. Simply because a court order does not forbid a project from going forward does not mean that the project will not be delayed by the litigation, because the litigation may cause a series of events that prohibit the company from moving forward. The determination of whether a delay is caused by litigation even absent a court order should be left to the claims process, not categorically excluded.

In addition, the definition of "litigation" should be amended to include "local" courts so that it is clear that any litigation in town, city, county, or municipal courts is included in the scope of the definition. For example, a local city council may pass a particular ordinance or require an unreasonable and arbitrary permitting requirement that directly interferes with the project. Under the law of a particular state, a challenge to such an ordinance or permitting process may be first required in town, city, county or municipal courts. The addition of the word "local" will provide greater clarity to the term "Federal, State, or tribal courts."

Finally, the definition of "litigation" should be amended to include arbitration proceedings and orders. Arbitration is a common and growing method of resolving disputes between or among parties. There can be little doubt that the drafters of the legislation intended for arbitration to be included in the meaning of "litigation," particularly in light of the strong federal policy of promoting arbitration as an alternative method of dispute resolution.

(iii) Contract "Rollover": Unutilized Higher Queue Coverage Should Roll to Lower-Queued Sponsors

In its December 23, 2005, comments on the Department's Notice of Inquiry, the nuclear energy industry suggested that the Standby Support program should include a "rollover" provision, in certain limited circumstances.

The statutory language in Section 638 contemplates coverage for the first six nuclear reactors built. It is conceivable that the first two projects covered under 638(d)(2) will reach full power and commercial operation without incurring delay costs (thereby not utilizing the funds to cover such delay costs). If so, the next project(s) in the queue should be eligible for the full coverage levels[5] under 638(d)(2), upon payment of any additional insurance premium established for the full coverage. 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.

The Department did not address this industry proposal in its May 15 Rule. The industry continues to believe that the concept has merit, is consistent with the statute, and deserves serious consideration. At the very least, the Department should be expected to explain its legal basis for rejecting the proposal.

[5] Full coverage would be $500 million, coverage for delay costs without a waiting period, and coverage for 100 percent of delay costs.

(iv) The Rule Appears To Be Contradictory on the Issue of Shared Costs

The nuclear energy industry is also concerned the Rule published on May 15 appears to be contradictory.

In one instance, the section-by-section analysis accompanying the Rule asserts that the Rule "requires the parties to specify in the Conditional Agreement the anticipated amount or anticipated percentage of the total funding in the Program Account to be contributed by appropriated funds to the Department, by the sponsor or by a non-federal source." (71 *Fed. Reg*., 28205, May 15, 2006.)

This appears to be a reasonable expectation. The percentage of funding in the Program Account from the sponsor should be the standard, fixed premium discussed above; the balance (if any) should be funds appropriated to the Department.

In another instance (71 *Fed. Reg*., 28205, May 15, 2006), the section-by-section analysis states: "With respect to the question of which party is responsible for funding the Standby Support Contracts, Congress provided a flexible mechanism for the parties to consider in structuring the contracts. In general, section 638 allows for the Program Account and Grant Account to be funded by contributions from government appropriations, the sponsor, or a non-federal source; or a combination of these sources."

This, too, appears to be a reasonable interpretation of the statute.

In a third instance, however, the section-by-section analysis states: "The Department anticipates that *all of the funds* in the Program Account needed for the Standby Support Program will be contributed by private industry through a risk premium (*emphasis added*)." (71 *Fed. Reg*., 28215, May 15, 2006.)

This assertion seems to contradict the previous two. Such internal inconsistencies in the Rule suggest that the Department has not yet fully addressed the issues associated with pricing of the insurance contracts, and has not yet developed a workable model that provides the certainty and predictability required for (1) corporate planning and investment decisions, and (2) multi-year appropriations planning.

(v) The May 15 Rule Does Not Appear to Have a Unifying Strategic Framework to Ensure Appropriate Budget Scoring, Sufficient Appropriations, and a Basis for Planning

Although it is not stated explicitly, the May 15 Rule language and the section-by-section analysis that accompanies the Rule language leave the impression that each Standby Support contract will be "scored" for budget purposes on a contract-by-contract basis, and that appropriations will be sought on a contract-by-contract basis.

There is nothing in the underlying statute to suggest that Congress intended the Department to establish separate Program Accounts and Grant Accounts for each project that receives Standby Support coverage. In fact, the statute (Section 638(b)(2)(B)) states:

> *"There is established in the Department 2 separate accounts, which shall be known as the—*
> *(i) 'Standby Support Program Account'; and*
> *(ii) 'Standby Support Grant Account'."*

The language suggests a single Program Account and a single Grant Account into which all appropriations and sponsor premiums are deposited, and which support all six Standby Support contracts.

As noted above in the discussion in Section I.B.(i) of these comments, the nuclear energy industry believes a straightforward, standardized cost-estimation approach is the only approach likely to succeed, and capable of providing certainty to project sponsors and government budget planners.

The nuclear industry believes the Standby Support program should have the following defining characteristics:

1. The Standby Support program must be structured as a multi-year program, with a multi-year funding profile, similar in concept to the Nuclear Power 2010 program and other Department of Energy R&D programs.
2. As suggested in Section I.B(i), the loan cost associated with the Standby Support Program Account should be calculated[6] on a standardized basis—e.g., the loan cost of the two $500-million contracts should be identical and the loan cost of the four $250-million contracts should be identical. The risk

[6] The nuclear energy industry believes it is virtually impossible to calculate the likelihood of claims under the Standby Support Program Account, given the lack of experience with the new and untested Part 52 licensing process. The Department acknowledges this in the May 15 Rule: "[I]t is not possible to predict the scope, frequency or timing of the events that would be subject to payment of standby support." (71 *Fed. Reg.*, 28214, May 15, 2006.) In determining the loan cost for the Standby Support Program Account, it is reasonable, therefore, to look for appropriate benchmarks or reference points elsewhere in the federal budget. Of 21 loan guarantee programs proposed in the President's FY 2007 budget, all but one have credit subsidy rates below 7.27 percent. (The sole outlying value is the HUD Native American housing program, which has a subsidy rate of 11.99 percent.) The majority of federal loan guarantee programs have credit subsidy rates significantly below 5 percent. These values provide a useful reference point in determining the credit subsidy cost associated with the Standby Support Program Account. (*See* Office of Management and Budget, *Analytical Perspectives on the Budget of the United States Government for Fiscal Year 2007*, Table 7-4, p.90.)

factors associated with the two $500-million contracts and the four $250-million contracts are identical.

3. In addition, as suggested above, the private sector premium should be standardized: the same amount for the two $500-million contracts, and a lesser amount for the four $250-million contracts, reflecting the lower level of coverage for the private sector and the lower level of risk to the government.
4. If the loan cost exceeds the premium payment, appropriations should be sought to fund the difference between the premium payments and the loan cost. The necessary appropriations could then be allocated over a two- to three-year period.

Using these four elements, the nuclear industry believes it is possible to create an organizing structure for the Standby Support program that provides a high degree of certainty, predictability and stability.

The nuclear energy industry believes that creating a structure or framework for the Standby Support program is preferable to the approach that appears to be embedded in the May 15 Interim Final Rule: project-by-project, contract-by-contract calculation of funding requirements, contract-by-contract appropriations, no strategic framework or overarching structure, and project sponsors forced to contend with the knowledge that their contributions are a moving target that can change from year to year.

(vi) Covered Events, Covered Delays, Covered Costs and Exclusions: The May 15 Rule Does Not Provide Clear Standards

Another key factor in ascertaining whether the proposed program will be workable is whether it provides predictability as to determinations of coverage. Without such predictability, investors and project lenders will not be willing to make the investment in or provide the financing for new nuclear power development.

Critical to the issue of predictability in insurance contracts is whether the regulations and contract clearly establish standards of causation and properly allocate the burden of proof. Clear standards and proper allocation will simplify contract administration, facilitate claims determinations and minimize disputes. However, the language of the interim final rule and the accompanying section-by-section analysis raise a number of difficult factual and legal issues regarding causation and allocation of the burden of proof.

Under the proposed definitions, a "*Covered event* means an event that *may result in* a covered delay *due to* [certain enumerated events]" and "covered delay" must be "caused by a covered event." Thus, if a covered event causes a covered delay and that, in turn, causes a covered cost, then the sponsor must be compensated. As currently formulated, however, the proposed regulations create further ambiguity

regarding what are already notoriously difficult-to-determine causation issues in cases such as this.

As a threshold matter, it must be recognized that, by their nature, timetables and schedules for advanced nuclear power facilities will be influenced by a confluence of factors. A covered event is highly unlikely to be the exclusive cause of a delay — even one that results in a delay of full-power operation. [7]

The currently proposed rules, however, do not provide a sufficiently clear and comprehensive legal framework for resolving the complex causation issues that must be determined in connection with claims under the Standby Support Contracts.

First, certain key language in the proposed rules and the section-by-section analysis creates potentially significant ambiguities that will likely prevent an efficient and effective resolution of the causation issues that sponsors and the Department are likely to face.[8]

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[7] The proposed final rules appear to recognize that a variety of factors may cause a delay. *See* 71 *Fed.Reg*. 28215, May 15, 2006 ("IV. Regulatory Review Requirements, A. Review Under Executive Order 12866): "The costs associated with a delay caused by the regulatory process or litigation could be significant and there is no well-established method of assessing the likelihood of such events until the new regulatory process is tested."

[8] For example, the Department sets forth what appears to be a general test that is based on whether the covered event in fact causes a delay in full-power operation (a "but for" test). *See* 71 *Fed.Reg*. 28209, May 15, 2006: "Compensation is dependent on whether a covered event *in fact* leads to a delay in full power operation. For instance, there may be a delay in the Commission staff's meeting the ITAAC review schedule for an individual ITAAC, *but* the delay does not actually cause a delay in full-power operation, because other factors may have caused the delay" and 71 *Fed.Reg*. 28213, May 15, 2006: "next step in the process . . . is for the sponsor to submit a claim for payment of covered costs when the sponsor is within 120 days of its expected date of full power operation, *but for* the covered delay"). *See also* 71 *Fed.Reg*., 28211, May 15, 2006: "…section 950.14(c) requires each Standby Support Contract to include a provision specifying the payment of covered costs if a covered event is determined to *cause a delay* in attainment of full power operation." (*emphasis added*). However, the Department also implies that (1) the covered event must be the *only* cause of the delay, (2) the test is whether the covered event "*directly causes* a delay*"* and (3) that the occurrence of a non-covered event would result in non-coverage even if the loss was also caused by a covered event. *Compare* Section 950.14(c) ("Each Standby Support Contract shall include a provision for the payment of covered costs . . . if a covered event(s) is determined to be *the cause* of delay in attainment of full power operation….") *with* 71 *Fed.Reg*. 28211, May 15, 2006 ("*directly causes* a delay") and 71 *Fed.Reg*. 28213, May 15, 2006 (". . . if the Commission failed to review an ITAAC on the approved schedule . . . and this failure of the Commission *was not caused by one of the events excluded from coverage* under section 950.14(b), e.g., an event within the control of the sponsor, then the event is a covered event.") (*Emphasis added.*) In addition, while the Department recognizes the

Second, the May 15 Rule does not adequately reflect legal principles of insurance law that address the respective burdens of the insured (the sponsor) and the insurer (the Department) with respect to the causation of covered and excluded events. In Section 950.20, the Department provides that the sponsor is required to prove that there is a covered event, a covered delay and a "covered loss." The Department has not, however, set forth which party has the burden of proof for any of the exclusions.

One of the central purposes of the insurance, which is also the purpose of the Standby Support Contracts, is to provide certainty that a particular type of injury would be compensable and provide assurance that, if that event occurs, claims would be paid promptly. Another central tenet of insurance law is that the insurer has the burden of proving that an exclusion applies. *See, e.g., Facet Indus. v. Wright*, 465 N.E.2d 1252, 1254 (N.Y. 1984) ("The burden of proving that the loss is within the exclusion of the policy is upon the insurer."); 7 Couch on Ins. § 101:63 (3d ed.) (2005) ("In keeping with the general rules of proof, any causation required to bring a loss within the positive coverage terms of the policy generally must be shown by the insured or person seeking coverage, while the insurer bears the burden of showing any causation necessary to bring the case within an exclusion from coverage.")

For these reasons, § 950.20 should be amended to add: "The Department is required to establish that any exclusions apply." In addition, a new subsection (e) should be added to § 950.14 as follows:

> § 950.14 (e). *Causation.* Each Standby Support Contract shall provide that the sponsor must prove: (1) a covered event was a cause of the delay in full-power operations; (2) such covered delay was a cause of the loss; and (3) the amount of the covered cost. Once the sponsor has made such a showing, the Department bears the burden of proving that any excluded event directly caused the delay (or any portion thereof) in full-power operation. If the Claims Administrator determines that an excluded event directly caused the delay (or any portion thereof) in full-power operation, whether concurrently, contributorily or otherwise, then the Claims Administrator shall not make

existence of concurrent delays and contributory delays, it does not adequately specify how such delays should be "taken into account." *See* 71 *Fed.Reg.* 28213, May 15, 2006 (section-by-section analysis for Section 950.22 relating to determination of covered event): "the Claims Administrator considers the effect of concurrent events (e.g., a litigation delay at the same time as a strike) on whether there is a covered delay"); *see also* Section 950.24(a)(1) (relating to determination of covered costs): "The duration of covered delay, taking into account contributory or concurrent delays resulting from events excluded from coverage"). Thus, as discussed below, the causation standard should be clarified and certain language in the interim final rule and section-by-section analysis should be changed.

any payment for the portion of costs to the extent of the delay in full-power operations determined to be directly caused by such excluded event.

(vii) Dispute Resolution Provisions Do Not Meet The Needs of Investors and Project Lenders

In response to the Department's questions on dispute resolution in the Notice of Inquiry, NEI and other commenters recommended that the regulations provide for expedited, independent, third-party binding arbitration of disputes under the contracts. In particular, NEI suggested use of the American Arbitration Association's (AAA) Commercial Arbitration Rules, as supplemented by the AAA's rules for "Large Complex Commercial Disputes" and "Expedited Procedures." The Department, however, rejected the proposals that third-party arbitrators be used on the grounds that the Department's Board of Contract Appeals is available for resolution of disputes and does not charge for the use of its services. This approach is penny-wise and pound-foolish, especially in light of the significant amounts that may be at stake in a dispute and the national interest in encouraging new nuclear power development.

The Department's approach in the May 15 rule does not meet the needs of prospective investors and lenders to these projects. The Department's approach is missing critical aspects of third-party arbitration that are central to its acceptance as an expedited dispute resolution process that is considered to be neutral and fair and which the parties are willing to make binding and not subject to appeal. These include the parties' ability to have some control over the dispute resolution process by, for example, allowing them to select their own neutral fact-finders with expertise in the resolution of insurance claims utilizing procedures (e.g., AAA Rules) that are familiar to the investing and lending community.

The Department's decision to utilize exclusively a single Administrative Judge of the Board, use the Summary Trial with Binding Decision rules, and prohibit any appeal on what is potentially a substantial amount to be awarded fundamentally alters the bargain. While Boards of Contract Appeals (BCAs) are established as independent, quasi-judicial tribunals, they are still part of the federal government within the Department of Energy (one of the parties to the dispute). The current DOE BCA consists of an Acting Chairman and one Administrative Judge—a limited panel for selection at best. BCA judges are required by the Contract Disputes Act to have expertise in government procurement. While these judges may be expert in disputes relating to government contracts, Standby Support Contracts are not FAR[9]-governed, standard government contracts, and BCA judges are unlikely to have expertise in the area of insurance claims and disputes and issues relating to political risk insurance.

[9] Federal Acquisition Regulations.

A review of the DOE BCA's own ADR Handbook confirms that this is not the correct forum for resolution of disputes under the Standby Support Contracts. As stated in the Handbook (p. 61), the DOE BCA provides ADR services for (1) disputes related to the Department's prime contractors and to financial assistance awards made by the Department; (2) disputes between the Department's cost-reimbursement contractors and their subcontractors; and (3) other matters involving DOE procurement and financial assistance, as appropriate. Standby Support Contracts have little in common with DOE's procurement contracts and are significantly different from any financial assistance awards made by the Department. As stated on page 28 of the ADR Handbook, DOE's BCA Summary Trial "is not appropriate where complex issues are presented or novel or new developments are being litigated." This would be the case for any disputes under the Standby Support Contracts.

The Overseas Private Investment Corporation (OPIC) utilizes AAA arbitration as the method for resolving disputes under its political risk insurance contracts. AAA or similar third-party arbitration is also standard practice for commercial political risk insurance contracts.

Accordingly, the industry strongly urges the Department to reconsider its selection of an arbitral forum. If nevertheless, the Department insists on utilizing its own BCA, then it is industry's view that sponsors and lenders will not accept such a forum without a right of appeal, in which case both DOE and the sponsors will have lost most of the benefit of expedited alternative dispute resolution, and thereby jeopardized the utility of these contracts because of the absence of a timely dispute resolution and payment process.

II.
SECTION-BY-SECTION ASSESSMENT OF INTERIM FINAL RULE ON STANDBY SUPPORT (10 CFR 950)

Subpart A—General Provisions

§950.1 Purpose. The purpose of this part is to facilitate the construction and full power operation of new advanced nuclear facilities by providing risk insurance for certain delays attributed to the Nuclear Regulatory Commission regulatory process or to litigation.

Industry Position: In the section-by-section analysis accompanying the May 15 Rule, the Department notes that the Energy Policy Act of 2005, and other federal programs, provide a range of financial incentives to stimulate investment in new nuclear power plants. As it did in its Notice of Inquiry last November, the Department again "requests comment on whether sponsors should be eligible to participate in multiple loan guarantee or other subsidy programs and, if so, on whether clarification is needed on issues such as the amounts an entity can receive under more than one Federal program" (71 *Fed. Reg.*, 28201, May 15, 2006).

The Energy Policy Act of 2005 does not provide for any such limitation, explicitly or implicitly, and there is no basis in the statute or the legislative history to impose any limitation.

The nuclear energy industry restates its position from its December 23, 2005, response to the Department's Notice of Inquiry:

> "There is nothing in Section 638, Title XVII or Section 1306 of the Energy Policy Act to suggest that Congress intended any limitation on any of these programs if project sponsors avail themselves of one, two or all three of these programs. The Department has no statutory basis, authority or discretion to impose any such limitation or create any linkage.
>
> "Participation in the different programs established under the Energy Policy Act of 2005 should not limit a project sponsor's eligibility for any of these programs, or the amounts that a sponsor can receive under them. The objective of these programs is to facilitate and encourage the construction and full power operation of new advanced nuclear facilities. The programs are complementary, not exclusive.

> "The Standby Support is materially different from the investment stimulus provided by the Title XVII loan guarantee authority and the Section 1306 production tax credits. The nuclear energy industry receives no direct financial benefit from the Section 638 Standby Support. Rather, this political risk insurance is designed to protect private companies from a regulatory miscarriage over which they have no control. Section 638 serves a broad public policy objective: Absent this investment protection for the first few nuclear plants built under an untested licensing process, companies would not proceed with the nuclear power plant construction that is clearly in the national interest.
>
> "In the event that a project obtains Standby Support coverage under Section 638 and a loan guarantee under Title XVII, the standby support coverage would apply under some circumstances to make payments for debt service and other delay costs so that there would be no need to resort to the loan guarantee program. Thus, the cost of the loan guarantee should be adjusted downward 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 when such risk is already covered under a section 638 Standby Support contract."

§950.3 Definitions

The nuclear energy industry agrees with most of the definitions in §950.3, save the following:

"Advanced nuclear facility" means any nuclear facility the reactor design for which is approved after December 31, 1993, by the Nuclear Regulatory Commission (and such design or a substantially similar design of comparable capacity was not approved on or before that date).

> **Industry Position:** The nuclear energy industry supports the interim final rule's definition of "advanced nuclear facility" (which is taken verbatim from the Act) and agrees with the Department's discussion in the section-by-section analysis of the phrase "substantially similar" and the Department's decision not to impose a "no later than" date for NRC design, review, and approval (71 *Fed. Reg*. 28201-28202, May 15, 2006,). The industry proposes, however, that the final rule clarify the use of the word "approved" as it is used in that definition. Since risk insurance contracts will be awarded only to "approved" designs, NEI believes it should be unmistakably clear what constitutes a design approval under the rule.

Under Part 52 of the NRC's rules, NRC design approval may be obtained in two ways. The design may be certified in a rulemaking proceeding, or the design may be approved in the COL proceeding itself. The Act draws no distinction between these two paths to design approval, and the final rule should state explicitly that either path to design approval is acceptable under the rule.

"Full power operation" means the point at which the sponsor first synchronizes the advanced nuclear facility to the electrical grid.

Industry Position: Since a covered delay is triggered by a delay in full-power operation, full-power operation must be a point in time after which a delay in operations caused by a covered event cannot occur.

The May 15 Rule defines full-power operation as the point when the plant synchronizes to the electric power grid. In the section-by-section analysis, the Department states that this event typically occurs between 10 and 25 percent of a facility's licensed thermal power capacity and represents a point where the covered risks are "either not applicable or no longer likely to occur." The Department justifies its decision to cut off coverage because the risk is "less likely to occur" after fuel load and synchronization and because it is a clear demarcation (71 *Fed. Reg*. 28211, May 15, 2006).

This definition fails to recognize adequately that full-scale commercial operation could be delayed by judicial or administrative proceedings even after a new plant has reached 10-25 percent power levels.[10] How likely or unlikely this is remains untested and removing that uncertainty is the reason why Congress determined it was necessary to provide this support in order to encourage new nuclear plant construction. By narrowly defining the term, the Department is attempting to shift that risk back to sponsors and their investors and lenders, which is impermissible.

For this reason, the nuclear energy industry believes that a meaningful definition of full-power operations must include two triggers: Power output level *and* the completion and resolution of any pending or ongoing hearings or litigation.

Accordingly, the industry proposes that "full-power operation" be defined as that point when the following have occurred:

1. the facility is synchronized to the grid and is operating at or near 100 percent or higher of its nameplate capacity on a sustained basis, and

[10] See discussion of definition of term, "litigation" on pages 10-14, *supra*.

2. any pending or ongoing hearing or litigation is complete and resolved.

"Incremental costs" means the incremental difference between: (1) the fair market price of power purchased to meet the contractual supply agreements that would have been met by the advanced nuclear facility but for a covered delay; and (2) the contractual price of power from the advanced nuclear facility subject to the delay.

Industry Position: The definition for incremental costs is applicable to new nuclear power plants constructed as merchant power generators. However, a nuclear plant built by a regulated utility as part of its rate base may not have a contract to sell the output from the facility. The plant's output will simply become part of general system supply. If the nuclear plant start is delayed, a regulated utility may have to purchase power from the market to cover needs, or it may be able to supply that shortfall from general system supply. If it does purchase power, the given definition of fair market price would apply. However, if the utility does not purchase replacement power from the market, the regulations should provide an alternative means to calculate the fair market price for covering demand from within its system.

"Litigation" means adjudication in Federal, State, or tribal courts, including appeals of Commission decisions related to the combined license process to such courts, but excluding administrative litigation that occurs at the Commission related to the combined license process.

Industry Position: The nuclear energy industry disagrees with the definition of litigation, as noted in the detailed discussion on pages 10-14 of this comment letter. Administrative litigation that occurs at the Commission related to the combined license should not be excluded from the definition. The plain language of the statute demonstrates that Congress did not intend to condition this coverage in any way—not based on the type of litigation causing the delay nor when it occurs, so long as that litigation delays full-power operation.

Section 638 of the 2005 Energy Policy Act specifically provides coverage for delays occurring after the COL is issued and construction begins and before full-power operation is achieved. The Final Rule should, therefore, define litigation to include all types of litigation associated with the Commission's implementation of 10 CFR 52. Only an inclusive definition of litigation will provide the broad coverage intended by Congress in Section 638.

"Sponsor" means a person whose application for a combined licensed for an advanced nuclear facility has been docketed by the Commission.

Industry Position: The Department's definition of sponsor and discussion (71 *Fed. Reg*., 28202, May 15, 2006) regarding the possibility of an entity other than the sponsor having a debt obligation, raises confusion regarding the eligibility of project participants for Standby Support coverage. Moreover, the Department's statement that "only a sponsor is . . . eligible for covered costs" only serves to heighten the concern. If the sponsor is a Project Entity that is able to secure its own financing for the advanced nuclear facility (project), the idea of a sponsor involving a single entity may make sense. However, the current definition and single entity approach fails to recognize that many projects are likely to involve multiple project owners, which will be applicants for a COL, as well as a lead project operator, which will be licensed to operate the facility and may (or may not) also be a project owner. Only one entity can be licensed to operate a nuclear plant, but pursuant to NRC precedent, each co-owner of a plant must be licensed by the NRC. In many circumstances, each co-owner would seek separate financing (secured by its interest in the plant), because financing terms are likely to vary among co-owners, *e.g.*, varying credit ratings among co-owners, financing by municipalities or public power entities versus commercial financing by regulated utilities versus commercial financing by merchant power producers.

It may be logical for the licensed operator to serve as the "Lead Sponsor" for purposes of submitting information, receiving notices from or providing notices to the Department, and claims administration. However, the individual co-owners are in fact the sponsor entities that are in need of coverage under the Standby Support Agreement. Therefore, the concept of "a sponsor" needs to be flexible to include the multiple COL applicants, each of which should be eligible for a *pro rata* share of coverage under the Standby Support Agreement. For example, a 25% co-owner would be entitled to up to $125 million in coverage under a $500 million support agreement. In this way multiple entities could comprise a single sponsor that obtains one of the six available Standby Support Agreements.

The nuclear industry suggests the following definition:

"Sponsor" means a person or persons whose application for a combined licensed for an advanced nuclear facility has been docketed by the Commission. Multiple applicants involved in the same advanced nuclear facility are considered a single sponsor. Where multiple applicants are involved, the applicant for authority to operate the advanced nuclear facility is designated the lead sponsor and acts as the sponsor for purposes of these regulations. The lead sponsor is responsible to the Department for providing information, making or receiving notices, and administering claims on behalf of the applicants. Applicants having an ownership share in the

advanced nuclear facility share in the benefits and obligations of the Standby Support Agreement in *pro rata* proportion to their NRC licensed ownership in the advanced nuclear facility.

Subpart B—Standby Support Contract Process

§950.10 Conditional agreement.

§950.10(a) Purpose. The Department and a sponsor may enter into a Conditional Agreement. The Department will enter into a Standby Support Contract with the first six sponsors to satisfy the specified conditions precedent for a Standby Support Contract if and only if all funding and other contractual, statutory and regulatory requirements have been satisfied.

§950.10 (b) Eligibility. A sponsor is eligible to enter into a Conditional Agreement with the Program Administrator after the sponsor has submitted to the Department the following information but before the sponsor receives approval of the combined license application from the Commission:

(1) An electronic copy of the combined license application docketed by the Commission pursuant to 10 CFR part 52, and if applicable, an electronic copy of the design certification or early site permit, or environmental report referenced or included with the sponsor's combined license application;
(2) A summary schedule identifying the projected dates of construction, testing, and full power operation;
(3) A detailed business plan that includes intended financing for the project including the credit structure and all sources and uses of funds for the project, the most recent private credit rating or other similar credit analysis for project related covered financing, and the projected cash flows for all debt obligations of the advanced nuclear facility which would be covered under the Standby Support Contract;
(4) The sponsor's estimate of the amount and timing of the Standby Support payments for debt service under covered delays; and
(5) The estimated dollar amount to be allocated to the sponsor's covered costs for principal or interest on the debt obligation of the advanced nuclear facility and for incremental costs, including whether these amounts would be different if the advanced nuclear facility is one of the initial two reactors or one of the subsequent four reactors.

§950.10 (c) The Program Administrator shall enter into a Conditional Agreement with a sponsor upon a determination by the Department that the sponsor is eligible for a Conditional Agreement, the information provided by the sponsor under

paragraph (b) of this section is accurate and complete, and the Conditional Agreement is consistent with applicable laws and regulations.

Industry Position: Sections 950.10 (a), (b) and (c) set forth the rationale and eligibility requirements for a project sponsor to execute a Conditional Agreement with the Department, that could be converted to a Standby Support contract at a later date, assuming a number of conditions precedent have been satisfied.

The industry generally agrees with these sections, and with the section-by-section analysis that accompanies them, with the following reservation.

Section 950.10(b) lists the types of information that must be provided by a project sponsor in order to enter into a Conditional Agreement. The Department's section-by-section analysis indicates that "this information is needed to determine the score under the Federal Credit Reform Act" (71 *Fed. Reg.*, 28203, May 15, 2006).

In the nuclear energy industry's view, the project-specific background information required by Section 950.10(b) has little or no bearing on calculation of the budget score (or loan cost or credit subsidy amount) required by the Federal Credit Reform Act. New nuclear power projects will certainly have project-specific risk factors (e.g., technology performance risks, market risks, construction management risks), but none of these are covered by the Standby Support program, and thus are not relevant to any calculation of loan cost or budget score. The risk factors relevant to calculating the budget score involve the likelihood of licensing events and litigation that delay full-power operation.

The nuclear industry is concerned that the Department would even consider the types of project-specific information requested in Section 950.10(b) to be relevant to a determination of loan cost. The comment in the section-by-section analysis suggests that the Department intends to score each Standby Support contract on a project-by-project basis when, in fact, a workable approach requires a standardized formula.

From the perspective of the Standby Support program, the risks associated with the two $500-million contracts are identical, as are the risks associated with the four $250-million contracts—although each of those projects will certainly have unique market-related and technology-related risks. The latter, project-specific risks are, however, irrelevant to any scoring of the Conditional Agreements or the Standby Support contracts, because these project-specific risks are not covered by the Standby Support contracts.

The nuclear energy industry supports the position taken by the Department in its section-by-section analysis that the Department anticipates that its environmental review under the National Environmental Policy Act (NEPA) for the Conditional Agreement or Standby Support Contract would be based upon the NEPA review conducted by the NRC in relation to its review and approval of the sponsor's combined license application (71 *Fed. Reg.* 28204, May 15, 2006). However, we note the following timing issue: the NRC NEPA review is likely to occur during the NRC's review of the combined license application, not before. Therefore, it is highly unlikely that an NRC NEPA review will have occurred at the time of the Conditional Agreement. A NEPA review is not required at that time, however. Given that the Conditional Agreement is, on its face, merely "conditional," it simply establishes eligibility for and the "pool" of sponsors that may enter into a Standby Support contract, the nuclear energy industry urges the Department to make a determination that entering into a Conditional Agreement is not a major federal action and does not trigger NEPA review. The Department's subsequent action—entering into the Standby Support Contract—would then be, and more appropriately should be, the federal action that triggers the NEPA review, which review should be based on the NEPA review conducted by the NRC in connection with its licensing process.

950.11 Terms and conditions of the Conditional Agreement.

§950.11 (a) General. Each Conditional Agreement shall include a provision specifying that the Program Administrator and the sponsor will enter into a Standby Support Contract provided that the sponsor is one of the first six sponsors to fulfill the conditions precedent specified in §950.12, subject to certain funding requirements and limitations specified in §950.12 and any other applicable contractual, statutory and regulatory requirements.

§950.11 (b) Allocation of Coverage. Each Conditional Agreement shall include a provision specifying the amount of coverage to be allocated under the Standby Support Contract to cover principal or interest costs and to cover incremental costs, including a provision on whether the allocation shall be different if the advanced nuclear facility is one of the initial two reactors or one of the subsequent four reactors, subject to paragraphs (c) and (d) of this section.

Industry Position: The Rule must indicate explicitly that a project sponsor is not obligated to allocate coverage between the Program Account and Grant Account (or can allocate 100 percent of the coverage to the Program Account), and may elect coverage of delay costs covered through the Program Account.

In its section-by-section analysis (71 *Fed. Reg*., 28205, May 15, 2006), the Department states: "Section 950.11(c) specifically addresses the issue of how the Standby Support Contracts will be funded. Section 638 *mandates* that before entering into a Standby Support Contract, the Department establish two separate accounts and have a specified amount of funds in the relevant accounts before entering into a contract. The first account is a "Standby Support Program Account" ("Program Account"), and the second account is a "Standby Support Grant Account" ("Grant Account"). Section 638 treats the funding requirements differently for each account." *(Emphasis added.)*

The nuclear energy industry does not agree that the statutory language mandates allocation of coverage between the two accounts. Section 638 simply requires funding in one or both accounts before the Secretary of Energy can execute a Standby Support contract providing coverage from one or both accounts. Section 638 contains no prohibition, express or implied, against a project sponsor electing to take the full $500 million or $250 million in coverage for delay costs from the Standby Support Program Account.

The Standby Support Grant Account is not subject to Federal Credit Reform Act scoring protocols, and Section 638 (b)(2)(C)(ii) requires that the total amount of the incremental cost of power (cost of coverage) be deposited into the Standby Support Grant Account before the Secretary of Energy can execute a contract that includes incremental cost coverage.

Because of the significant difference in scoring of the power purchase protection, the nuclear industry would not be interested in availing itself of the power purchase coverage unless the Standby Support Grant Account was funded entirely through appropriations. Since this is unlikely, given the continuing pressure on the federal budget, the nuclear industry's interest in the coverage available through the Standby Support Grant Account approaches zero.

Given this, the final rule must clarify that the Department is authorized to enter into contracts that provide the full amount of coverage ($500 million in the case of the first two contracts, $250 million in the case of the next four) only for delay costs covered by the Standby Support Program Account. The Standby Support contracts do not have to include coverage (or provide funding for) delay costs covered by the Standby Support Grant Account.

§950.11 (c) Funding. Each Conditional Agreement shall contain a provision that the Program Account or Grant Account shall be funded in advance of execution of the Standby Support Contract and in the following manner, subject to the conditions of paragraphs (d) and (e) of this section. Under no circumstances will the amount of the

coverage for payments of principal and interest under a Standby Support Contract exceed 80 percent of the total of the financing guaranteed under that Contract.

Industry Position: The nuclear energy industry does not agree with the requirement that coverage for payments from the Standby Support Program Account cannot exceed 80 percent of the total of the financing guaranteed under that contract. There is no such 80-percent limitation either in Section 638 or in the Federal Credit Reform Act, and any such limitation in the Rule is unnecessary and should be removed. This provision reflects a chronic confusion in the May 15 Rule over whether the Standby Support Program Account is delay insurance or a loan/loan guarantee program. It is, of course, an insurance program, in which the coverage available through the Program Account is scored like a loan guarantee. That scoring methodology does not make the Program Account a loan guarantee, however.

The 80-percent limitation referenced in Section 950.11(c) apparently reflects Office of Management and Budget guidance in OMB Circular A-129, which establishes for loan and loan guarantee programs a discretionary guideline limiting federal loan and loan guarantees to 80 percent of the loan amount. This discretionary guidance is not binding, however: Many federal loan guarantee programs provide 100 percent coverage of the loan amounts, including the USDA Rural Utilities Service, the Export-Import Bank, HUD loan guarantees for health care and nursing homes, and Small Business Administration loan guarantees for Section 504 Certified Development Companies.

Moreover, the 80-percent limitation is inapplicable here because the Standby Support Contract does not "cover 100 percent of any losses on a loan." Rather, Standby Support provides coverage for only certain limited risks, which coverage is subject to dollar caps and in the case of the second four reactors is limited to 50 percent coverage and a six-month waiting period. This is far from the 100 percent coverage of all principal and interest for all risks that is the subject of the OMB guidance. The 80-percent limitation has no place in the Standby Support Rule and should be removed.

§950.11 (c)(1) The Program Account shall receive funds appropriated to the Department or a combination of appropriated funds and loan guarantee fees that are in an amount equal to the loan costs associated with the amount of principal or interest covered by the available indemnification. The parties shall specify in the Conditional Agreement the anticipated amount or anticipated percentage of the total funding in the Program Account to be contributed by appropriated funds to the Department, by the sponsor or by a non-federal source.

§950.11 (c)(2) The Grant Account shall receive funds appropriated to the Department, or a combination of appropriated funds and funds from the sponsor or other non-Federal source, in an amount equal to the incremental costs. The parties shall specify in the Conditional Agreement the anticipated amount or anticipated percentage of the total funding in the Grant Account to be contributed by appropriated funds to the Department, by the sponsor, or by a non-federal source.

> **Industry Position:** The industry generally agrees with §950.11 (c)(1) and (2), provided that it does not imply that a project sponsor must elect coverage from both the Program Account and the Grant Account. The section-by-section analysis accompanying the May 15 Rule states (71 *Fed. Reg.*, 28205, May 15, 2006) that "the Conditional Agreement include a provision addressing how to allocate the $500 million or the $250 million between the accounts." This implies a mandatory allocation requirement, which is not required by the statute. In addition, as noted previously, such an allocation is unnecessary since the industry will likely not avail itself of coverage for incremental costs through the Grant Account

§950.11 (d) Reconciliation. Each Conditional Agreement shall include a provision that the sponsor shall provide no later than ninety (90) days prior to execution of a Standby Support Contract sufficient information for the Program Administrator to recalculate the loan costs and the incremental costs associated with the advanced nuclear facility, taking into account whether the sponsor's advanced nuclear facility is one of the initial two reactors or the subsequent four reactors.

> **Industry Position:** The nuclear energy industry objects to the concept of re-calculating the loan cost (and, presumably, the underlying risk) associated with a Standby Support Contract shortly prior to execution of that contract.
>
> As noted previously, the "moving target" approach to pricing and cost does not meet the industry's legitimate need for certainty and predictability. The cost of the insurance and the premium that sponsors will be required to pay for such insurance should be established at the time of the Conditional Agreement, and the premium amount should be one of the terms of the Conditional Agreement. The Department should work with OMB to establish a procedure through which the loan cost and insurance premium are fixed at the time of the Conditional Agreement consistent with the Federal Credit Reform Act (FCRA). Other participants in FCRA programs are not subject to fluctuation in such terms at the time they enter into agreements or obtain commitments.
>
> In the event that FCRA requires re-calculation prior to the second step (that is, execution of the Standby Support Contract) in this two-step process, then

such a re-calculation should be treated as a re-estimate, with any increase in loan cost coming from the permanent indefinite budget authority that is available for this purpose pursuant to section 504(f) of the FCRA. The risk factors relevant to any re-calculation involve the likelihood of licensing events and litigation that delay full-power operation. The nuclear energy industry does not believe that it is likely that such risk factors will measurably change during the period between Conditional Agreement and execution of the Standby Support Contract. However, to the extent the government recalculates these risks based on its changed perception of such risks, then any increase in loan cost must come from permanent indefinite budget authority or appropriations and should not be the responsibility of the project sponsor since these are not project-specific risks and are not within the control of project sponsors.

§950.11 (e) Limitations.—Each Conditional Agreement shall contain a provision that limits the Department's contribution of Federal funding to the Program Account or the Grant Account to only those amounts, if any, that are appropriated to the Department in advance of the Standby Support Contract for the purpose of funding the Program Account or Grant Account. In the event the amount of appropriated funds to the Department for deposit in the Program Account or Grant Account is not sufficient to result in an amount equal to the full amount of the loan costs or incremental costs under the Conditional Agreement, the sponsor shall no later than sixty (60) days prior to execution of the Standby Support Contract:
(i) notify the Department that it shall not execute a Standby Support Contract; or
(ii) notify the Department that it shall provide additional contributions to the Program Account or Grant Account necessary to fund the total amount of loan costs or incremental costs as specified in the Conditional Agreement. The sponsor shall not have the option to provide additional funds to the Program Account or Grant Account that would fund less than the full amount necessary to fund that account.

Industry Position: The nuclear energy industry agrees that Section 638 of the Energy Policy Act of 2005 requires full funding of the loan cost (in the case of the Program Account) and the entire incremental cost (in the case of the Grant Account). If, however, the Department does not have the necessary appropriation to meet its share of the cost of the coverage, then the Rule must allow the project sponsor four options, not two. The project sponsor should be given the option of not executing the Standby Support contract, or providing additional funds (as contemplated under §950.11 (e)(i) and (ii)). In addition, however, the project sponsor should be permitted to hold open its right to execute a Standby Support contract until such time as appropriated funds become available, either through the normal

appropriations process or through reprogramming.[11] Finally, a sponsor should be entitled to elect a reduced level of coverage so long as that level is above the Department's minimum coverage level and is fully funded by a combination of available appropriations and sponsor contributions.

§950.11 (f) Termination of Conditional Agreements. Each Conditional Agreement shall include a provision that the Conditional Agreement remains in effect until such time as:
(1) The sponsor enters into a Standby Support Contract with the Program Administrator;
(2) The sponsor has commenced construction on an advanced nuclear facility and has not entered into a Standby Support Contract with the Program Administrator within thirty (30) days after commencement of construction;
(3) The sponsor notifies the Program Administrator in writing that it wishes to terminate the Conditional Agreement, thereby extinguishing any rights or obligations it may have under the Conditional Agreement;
(4) The Program Administrator has entered into Standby Support Contracts that cover three different reactor designs, and the Conditional Agreement is for an advanced nuclear facility of a different reactor design than those covered under existing Standby Support Contracts; or
(5) The Program Administrator has entered into six Standby Support Contracts.

Industry Position: No objection to §950.11(f). However, the termination provisions under clauses (4) and (5) must accommodate the circumstances where an existing Standby Support Contract is terminated or cancelled, and the Department is able to enter into a Standby Support Contract with the next sponsor that meets the eligibility conditions. Accordingly, the nuclear energy industry recommends that clauses (4) and (5) be modified to provide that the Program Administrator has not only entered into such Standby Support Contracts, but that "such Standby Support Contracts have expired in accordance with the stated term thereof pursuant to 10 CFR §950.13(e)."

§950.12 Standby Support Contract Conditions.

§950.12 (a) Conditions Precedent. If the Program Administrator has not entered into six Standby Support Contracts, the Program Administrator shall enter into a Standby Support Contract with the sponsor, consistent with applicable statutes and regulations and subject to the conditions set forth in paragraphs (b) and (c) of this

[11] In such a situation, the project sponsor would, of course, be at risk of forfeiting eligibility for the Standby Support contract if another project achieved the conditions precedent to execution of a Standby Support contract—e.g., receipt of a COL and commencement of construction.

section, upon a determination by the Department that all the conditions precedent to a Standby Support Contract have been fulfilled, including that the sponsor has:
(1) A Conditional Agreement with the Department, consistent with this subpart;
(2) A combined license issued by the Commission;
(3) Documentation that it possesses all Federal, State, or local permits required by law to commence construction;
(5) Documented coverage of required insurance for the project;
(6) Paid any required fees into the Program Account and the Grant Account, as set forth in the Conditional Agreement and paragraph (b) of this section;
(7) Provided to the Program Administrator, no later than ninety (90) days prior to execution of the contract, the sponsor's detailed schedule for completing the inspections, tests, analyses and acceptance criteria in the combined license and informing the Commission that the acceptance criteria have been met; and the sponsor's proposed schedule for review of such inspections, tests, analyses and acceptance criteria by the Commission, consistent with §950.14(a) of this part and which the Department will evaluate and approve; and
(8) Provided to the Program Administrator, no later than ninety (90) days prior to execution of the contract, a detailed systems-level construction schedule that includes a schedule identifying projected dates of construction, testing and full power operation of the advanced nuclear facility and which the Department will evaluate and approve.
(9) Provided to the Program Administrator, no later than ninety (90) days prior to the execution of the contract, a detailed and up-to-date plan of financing for the project including the credit structure and all sources and uses of funds for the project, and the projected cash flows for all debt obligations of the advanced nuclear facility.

Industry Position: The nuclear energy industry recommends that the Department delete condition (5) relating to documentation of required insurance coverage and delete the language in condition (8) requiring Department evaluation and approval of the detailed systems-level construction schedule.

Condition (5) relating to documentation of required insurance coverage is not relevant to Standby Support for covered delays and should be removed. The Standby Support provides insurance for certain events for which insurance is not otherwise available in the market. Casualty and other insurance that project sponsors otherwise obtain is simply not relevant to the issue of Standby Support coverage. Moreover, the regulation is unclear in that it refers to "required insurance" without specifying what insurance requirements are being referred to. Insurance for nuclear liability required by the NRC is adequately addressed through the licensing process. Other statutorily required insurance, such as workmen's compensation, is simply irrelevant to the Standby Support coverage.

In addition, the nuclear energy industry believes that the requirement in condition (8) for Department evaluation and approval of the detailed systems-level construction schedule should be removed. In the event of a covered event, the sponsor will be required to demonstrate that the delay and costs resulted from the covered event regardless of what the construction schedule is. The construction schedule will be determined between project sponsors, their contractors and their lenders. Evaluation and approval of the construction schedule is unnecessary to Standby Support and represents an unnecessary interjection of the Department into the construction process.

Finally, the lead-in to §950.12(a) has the effect of prohibiting the Program Administrator from entering into Standby Support Contracts once it has entered into six Standby Support Contracts. This limitation does not adequately account for the possibility of cancellation or termination of Standby Support Contracts and the need to be able to enter into additional Standby Support Contracts in such circumstances.

§950.12 (b) Funding. No later than thirty (30) days prior to execution of the contract, and consistent with section 638(b)(2)(C), funds in an amount sufficient to fully cover the loan costs or incremental costs as specified in the Conditional Agreement have been made available and shall be deposited in the Program Account or the Grant Account respectively.

Industry Position: The industry objects to the requirement to deposit funds 30 days in advance of execution of the contract. The fee that the sponsors are likely to be required to deposit will not be insignificant, and the industry does not understand why the Department needs the funds this far in advance. The financing for the project is the likely source of funding for the sponsor payment, but sponsors will be unable to close on such funding prior to contract execution. The industry requests that it be able to meet his condition simultaneous with closing of the financing, as would be standard commercial practice.

§950.12 (c) Limitations. The Department shall not enter into a Standby Support Contract, if:
(1) Program Account. There are insufficient funds deposited in the Program Account to cover the loan costs of the advanced nuclear facility under the Standby Support Contract as specified in the Conditional Agreement and paragraph (b) of this section; or
(2) Grant Account. The Department has not deposited in the Grant Account sufficient funds to cover the incremental costs of the advanced nuclear facility under the

Standby Support Contract as specified in the Conditional Agreement and paragraph (b) of this section.

Industry Position: No objection to §950.12 (c).

§950.13 Standby Support Contract: General provisions.

§950.13 (a) Purpose. Each Standby Support Contract shall include a provision setting forth an agreement between the parties in which the Department shall provide compensation for covered costs incurred by a sponsor for covered events that result in a covered delay of full power operation of an advanced nuclear facility.

§950.13 (b) Covered Facility. Each Standby Support Contract shall include a provision of coverage only for an advanced nuclear facility which is not a federal entity. Each Standby Support Contract shall also include a provision to specify the advanced nuclear facility to be covered, along with the reactor design, and the location of the advanced nuclear facility.

§950.13 (c) Sponsor Contribution. Each Standby Support Contract shall include a provision to specify the amount that a sponsor has contributed to funding each type of account.

§950.13 (d) Maximum Aggregate Compensation. Each Standby Support Contract shall include a provision to specify that the Program Administrator shall not pay compensation under the contract in an aggregate amount that exceeds the amount of coverage up to $500 million each for the initial two reactors or up to $250 million each for the subsequent four reactors. The Department may set a minimum amount of coverage.

§950.13 (e) Term. Each Standby Support Contract shall include a provision to specify the date at which the contract commences as well as the term of the contract. The contract shall enter into force on the date it has been signed by both the sponsor and the Program Administrator. Subject to the cancellation provisions set forth in paragraph (f) of this section, the contract shall terminate when all claims have been paid up to the full amounts to be covered under the Standby Support Contract, or all disputes involving claims under the contract have been resolved in accordance with subpart D of this part.

Industry Position: No objection to §950.13 (a) – (e).

§950.13 (f) Cancellation provisions. Each Standby Support Contract shall provide for cancellation in the following circumstances:

(1) If the sponsor abandons construction, and the abandonment is not caused by a covered event or force majeure, the Program Administrator may cancel the Standby Support Contract by giving written notice thereof to the sponsor and the parties have no further rights or obligations under the contract.

> **Industry Position:** If the sponsor has not notified the Department that a project has been abandoned, then the Department must give notice to the sponsor before canceling a Contract on the grounds of abandonment to allow the sponsor opportunity to either resume construction (that is, cure the "abandonment") or produce proof of continuing construction, force majeure or covered delay.

§950.13 (f)(2) If the sponsor does not require continuing coverage under the contract, the sponsor may cancel the Standby Support Contract by giving written notice thereof to the Program Administrator and the parties have no further rights or obligations under the contract.
(3) For such other cause as agreed to by the parties.

> **Industry Position:** No objection to §950.13 (f)(2) and (3). The regulations should explicitly provide that in the event of cancellation (by the Department, the sponsor, or as agreed by the parties), the Standby Support coverage should roll over, both in terms of (1) making available the full 100 percent coverage to the first of the second four reactors in the event the contract that was cancelled was one of the first two contracts and (ii) making available a Standby Support Contract to the next project sponsor with a Conditional Agreement in the queue.

§950.13 (g) Termination by Sponsor. Each Standby Support Contract shall include a provision that prohibits a sponsor or any related party from executing another Standby Support Contract, if the sponsor elects to terminate its Standby Support Contract.

> **Industry Position:** While the industry recognizes the Department's concern as expressed in the section-by-section analysis with respect to "gaming," the proposed solution as reflected in §950.13(g) is overly broad. For example, a sponsor may terminate a Standby Support contract in the event that it suspends or cancels a project for economic or other reasons. As drafted, this provision would prohibit that sponsor from obtaining a Standby Support Contract for another project, which project may otherwise be one of the first six to meet all of the necessary conditions to effectiveness of a contract. This outcome is even more inequitable where sponsors may own partial interests in different projects and, as a result, projects and the other sponsors in those projects are penalized for actions of minority participants taken in otherwise unrelated projects (because the project company denied a

contract is still determined to be a related party to the sponsor that terminated a contract). Accordingly, the industry recommends that the Department delete §950.13(g) or, at a minimum, limit the prohibition to situations in which a "sponsor elects to terminate its Standby Support Contract unless the sponsor has suspended, cancelled or terminated construction of the reactor covered by such contract."

§950.13 (h) Assignment. Each Standby Support Contract shall include a provision on assignment of a sponsor's rights and obligations under the contract. The Program Administrator shall permit assignment of rights under the contract with the Department's prior approval. The sponsor may not assign its rights under the contract without the prior written approval of the Program Administrator and any attempt to do so is null and void.

Industry Position: This section of the Rule should address two types of assignment: (1) assignment of payments and (2) assignment of the Contract. Each Standby Support Contract should allow the assignment and payment of covered costs to the lenders to the project with notice, but without requirement for prior Department consent. It is standard in project financing for lenders to be named as additional insureds and as loss payees under all insurance. While the statute restricts the Department's authority to entering into contracts with "sponsors", there are no similar restrictions on the assignment or payment of covered costs. Assignment of payment of covered costs will be a necessary condition of debt financing and should be included in the Final Rule. The second type of assignment is assignment of the Contract itself, including rights and obligations. Assignment of the Contract is adequately addressed in the May 15 Rule. However, as the Department notes in the section-by-section analysis, any transfer of control over a license requires prior NRC approval. The Standby Support Contract should be assignable with notice, but without requirement of prior Department consent, to any license transferee approved by the NRC.

§950.13 (i) Claims Administration. Each Standby Support Contract shall include a provision to specify a mechanism for administering claims pursuant to the procedures set forth in subpart C of this part.

§950.13 (j) Dispute Resolution. Consistent with the Administrative Dispute Resolution Act, each Standby Support Contract shall include a provision to specify a mechanism for resolving disputes pursuant to the procedures set forth in subpart D of this part.

Industry Position: No objection to §950.13 (i) and (j).

§950.13 (k) Re-estimation. Consistent with the Federal Credit Reform Act (FCRA), the sponsor shall provide all needed documentation as required in §950.12 to allow the Department to annually re-estimate the loan cost needed in the financing account as that term is used in 2 U.S.C. 661a(7) and funded by the Program Account.

Industry Position: The nuclear energy industry has no objection if the Department of Energy wishes to re-estimate the loan cost (and, presumably, the underlying risk) associated with a Standby Support Contract on an annual basis as required by FCRA once the contract has been executed. However, §950.13(k) should make clear that any increase in the loan cost resulting from the re-estimate shall be covered from the permanent indefinite budget authority that is available for this purpose pursuant to section 504(f) of the FCRA.

As also noted previously, the risk factors relevant to that re-estimation involve the likelihood of licensing events and litigation that delay full-power operation. Since these are not project-specific risks, and are not within the control of the project sponsors, any increase in loan cost must come from indefinite permanent budget authority or appropriations and should not be the responsibility of the project sponsor.

Since the Standby Support insurance, by definition, covers risks over which the project sponsor has no control, it is unlikely that a project sponsor would have any documentation that would allow the Department to re-estimate the loan cost associated with any given Standby Support contract.

The nuclear energy industry is also concerned about provisions (like *§950.13 (k)*) that would expose the industry to fluctuations in the cost for this insurance. As stated previously, the industry believes the Department of Energy should establish a standard premium for the insurance coverage, which will remain stable for the term of the coverage. Fluctuations in cost do not meet investor needs for stability and certainty.

§950.14 Standby Support Contract: Covered events, exclusions, covered delay and covered cost provisions.

§950.14 (a) Covered Events. Subject to the exclusions set forth in paragraph (b) of this section, each Standby Support Contract shall include a provision setting forth the type of events that are covered events under the contract. The type of events shall include:

(1) the Commission's failure to review the sponsor's inspections, tests, analyses and acceptance criteria in accordance with the Commission's rules, guidance, audit

procedures, or formal opinions, in the case where the Commission has in place any rules, guidance, audit procedures or formal opinions setting schedules for its review of inspections, tests, analyses, and acceptance criteria under a combined license or the sponsor's combined license;
(2) the Commission's failure to review the sponsor's inspections, tests, analyses, and acceptance criteria on the schedule for such review proposed by the sponsor, subject to the Department's review and approval of such schedule, including review of any informal guidance or opinion of the Commission that has been provided to the sponsor or the Department, in the case where the Commission has not provided any rules, guidance, audit procedures or formal Commission opinions setting schedules for review of inspections, tests, analyses and acceptance criteria under a combined license, or under the sponsor's combined license;

Industry Position: The May 15 Rule recognizes the need to incorporate into the Standby Support Contract a schedule of the Commission's review of inspections, tests, analyses and acceptance criteria (ITAAC) for use in determining if a covered event has occurred.

The industry agrees with the two-tier approach proposed by the Department for assessing whether an ITAAC-related delay should be considered a covered event. If the Commission has not issued any formal rule, guidance, auditing procedures or formal opinion setting its ITAAC review schedule, an ITAAC review schedule will be drafted by the sponsor and then reviewed and accepted by the Department. Once the schedule has been accepted, the Department can only consult the schedule itself during Covered Event Determination.

As noted in the section-by-section analysis, schedules may require revision during construction. The final rule should outline a process for the adjustment of the ITAAC review schedule, to which both parties must agree. Under no circumstances should the ITAAC review schedule be changed without express approval by both the sponsor and the Department. Until agreement on an updated schedule is established, the last agreed-upon ITAAC review schedule remains in place and should be used to determine covered events.

§950.14 (a)(3) The conduct of a pre-operational hearing in accordance with 10 CFR 52.103; and

Industry Position: Pre-operational hearings should include any hearing conducted in the context of the combined licensing procedure. Nothing in the statute gives the Department the discretion or authority to limit the phrase "pre-operational hearings" to a hearing conducted pursuant to 10 CFR 52.103.

Although industry agrees that it is unlikely the Commission would hold a hearing during construction and start-up other than the non-mandatory hearing authorized under 10 CFR 52.103, other hearings that could lead to covered delays are possible. Any amendment to the combined license (including a change to the ITAAC, for example) requires the opportunity for a hearing (10 CFR 52.97(b)(2)).

The Standby Support Contract is specifically designed to cover unforeseen delays in licensing, which would include unlikely hearings. Therefore, industry suggests that the final rule specify that pre-operational hearings include any hearing the Commission holds with respect to the part 52 licensing procedure.

Pre-operational hearings should also include any associated appeals or remands that might cause a delay in full-power operations. Even if a pre-operational hearing is complete, a Licensing Board could remand the question for further NRC staff action or a party could appeal a pre-operational hearing decision to the Commission. If either of these occur before full-power operation, a delay in full-power operation is possible. The Department should revise this provision to make clear that a covered delay not only includes the initial hearing, but also any Commission appeals or remands associated with that hearing.

§950.14 (a)(4) Litigation in State, Federal or tribal courts, including appeals of Commission decisions related to an application for a combined license to such courts, and excluding administrative litigation that occurs at the Commission related to the combined license.

Industry Position: The nuclear energy industry disagrees with the definition of litigation, as noted in the detailed discussion on pages 10-14 of this comment letter. Administrative litigation that occurs at the Commission related to the combined license should not be excluded from the definition. The plain language of the statute demonstrates that Congress did not intend to condition this coverage in any way—not based on the type of litigation causing the delay nor when it occurs, so long as that litigation delays full-power operation.

Section 638 of the 2005 Energy Policy Act specifically provides coverage for delays occurring after the COL is issued and construction begins and before full-power operation is achieved. The Final Rule should, therefore, define litigation to include all types of litigation associated with the Commission's implementation of 10 CFR 52. Only an inclusive definition of litigation will provide the broad coverage intended by Congress in Section 638.

§950.14 (b) Exclusions. Each Standby Support Contract shall include a provision setting forth the type of events that are excluded as covered costs under the contract, and for which any associated delay in the attainment of full power operations is not a covered delay. The types of excluded events are:

(1) The failure of the sponsor to take any action required by law, regulation, or ordinance, including but not limited to:
(i) The sponsor's failure to comply with environmental laws or regulations such as those related to pollution abatement or human health and the environment;
(ii) The sponsor's re-performance of any inspections, tests, analyses or redemonstration that acceptance criteria have been met due to Commission non-acceptance of the sponsor's submitted results of inspections, tests, analyses, and demonstration of acceptance criteria;
(iii) Delays attributable to the sponsor's actions to redress any deficiencies in inspections, tests, analyses or acceptance criteria as a result of a Commission disapproval of fuel loading; or
(2) Events within the control of the sponsor, including but not limited to delays attributable to:
(i) project planning and construction problems;
(ii) labor-management disputes;
(iii) the sponsor's failure to perform inspections, tests, analyses and to demonstrate acceptance criteria are met or failure to inform the Commission of the successful completion of inspections, tests, analyses and demonstration of meeting acceptance criteria in accordance with its schedule;
(iv) The lack of adequate funding for construction and testing of the advanced nuclear facility;
(v) a sponsor's decision not to continue construction or attain full power operation unless such action is required by a court order.
(3) Normal business risks, including but not limited to:
(i) Delays attributable to force majeure events such as a strike or the failure of power or other utility services supplied to the location, or natural events such as severe weather, earthquake, landslide, mudslide, volcanic eruption, other earth movement, or flood;
(ii) Government action meaning the seizure or destruction of property by order of governmental authority;
(iii) War or military action;
(iv) Acts or decisions, including the failure to act or decide, of any person, group, organization, or government body (excluding those acts or decisions or failure to act or decide by the Commission that are covered events);
(v) Supplier or subcontractor delays in performance;
(vi) Litigation, whether initiated by the sponsor or another party, that is not a covered event under paragraph (a) of this section;

(vii) Failure to timely obtain regulatory permits or approvals that are not covered events under paragraph (a) of this section; or
(viii) Unrealistic and overly ambitious schedules set by the sponsor.

Industry Position: While §950.14(b) provides examples of excluded events, the Department has provided little guidance on how these exclusions are to be applied in making claims determinations. As discussed above, once a project sponsor has met its initial burden of showing that a covered event was a cause of the delay in full-power operations, the Department bears the burden of proving that an excluded event directly caused the delay (or any portion thereof) in full-power operation.

With respect to the list of examples of excluded events in §950.14(b), the nuclear energy industry has the following comments:

Clauses (1)(ii), (1)(iii), and (2)(iii) relating to ITAAC should be removed or clarified. Leaving these items as examples of excluded events could result in excluding coverage where the sponsor's actions (*e.g.*, reperformance of any ITAAC or inability to perform an ITAAC on schedule) resulted from (i) the NRC's failure to comply with the ITAAC schedule (a covered event), or (ii) other fault of the NRC (*e.g.*, NRC's inspector's non-acceptance or determination of deficiency may not have been warranted, but delay resulting from such NRC action could act as an exclusion that would deny coverage for a concurrent delay that was covered). These items should be removed and determinations of whether a delay resulted from the NRC's failure to comply with schedules for ITAAC review and approval or from an event within the sponsor's control should be left to the claims administration process, not to a categorical exclusion.

As discussed above, the nuclear energy industry also objects to the inclusion of clause (2)(v) that too narrowly limits the coverage for potential delays resulting from litigation.

Clause (3)(iv) broadly excludes from coverage acts and or decisions or failures to act or decide of any person, group, organization, or governmental body and should be removed as overly broad. In an attempt to limit the over-reaching of this clause, the Department included a parenthetical excluding NRC acts or decisions or failures to act or decide from the exclusion. The nuclear energy industry notes that this parenthetical should similarly exclude litigation and acts or decisions or failures to act or decide by courts and arbitral bodies. Once this omission is corrected, the clause becomes completely circular, demonstrating further why its inclusion is overly broad and why it should be deleted.

Finally, clause (3)(viii) contains an exclusion for "unrealistic and overly ambitious schedules set by the sponsor." This exclusion is unnecessary and unwarranted. Presumably, it is not referring to ITAAC schedules since those are either approved by the NRC or the Department. With respect to construction schedules, as noted above, those will be determined by the sponsors, their contractors and their lenders. To the extent that a covered event occurs, the sponsor will be required to demonstrate that the delay and cost resulted from the covered event. Whether or not the schedule was "unrealistic and overly ambitious" will be irrelevant to that determination.

§950.14 (c) Covered Delay. Each Standby Support Contract shall include a provision for the payment of covered costs, in accordance with the procedures in subpart C of this part for the payment of covered costs, if a covered event(s) is determined to be the cause of delay in attainment of full power operation, provided that:

(1) Under Standby Support Contracts for the subsequent four reactors, covered delay may occur only after the initial 180-day period of delay, and
(2) The sponsor has used due diligence to mitigate, shorten, and end, the covered delay and associated costs covered by the Standby Support Contract and demonstrated this to the Program Administrator.

Industry Position: The due diligence requirement is consistent with a party's obligation under general principles of contract law to mitigate damages (as noted in the Department's section-by-section analysis), with most standard force majeure clauses and with the statutory requirement in Section 638 of the Energy Policy Act of 2005. However, the obligation that the sponsor have "demonstrated this to the Program Administrator" is unnecessary and is virtually impossible to meet. A sponsor should not be required to demonstrate due diligence to establish coverage. In other words, it should not be an element of proof that the sponsor has the burden of demonstrating in order to establish coverage. Rather, once a sponsor has established that a covered event and a covered delay have occurred, the sponsor's failure to exercise due diligence to shorten and to end the delay would serve to limit the covered costs. Moreover, requiring the sponsor to demonstrate that it has used due diligence as an element in demonstrating a covered delay establishes a standard that is virtually impossible to meet, because it requires proving everything that a reasonable person would have done. The Department in its section-by-section analysis notes the definition of "diligence" as involving a "continual effort to accomplish something" (71 *Fed. Reg*. 28211, May 15, 2006). The Department is therefore requiring sponsors to demonstrate this "continual effort." This is particularly problematic when the covered events are such things as litigation and failure of a government agency to comply with ITAAC schedules, events which are outside of the control of the sponsor. Rather than being part of

the proof of claim, the Claims Administrator could request additional information with respect to any concerns that a sponsor failed to use due diligence to shorten and to end a covered delay. Sponsors would then have an opportunity to address specific issues. Accordingly, the Department should delete the language in §950.14(c)(2) requiring that the sponsor have "demonstrated this to the Program Administrator."

§950.14 (d) Covered Costs. Each Standby Support Contract shall include a provision to specify the type of costs for which the Department shall provide payment to a sponsor for covered delay in accordance with the procedures set forth in subparts C and D of this part. The types of costs shall be limited to either or both, dependent upon the terms of the contract:
§950.14 (d)(1) The principal or interest on which the loan costs for the Program Account was calculated; and
§950.14 (d)(2) The incremental costs on which funding for the Grant Account was calculated.

Industry Position: The industry does not agree with the narrow and unnecessarily restrictive definition of covered costs under the Program Account that is reflected in Section 950.14 (d)(1).

Section 638(d)(5) of the Energy Policy Act of 2005 provides that the types of covered costs listed in that subsection are inclusive, rather than exclusive. Specifically, the statutory language in Section 638(d)(5) states that a Standby Support contract:

> *"... shall include as covered costs those costs that result from a delay during construction and in gaining approval for fuel loading and full-power operation**, including***—
>
> *a. principal or interest on any debt obligation ..." (Emphasis added.)*

The use of the word "including" in the description of covered costs—without any additional qualifying language such as "and limited solely to"—suggests that Congress intended an inclusive and expansive definition of covered costs. The implementing regulations should follow this interpretation and specify that allowable covered costs "include" principal and interest on project debt (as noted explicitly in the statute), but also operating and maintenance costs and other costs associated with delay in commercial operation. Because the costs of a covered delay would certainly include significant costs beyond principal and interest, 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 or additions to the project, then the additional costs associated with such redesign or alterations should be covered.

In its section-by-section analysis accompanying the May 15 Rule, the Department concedes (71 *Fed. Reg.*, 28212, May 15, 2006) that "there is more than one reasonable interpretation of paragraph (d)(5) and that it is not clear on its face; as a result, the Department has broad discretion to interpret the term "including" in paragraph (d)(5)."

The section-by-section analysis goes on to say that "expanding the coverage to down-time costs ... could reduce a sponsor's incentive to expeditiously complete a project." The nuclear energy industry regards this assertion as nonsensical. Project sponsors have enormous incentives to complete new nuclear projects. For example, even with an expansive definition of covered costs, coverage from the Standby Support Program Account would not provide a return on or of shareholder equity. That alone would drive a project sponsor to complete a project as expeditiously as possible. Nothing in the May 15 Rule justifies the narrow interpretation of covered costs. Moreover, such an interpretation is contrary to the purpose of the program and Congressional intent to provide coverage for licensing and litigation risk to reduce uncertainty and encourage the development of new nuclear power plants.

Subpart C—Claims Administration Process.

§950.20 General provisions.
The parties shall include provisions in the Standby Support Contract to specify the procedures and conditions set forth in this subpart for the submission of claims and the payment of covered costs under the Standby Support Contract. A sponsor is required to establish that there is a covered event, a covered delay and a covered loss.

Industry Position: As discussed above, the nuclear energy industry supports the position that the sponsor has the burden of making a good-faith showing of covered event, covered delay and covered cost and has no objection to §950.20. In addition, the nuclear energy industry generally supports the two-step process for claims administration and concurs with the Department's assessment regarding the need and benefits of a bifurcated process in which there is a timely notification and determination

of a covered event followed by a determination of covered delay and the amount of covered costs. The industry notes that §950.20 and the accompanying section-by-section analysis uses the term "covered loss," which is not defined. The nuclear energy industry suggests that this be revised to refer to the "amount of covered costs".

§950.21. Notification of covered event.

(a) A sponsor shall submit in writing to the Claims Administrator a notification that a covered event has occurred that has delayed the schedule for construction or testing and that may cause covered delay. The sponsor shall submit to the Claims Administrator within thirty (30) days of the end of the covered event and contain the following information:

(1) A description and explanation of the covered event, including supporting documentation of the event;
(2) The duration of the delay in the schedule for construction, testing and full power operation, and the schedule for inspections, tests, analyses and acceptance criteria, if applicable;
(3) The sponsor's projection of the duration of covered delay;
(4) A revised schedule for construction, testing and full power operation, including the dates of system level construction or testing that had been conducted prior to the event; and
(5) A revised inspections, tests, analyses, and acceptance criteria schedule, if applicable, including the dates of Commission review of inspections, tests, analyses, and acceptance criteria that had been conducted prior to the event.

Industry Position: Notification of a covered event under §950.21 should be submitted "no later than" 30 days after the end of a covered event. Some covered events could be protracted, such as litigation, and notification may sometimes be appropriate long before the end of an event. The Department should be willing to accept notice and begin paying claims as covered losses are incurred, while a covered event is ongoing.

§950.21 (b) An authorized representative of the sponsor shall sign the notification of a covered event, certify the notification is made in good faith, and represent that the supporting information is accurate and complete to the sponsor's knowledge and belief.

Industry Position: No objection to §950.21(b).

§950.22 Covered event determination.

(a) Completeness Review. Upon notification of a covered event from the sponsor, the Claims Administrator shall review the notification for completeness within thirty (30) days of receipt.

(1) If the notification is not complete, the Claims Administrator shall return the notification within thirty (30) days of receipt and specify the incomplete information for submission by the sponsor to the Claims Administrator in time for a determination by the Claims Administrator in accordance with paragraph (c) of this section.

> **Industry Position:** The industry thinks it is reasonable for the Claims Administrator to review *and make a determination on the covered event*, provided the notification is complete, in 30 days. If the notification is not complete, the Claims Administrator shall alert the sponsor and specify the incomplete information as soon as possible but no later than 30 days after notification receipt. Once a notification is complete, the Claims Administrator should have 30 days to make a determination.

§950.22 (b) Covered Event Determination. The Claims Administrator shall review the notification and supporting information to determine whether there is agreement by the Claims Administrator with the sponsor's representation of the event as a covered event (Covered Event Determination) based on a review of the contract conditions for covered events and excluded events.

> **Industry Position:** No objection to §950.22 (b).

§950.22 (c) Timing. The Claims Administrator shall notify the sponsor within sixty (60) days of receipt of the notification whether the Administrator agrees with the sponsor's representation, disagrees with the representation, or requires further information. If the sponsor disagrees with the Covered Event Determination, the parties shall resolve the dispute in accordance with the procedures set forth in subpart D of this part.

> **Industry Position:** As discussed above, the industry thinks it is reasonable for the Claims Administrator to review *and make a determination* on the covered event within 30 days of receipt of a complete notification. The industry objects to the open-ended process for requiring further information, however. §950.22(a)(1) already provides a mechanism by which the Claims Administrator can request additional information to ensure a complete notification. Once the notification is complete, it is critical to get a decision within a set time-frame and not to allow for an open-ended process for requiring further information. The phrase "or requires further information" should be deleted from §950.22(c).

§950.23 Claims process for payment of covered costs.

§950.23 (a) General. No more than 120 days of when a sponsor was scheduled to attain full power operation and expects it will incur covered costs, the sponsor may make a claim upon the Department for the payment of its covered costs under the Standby Support Contract. The sponsor shall file a Certification of Covered Costs and thereafter such Supplementary Certifications of Covered Costs as may be necessary to receive payment under the Standby Support Contract for covered costs.

> **Industry Position:** The sponsor should have the ability to submit a claim to the Department for covered costs as soon as a covered event has caused a delay in full-power operation of the nuclear facility—even if this occurs more than 120 days before the scheduled start date. Conceivably, litigation could begin and cause a halt to construction anytime after the combined license is issued and construction begins. Such a delay could be protracted and costly. Industry believes the risk insurance is intended to cover this type of delay. If this occurred more than 120 days from full-power operation, a sponsor should be able to submit a claim, as long as there is reasonable evidence that the covered event will cause a delay in full-power operations. Once a sponsor begins incurring covered losses, the Department then would be prepared to begin making prompt payment.

§950.23 (b) Certification of Covered Costs. The Certification of Covered Costs shall include the following:

(1) A Claim Report, including the information specified in paragraph (c) of this section;
(2) A certification by the sponsor that:
(i) The covered costs listed on the Claim Report filed pursuant to this section are losses to be incurred by the sponsor;
(ii) The claims for the covered costs were processed in accordance with appropriate business practices and the procedures specified in this subpart; and
(iii) The sponsor has used due diligence to mitigate, shorten, and end, the covered delay and associated costs covered by the Standby Support Contract.

§950.23 (c) Claim Report. For purposes of this part, a "Claim Report" is a report of information about a sponsor's underlying claims that, in the aggregate, constitute the sponsor's covered costs. The Claim Report shall include, but is not limited to:
(1) Detailed information substantiating the duration of the covered delay;
(2) Detailed information about the covered costs associated with covered delay, including as applicable:
(i) The amount of payment for principal or interest during the covered delay, including the relevant dates of payment, amounts of payment and any other

information deemed relevant by the Department, and the name of the holder of the debt, if the debt obligation is held by a Federal agency; or
(ii) The underlying payment during the covered delay related to the incremental cost of purchasing power to meet contractual agreements, including any documentation deemed relevant by the Department to calculate the fair market price of power.

§950.23 (d) Supplementary Certification of Covered Cost. If the total amount of the covered costs due to a sponsor under the Standby Support Contract has not been determined at the time the Certification of Covered Costs has been filed, the sponsor shall file monthly, or on a schedule otherwise determined by the Claims Administrator, Supplementary Certifications of Covered Costs updating the amount of the covered costs owed to the sponsor. Supplementary Certifications of Covered Costs shall include a Claim Report and a certification as described in this section.

§950.23 (e) Supplementary Information. In addition to the information required in paragraphs (b) and (c) of this section, the Claims Administrator may request such additional supporting documentation as required to ascertain the appropriate covered costs sustained by a sponsor.

> **Industry Position:** No objection to §950.23(b) – (e). The ability to request additional supporting documentation in §950.23(e) should not be a subjective determination by the Claims Administrator and so the word "reasonably" should be inserted before "required". In addition, as discussed below, the word "appropriate" should be deleted from §950.23(e).

§950.24 Claim determination for covered costs

§950.24 (a) No later than thirty (30) days from the sponsor's submission of a Certification of Covered Costs, the Claims Administrator shall issue a Claim Determination identifying those claimed costs deemed to be reasonable and appropriate based on an evaluation of:

(1) The duration of covered delay, taking into account contributory or concurrent delays resulting from events excluded from coverage;
(2) The covered costs associated with covered delay, including an assessment of the sponsor's due diligence in mitigating or ending covered costs, as set forth in §950.23;
(3) Any adjustments to the covered costs, as set forth in §950.26; and
(4) Other information as necessary and appropriate.

§950.24 (b) The Claim Determination shall state the Claims Administrator's determination that the claim shall be paid in full, paid in an adjusted amount as deemed appropriate by the Claims Administrator, or rejected in full.

§950.24 (c) Should the Claims Administrator conclude that the sponsor has not supplied the required information in the Certification of Covered Costs or any supporting documentation sufficient to allow reasonable verification of the duration of the covered delay or covered costs, the Claims Administrator shall so inform the sponsor and specify the nature of additional documentation requested, in time for the sponsor to supply supplemental documentation and for the Claims Administrator to issue the Claim Determination.

§950.24 (d) Should the Claims Administrator find that any claimed covered costs are not appropriate or otherwise should be considered excluded costs under the Standby Support Contract, the Claims Administrator shall identify such costs and state the reason(s) for that decision in writing. If the parties cannot agree on the covered costs, they shall resolve the dispute in accordance with the requirements in subpart D of this part.

Industry Position: Section 950.24 introduces subjective concepts that should not be part of the claims process. In particular, §950.24 in several places provides that determinations will be made based on what the Claims Administrator "deems reasonable and appropriate". Determinations should be made based on the terms of the Standby Support Contract, not based on the Claims Administrator's views of reasonableness and appropriateness. In particular, §950.24 should be revised as follows: (i) first sentence of §950.24(a) change "deemed to be reasonable and appropriate" to "determined to be covered under the contract", (ii) in §950.24(b), change "as deemed appropriate by the Claims Administrator" to "as determined pursuant to §950.26"; and (iii) in §950.24(d), change "not appropriate" to "not covered".

Consistent with the earlier discussion on causation, §950.24 (a)(1) should be revised to read as follows: "The duration of covered delay, taking into account contributory or concurrent delays directly caused by any ~~resulting from~~ events excluded from coverage as provided in §950.14(e);"

In addition, in §950.24(a)(2) the phrase "including an assessment of the sponsor's due diligence in mitigating or ending covered cost," should be deleted as adjustments to covered costs relating to sponsor's exercise of due diligence is already addressed in §950.24(a)(3). Reference to making an adjustment based on a sponsor's due diligence obligation in both clause (2) and (3) risks double-counting and is confusing.

§950.25 Calculation of covered costs.

§950.25 (a) The Claims Administrator shall calculate the appropriate amount of the covered costs claimed in the Certification of Covered Costs as follows:

(1) Costs covered by Program Account Loan guarantee. The principal or interest on any debt obligation financing the advanced nuclear facility for the duration of covered delay to the extent the debt obligation was included in the calculation of the loan cost; and

> **Industry Position:** For the reasons discussed above, the word "appropriate" should be deleted from the first sentence of §950.25(a). In §950.25(a)(1), the phrase "to the extent the debt obligation was included in the calculation of the loan cost" should be deleted and the phrase "and specifically identified in the Standby Support Contract" should be inserted before the phrase "for the duration of covered delay." The existing wording raises concerns that, in the case of floating rate loans, the actual rate of interest may not be covered by the phrase "to the extent". Moreover, the calculation of loan cost is conducted by the Department and OMB and it would be more appropriate to ascertain coverage by reference to the contract to which the sponsor is a party.

(2) Costs covered by Grant Account. The incremental costs calculated for the duration of the covered delay. In calculating the incremental cost of power, the Claims Administrator shall consider:

(i) Fair Market Price. The fair market price may be determined by the lower of the two options: (A) the actual cost of the short-term supply contract for replacement power, purchased by the sponsor, during the period of delay, or (B) for each day of replacement power by its day-ahead weighted average index price in $/MWh at the hub geographically nearest to the advanced nuclear facility as posted on the previous day by the Intercontinental Exchange (ICE) or an alternate electronic marketplace deemed reliable by the Department. The daily MWh assumed to be covered is no more than its nameplate capacity multiplied by 24 hours; multiplied by the capacity-weighted U.S. average capacity factor in the previous calendar year, including in the calculation any and all commercial nuclear power units that operated in the United States for any part of the previous calendar year; and multiplied by the average of the ratios of the net generation to the grid for calculating payments to the Nuclear Waste Fund to the nameplate capacity for each nuclear unit included. In addition, the Claims Administrator may consider "fair market price" from other published indices or prices at regional trading hubs and bilateral contracts for similar delivered firm power products and the costs incurred, including acquisition costs, to move the power to the contract-specified point of delivery, as well as the provisions of the covered contract regarding replacement power costs for delivery default; and

(ii) Contractual Price of Power. The contractual price of power shall be determined as the daily weighted average price in equivalent $/MWh under a contractual supply agreement(s) for delivery of firm power that the sponsor entered into prior to any covered event. The daily MWh assumed to be covered is no more than the advanced

nuclear facility's nameplate capacity multiplied by 24 hours; multiplied by the capacity weighted U.S. average capacity factor in the previous calendar year, including in the calculation any and all commercial nuclear power units that operated in the United States for any part of the previous calendar year; and multiplied by the average of the ratios of the net generation to the grid for calculating payments to the Nuclear Waste Fund to the nameplate capacity for each nuclear unit included.

Industry Position: The May 15 Rule states that the fair market price is the lower of the cost of a short-term supply contract or the day-ahead spot price. In the section-by-section analysis accompanying the May 15 Rule, the Department states: "The determination of which option represents the lower price necessarily cannot be an after-the-fact mechanical determination but rather must be made in the context of whether the sponsor exercised due diligence in selecting an option to pursue" (71 *Fed. Reg.*, 28212, May 15, 2006). This logic is not represented in the text of the Rule itself and should be.

As the Rule currently stands, there is disincentive to enter into a short-term supply contract. A short-term supply contract may be the more prudent option, but the sponsor takes the risk of not recovering the full contract cost if the spot price drops below the contract price. The Rule language must reflect the sentiment expressed in the section-by-section analysis—e.g., that the Claims Administrator shall consider whether the project sponsor exercised due diligence.

The descriptions of Fair Market Price and Contractual Price of Power are applicable to new nuclear power plants constructed as merchant power generators. A nuclear plant built by a regulated utility as part of its rate base likely will not have a contract to sell the output from the facility. If the nuclear plant's operation is delayed, a regulated utility may or may not have to purchase power from the market to cover needs. If it does purchase power, the given definition of fair market price would apply. If the utility does not purchase replacement power from the market, the Rule should supply an alternative way of calculating the fair market price for supply from system resources the electricity that would otherwise have been supplied by the nuclear plant.[12]

§950.26 Adjustments to claim for payment of covered costs.

[12] The nuclear energy industry's comments and suggestions for improvement on the subject of incremental costs are provided for reasons of technical completeness and accuracy only. As stated previously in these comments, the nuclear energy industry sees no value in the coverage for incremental costs through the Standby Support Grant Account, and doubts any company will avail themselves of this coverage.

§950.26 (a) Aggregate amount of covered costs. The sponsor's aggregate amount of covered costs shall be reduced by any amounts that are determined to be either excluded or not covered.

§950.26 (b) Amount of Department share of covered costs. The Department share of covered costs shall be adjusted as follows:
(1) No excess recoveries. The share of covered costs paid by the Department to a sponsor shall not be greater than the limitations set forth in §950.27(d).
(2) Reduction of amount payable. The share of covered costs paid by the Department shall be reduced by the appropriate amount consistent with the following:
(i) Excluded claims. The Department shall ensure that no payment shall be made for costs resulting from events that are not covered under the contract as specified in § 950.14; and
(ii) Sponsor due diligence. Each sponsor shall ensure and demonstrate that it uses due diligence to mitigate, shorten, and to end the covered delay and associated costs covered by the Standby Support Contract.

> **Industry Position:** For the reasons discussed previously, §950.26(b) should be revised to read as follows:
>
> §950.26 (b) Amount of Department share of covered costs. The Department share of covered costs shall be adjusted as follows:
> (1) No excess recoveries. The share of covered costs paid by the Department ~~to a sponsor~~ shall not be greater than the limitations set forth in §950.27(d).
> (2) Reduction of amount payable. The share of covered costs paid by the Department shall be reduced ~~by the appropriate amount consistent with the following:~~ as follows:
> (i) Excluded claims. The Department shall ~~ensure that no payment shall be made~~ not make any payment for costs ~~resulting from~~ directly caused by any events that are not covered under the contract as specified in § 950.14; and
> (ii) Sponsor due diligence. ~~Each sponsor shall ensure and demonstrate that it uses~~ The Department shall not make any payment for costs directly caused by the sponsor's failure to use due diligence to mitigate, shorten, and to end the covered delay and associated costs covered by the Standby Support Contract.

§950.27 Conditions for payment of covered costs.

§950.27 (a) General. The Department shall pay the covered costs associated with a Standby Support Contract in accordance with the Claim Determination issued by the Claims Administrator under §950.24 or the Final Claim Determination under §950.34, provided that:

(1) Neither the sponsor's claim for covered costs nor any other document submitted to support the underlying claim is fraudulent, collusive, made in bad faith, dishonest or otherwise designed to circumvent the purposes of the Act and regulations;
(2) The losses submitted for payment are within the scope of coverage issued by the Department under the terms and conditions of the Standby Support Contract as specified in subpart B of this part; and
(3) The procedures specified in this subpart have been followed and all conditions for payment have been met.

§950.27 (b) Adjustments to Payments. In the event of fraud or miscalculation, the Department may subsequently adjust, including an adjustment obligating the sponsor to repay any payment made under paragraph (a) of this section.

§950.27 (c) Suspension of payment for covered costs. If the Department paid or is paying covered costs under paragraph (a) of this section, and subsequently makes a determination that a sponsor has failed to meet any of the requirements for payment specified in paragraph (a) of this section for a particular covered cost, the Department may suspend payment of covered costs pending investigation and audit of the sponsor's covered costs.

§950.27 (d) Amount payable. The Department's share of compensation for the initial two reactors is 100 percent of the covered costs of covered delay but not more than the coverage in the contract or $500 million per contract, whichever is less; and for the subsequent four reactors, not more than 50 percent of the covered costs of the covered delay but not more than the coverage in the contract or $250 million per contract, whichever is less. The Department's share of compensation for the subsequent four reactors is further limited in that the payment is for covered costs of a covered delay that occurs after the initial 180-day period of covered delay.

Industry Position: No objection to §950.27(a) - (d).

§950.28 Payment of covered costs.

(a) General. The Department shall pay to a sponsor the appropriate covered costs due the sponsor, provided that there are no disputes between the sponsor and the Department. Payment shall be made in such installments and on such conditions as the Department determines appropriate. Any overpayments by the Department of the covered costs shall be offset from future payments to the sponsor or returned by the sponsor to the Department within forty-five (45) days. If there is a dispute, then the Department shall pay the undisputed costs and defer payment of the disputed portion upon resolution of the dispute in accordance with the procedures in subpart D of this part. If the covered costs include principal or interest owed on a loan made or guaranteed by a Federal agency, the Department shall instead pay that Federal agency the covered costs, rather than the sponsor.

Industry Position: Industry feels that it is reasonable to expect the Department to pay any undisputed costs in a claim, and defer payment of disputed costs until the dispute is resolved, as the fourth sentence in this section describes: "If there is a dispute, then the Department shall pay the undisputed costs and defer payment of the disputed portion upon resolution of the dispute."

The first sentence in this section, however, implies that the Department will defer all payments of undisputed and disputed costs until all disputes are resolved. Industry disagrees with this payment procedure and recommends the phrase, "provided that there are no disputes between the sponsor and the Department," be removed from the text to reduce confusion and eliminate contradiction. In addition, the word "appropriate" should be deleted from the first sentence.

The industry also objects to the second sentence. Once a claim determination has been made, payment should be unconditional. The Department's rights in the event of fraud or miscalculation are adequately protected by §950.27, and there should be no other basis for conditions. Ambiguous or otherwise open-ended discretion to impose conditions as contained in this provision do not provide the level of certainty and predictability needed for investor and lender participation in new nuclear power development. Similarly, Department discretion to make payments in installments as it deems "appropriate" is not appropriate and is inconsistent with the provisions of §950.28(b). Once a claim determination has been made, the Department should pay for any costs that have been incurred within a short, set time frame (no longer than 30 days) with payment for future covered costs made promptly (again, no longer than 30 days) after submission of the Supplementary Certification of Covered Costs. Interest on amounts due (in the case of principal and interest on covered debt obligations, at the rate applicable under such debt obligation) should be paid from the date such amount was or is due (in the case of principal and interest on covered debt obligations, the due date under the loan documents) to the date of payment by the Department.

A federal loan guarantee allows the recipient to secure debt from commercial lenders. Any debt service claim is owed the private lender, not the federal government. The sponsor has likely already paid the private lender, in which case the claim should be paid to the sponsor. The claim should only be paid to a federal agency that has granted the sponsor a loan guarantee if that agency has paid the debt service.

§950.28 (b) Timing of Payment. The sponsor may receive payment of covered costs when:
(1) The Department has approved payment of the covered cost as specified in this subpart; and
(2) The sponsor has incurred and is obligated to pay the costs for which payment is requested.

§950.28 (c) Payment process. The covered costs shall be paid to the sponsor designated on the Certification of Covered Costs required by §950.23. A sponsor that requests payment of the covered costs must receive payment through electronic funds transfer.

> **Industry Position:** At the end of the first sentence of §950.28(c), the Department should add the phrase "or to such sponsor's assignee as permitted by §950.13(h)."

Subpart D—Dispute Resolution Process

§950.30 General.

The parties, i.e., the sponsor and the Department, shall include provisions in the Standby Support Contract that specify the procedures set forth in this subpart for the resolution of disputes under a Standby Support Contract. §§950.31 and 950.32 address disputes involving covered events; §§950.33 and 950.34 address disputes involving covered costs; and §§950.36 and 950.37 address disputes involving other contract matters.

§950.31 Covered event dispute resolution.

§950.31 (a) If a sponsor disagrees with the Covered Event Determination rendered in accordance with §950.22 and cannot resolve the dispute informally with the Claims Administrator, then the disagreement is subject to resolution as follows:
(1) A sponsor shall, within thirty (30) days of receipt of the Covered Event Determination, deliver to the Claims Administrator written notice of a sponsor's rebuttal which sets forth reasons for its disagreement, including any expert opinion obtained by the sponsor.
(2) After submission of the sponsor's rebuttal to the Claims Administrator, the parties shall have fifteen (15) days during which time they must informally and in good faith participate in mediation to attempt to resolve the disagreement before instituting the process under paragraph (b) of this section. If the parties reach agreement through mediation, the agreement shall constitute a Final Determination on Covered Events.
(3) The parties shall jointly select the neutral(s). The parties shall share equally the cost of the mediation.

§950.31 (b) If the parties cannot resolve the disagreement through mediation under the timeframe established under paragraph (a)(2) of this section and the sponsor elects to continue pursuing the claim, the sponsor shall within ten (10) days submit any remaining issues in controversy to the Department of Energy Board of Contract Appeals (Board) or its successor, for binding resolution by an Administrative Judge of the Board utilizing the Board's Summary Trial with Binding Decision process. The parties shall abide by the procedures of the Board for Summary Trial with Binding Decision. The parties agree that the decision of the Board constitutes a Final Determination on Covered Events.

§950.32 Final Determination on covered events.

(a) If the parties reach a Final Determination on Covered Events through mediation, or Summary Trial with Binding Decision as set forth in this subpart, the Final Determination on Covered Events is a final settlement of the issue, made by the sponsor and the Program Administrator. The sponsor, and the Department, may rely on, and neither may challenge, the Final Determination on Covered Events in any future Certification of Covered Costs related to the covered event that was the subject of that Initial Determination.

(b) The parties agree that no appeal shall be taken or further review sought, and that the Final Determination on Covered Events is final, conclusive, non-appealable and may not be set aside, except for fraud.

§950.33 Covered costs dispute resolution.

§950.33 (a) If a sponsor disagrees with the Claim Determination rendered in accordance with §950.24 and cannot resolve the dispute informally with the Claims Administrator, then the parties agree that any dispute must be resolved as follows:
(1) A sponsor shall, within thirty (30) days of receipt of the Claim Determination, deliver to the Claims Administrator in writing notice of and reasons for its disagreement (Sponsor's Rebuttal), including any expert opinion obtained by the sponsor.
(2) After submission of the sponsor's rebuttal to the Claims Administrator, the parties have fifteen (15) days to informally and in good faith participate in mediation to resolve the disagreement before instituting the process under paragraph (b) of this section. If the parties reach agreement through mediation, the agreement shall constitute a Final Claim Determination.
(3) The parties shall jointly select the mediator(s). The parties shall share equally the cost of the mediator(s).

§950.33 (b) If the parties cannot resolve the disagreement through mediation under the timeframe established under paragraph (a)(2) of this section, any remaining

issues in controversy shall be submitted by the sponsor within ten (10) days to the Department of Energy Board of Contract Appeals (Board) or its successor, for binding arbitration by an Administrative Judge of the Board utilizing the Board's Summary Trial with Binding Decision process. The parties shall abide by the procedures of the Board for Summary Trial with Binding Decision. The parties agree that the decision of the Board shall constitute a Final Claim Determination.

§950.34 Final claim determination.

§950.34 (a) If the parties reach a Final Claim Determination through mediation, or Summary Trial with Binding Decision as set forth in this subpart, the Final Claim Determination is a final settlement of the issue, made by the sponsor and the Program Administrator.

§950.34 (b) The parties agree that no appeal shall be taken or further review sought and that the Final Claim Determination is final, conclusive, non-appealable, and may not be set aside, except for fraud.

§950.35 Payment of final claim determination.
Once a Final Claim Determination is reached by the methods set forth in this subpart, the parties intend that such a Final Claim Determination shall constitute a final settlement of the claim and the sponsor may immediately present to the Department a Final Claim Determination for payment.

§950.36 Other contract matters in dispute

§950.36 (a) If the parties disagree over terms or conditions of the Standby Support Contract other than disagreements related to covered events or covered costs, then the parties shall engage in informal dispute resolution as follows:
(1) The parties shall engage in good faith efforts to resolve the dispute after written notification by one party to the other that there is a contract matter in dispute.
(2) If the parties cannot reach a resolution of the matter in disagreement within thirty (30) days of the written notification of the matter in dispute, then the parties shall have fifteen (15) days during which time they must informally and in good faith participate in mediation to attempt to resolve the disagreement before instituting the process under paragraph (b) of this section. If the parties reach agreement through mediation, the agreement shall constitute a Final Agreement on the matter in dispute.
(3) The parties shall jointly select the neutral(s). The parties shall share equally the cost of the mediation.

§905.36 (b) If the parties cannot resolve the disagreement through mediation under the timeframe established in paragraph (a)(2) of this section and either party elects to continue pursuing the disagreement, that party shall within ten (10) days submit

any remaining issues in controversy to the Department of Energy Board of Contract Appeals (Board) or its successor, for binding resolution by an Administrative Judge of the Board utilizing the Board's Summary Trial with Binding Decision process. The parties shall abide by the procedures of the Board for Summary Trial with Binding Decision. The parties shall agree that the decision of the Board constitutes a Final Decision on the matter in dispute.

§950.37 Final agreement or final decision

§950.37 (a) If the parties reach a Final Agreement on a contract matter in dispute through mediation, or a Final Decision on a contract matter in dispute through a Summary Trial with Binding Decision as set forth in this subpart, the Final Agreement or Final Decision is a final settlement of the contract matter in dispute, made by the sponsor and the Program Administrator.

§950.37 (b) The parties agree that no appeal shall be taken or further review sought, and that the Final Agreement or Final Decision is final, conclusive, non-appealable and may not be set aside, except for fraud.

Industry Position: As discussed above in Section I of these comments, the industry reiterates its position that dispute resolution should follow the model of OPIC and commercial political risk insurers in utilizing third-party, commercial arbitration, such as AAA. In addition, industry has the following comments with respect to other aspects of Subpart D:

(1) The proposed rules should be amended to clarify that if the parties cannot select a mediator in the allotted 15 days, then the claim determination must still proceed. The process is not suspended.

(2) Sections 950.31(a)(3) and 950.36(a)(3) use the term "neutral" but section 950.33(a)(3) uses the term "mediator." The term should be used consistently throughout the regulations.

(3) There is currently no provision setting forth the standard by which the Claims Administrator's decision should be reviewed. The current draft should be amended to read: "(d) Any decision by the Claims Administrator shall be reviewed *de novo*."

Subpart E—Audit and Investigations and Other Provisions

§950.40 General.

The parties shall include a provision in the Standby Support Contract that specifies the procedures in this subpart for the monitoring, auditing and disclosure of information under a Standby Support Contract.

§950.41 Monitoring/Auditing.
The Department has the right to audit any and all costs associated with the Standby Support Contracts. Auditors who are employees of the United States government, who are designated by the Secretary of Energy or by the Comptroller General of the United States, shall have access to, and the right to examine, at the sponsor's site or elsewhere, any pertinent documents and records of a sponsor at reasonable times under reasonable circumstances. The Secretary may direct the sponsor to submit to an audit by a public accountant or equivalent acceptable to the Secretary.

§950.42 Disclosure.
Information received from a sponsor by the Department may be available to the public subject to the provision of 5 U.S.C. 552, 18 U.S.C. 1905 and 10 CFR part 1004; provided that: (1) Subject to the requirements of law, information such as trade secrets, commercial and financial information that a sponsor submits to the Department in writing shall not be disclosed without prior notice to the sponsor in accordance with Department regulations concerning the public disclosure of information. Any submitter asserting that the information is privileged or confidential should appropriately identify and mark such information. (2) Upon a showing satisfactory to the Program Administrator that any information or portion thereof obtained under this regulation would, if made public, divulge trade secrets or other proprietary information, the Department may not disclose such information.

Industry Position: No objection to §950.40, §950.41, §950.42.