



September 22, 2009

Mr. David G. Frantz
Director
Loan Guarantee Office - Office of the Chief Financial Officer
1000 Independence Avenue, S.W.
Washington, D.C., 20585-0121

Dear Mr. Frantz:

Our organizations, representing thousands of clean energy technology companies with an interest in a viable loan guarantee program, wish to express our unqualified support for the revisions to the Final Rule reflected in the current notice of proposed rulemaking (74 Federal Register 39569, August 7, 2009). These adjustments to the Final Rule—determining the scope of the required collateral package according to the underwriting requirements of each project, flexibility in sharing collateral with co-lenders, and cooperating with co-lenders in determining appropriate actions in a default scenario—are essential steps toward a workable Loan Guarantee Program (LGP).

Eliminating the strict requirement that the Department of Energy (DOE) must have a first priority lien on all project assets, as proposed, would open the LGP to clean energy projects in which multiple owners hold undivided ownership interests in the project and finance their ownership interests separately. Additionally, allowing DOE to negotiate intercreditor agreements on a project-by-project basis would facilitate use of loan guarantees with customary interest rate or commodity hedging agreements and working capital facilities, as well as increase participation in the LGP by export credit agencies, private lenders and creditworthy sponsors that seek a corporate lending structure. Collectively, the proposed amendments would make the LGP more functional for borrowers and lenders.

There are, however, a number of other modifications and clarifications to the Final Rule, discussed below, which these proposed changes do not address. Although

these additional proposed changes are not equally important to all the organizations that are signatories to this letter, all of us share a common interest in a workable loan guarantee program, and the additional changes to the Final Rule outlined below would, we believe, lead to more effective implementation of the program.

- Allow applicants to submit applications for multiple projects using the same technology. Section 609.3(a) of the Final Rule provides that a Project Sponsor or Applicant may not apply for more than one loan guarantee per technology per solicitation. This limitation is not required by Title XVII of the Energy Policy Act, but DOE imposed this restriction for its solicitations under the Section 1703 Program and has applied the same rule to its recent hybrid Section 1703/1705 solicitation for innovative technology projects. This prohibition arbitrarily excludes what might otherwise be excellent projects from the perspectives of both credit quality and job creation. While we understand the Department's desire to diversify its credit exposure, these decisions would better be made on a case-by-case basis. In the recent solicitation for large transmission projects, this limitation appears to have been dropped as a requirement for commercial technology projects in the Section 1705 program. This restriction is counter-productive and should be dropped for all Section 1703 and Section 1705 programs.
- Secretary's Right to cancel arbitrarily a Conditional Commitment. Section 609.2 (under the definition of Conditional Commitment) currently provides that "the Secretary may terminate a Conditional Commitment for any reason at any time prior to the execution of the Loan Guarantee Agreement." We propose:
 - (i) to delete this restriction for section 1705 projects, where the DOE can pay the credit subsidy cost upon concluding a term sheet; and
 - (ii) for 1703 projects, specify that a conditional commitment is binding on both parties if the applicant meets all terms and conditions specified in the conditional commitment, and allow the project sponsor to enter into a binding obligation to pay the credit subsidy cost (that the government can record as an account receivable), but not actually pay the subsidy cost until the final loan guarantee agreement is executed.
- Preliminary credit assessments. For projects underwritten by DOE, the requirement should be limited to a final credit assessment prior to financial closing (to assist, among other things, with determination of the credit subsidy cost) and not include a preliminary assessment at the time of application. If, under the section 1705 program for commercial technology projects, a commercial lender is underwriting the transaction, the credit assessment at any stage should be at the option of that commercial lender. Alternatively, the \$25 million threshold

under Section 609.6(2) for requiring a “preliminary credit assessment” should be raised substantially, such as to \$500 million or \$1 billion.

We also note the following concerns with respect to the terms of the LGP that appear to remain within the administrative discretion of the Department of Energy:

- FFB funding of the guaranteed portion of partially-guaranteed loans. Allow access to (but do not mandate use of) FFB loans for the guaranteed portions of loans made under the upcoming Section 1705 solicitation for commercial technology projects. “Stapling” the guaranteed and un-guaranteed portions of the loan, as DOE has proposed in the upcoming solicitation for commercial technology projects, blocks access to the FFB and imposes significant transaction costs to synthetically segregate the guaranteed portion in order to access the capital market for USG-guaranteed securities. The higher borrowing and transaction costs resulting from this approach imposes a significant and unnecessary burden on projects and increases DOE and taxpayer risk as a result of the adverse effect on project economics.
- Refinancing interim period project investment. DOE-guaranteed financing under Section 1705 should be available to take out equity, construction loans and term replacement debt facilities. Projects should not become ineligible for a Section 1705 loan guarantee because the sponsors decided to fund construction with equity or the proceeds of a construction loan financing, or decided to draw down a term loan to take out a construction loan financing, all for the purpose of moving a project forward during the period before solicitations are issued and loan guarantees are granted. While there has been a view that the existing Section 1703 program, with its “innovative technology” limitation, is not available for projects that have been able to obtain financing, this view should not apply to the Section 1705 program, which does not have an “innovative technology” requirement. This distinction between statutory provisions is particularly important since a primary goal of the Section 1705 program is to fund projects that can commence construction as soon as possible. A bar on using Section 1705 loan guarantees for projects that commenced construction subsequent to the passage of the Recovery Act, and before issuance of awards under the applicable solicitation, would frustrate achievement of the statutory goals.
- “Reachback” and Non-cash Equity. Similarly, to avoid penalizing project sponsors for early action and to maximize the “stimulus” effect of the LGP, it is important to give sponsors credit for *bona fide* development costs and other non-cash equity contributions (e.g., land). DOE should define eligible development costs and a “reach-back” period for past investments to be included at fair market value, consistent with other government project financing programs. This will

ensure that loan guarantees are being used to support incremental investments without unduly penalizing sponsors who have moved ahead on the assumption that they would have access to the LGP once it is in place.

- Equity cure rights. DOE should agree to extended cure rights (e.g., forbearance upon non-payment defaults) on guaranteed debt provided the borrowers remain current on principal and interest payments. There is precedent for this in the renewable energy market where it is necessary in order to attract tax equity investors who can help developers efficiently utilize accelerated depreciation tax benefits.
- Streamline National Environmental Policy Act review requirements:
 - DOE should assure timely and non-duplicative application of NEPA review. Many projects are already engaged in mandatory, substantial environmental review processes with state agencies. DOE should accept such reviews and decisions of state permitting agencies and not require applicants to incur costs and delays for redundant reviews of these assessments.
 - Project implementation should be permitted to progress without waiting for NEPA clearance from DOE (subject to the willingness of Sponsors to accept the risk of ultimate NEPA rejection). Otherwise, the LGP becomes an anti-stimulus program in which developers must postpone project construction to await NEPA clearance.
- Project bundling. Developers should have the ability to bundle small projects, such as distributed generation systems and energy efficiency projects, under one loan guarantee to gain the efficiencies necessary to make the LGP effective for small projects. Absent a mechanism to provide guarantees to support financing of multiple small projects, the LGP would not be helpful to, for instance, distributed generation projects because the transaction costs for individual projects would outweigh the benefit of the individual project loan guarantee, leaving such projects stranded. Also, the scale inefficiencies of any such projects that did apply would unnecessarily tax DOE's manpower resources and adversely affect the processing of larger projects.
- OMB Review. Steps should be taken to assure that OMB's planned solicitation-by-solicitation reviews do not unnecessarily further delay implementation of the LGP and that the OMB's planned project-by-project reviews do not unnecessarily delay financial closings and project implementation.

- Credit Subsidy Cost calculations should be transparent. Pursuant to the Federal Credit Reform Act of 1990, DOE must hold on reserve the "Credit Subsidy Cost" to cover estimated losses. The Credit Subsidy Cost is calculated by DOE (and approved by OMB). The calculation of the Credit Subsidy Cost is critical for determining the amount of DOE loan guarantees that are available under Section 1705. The calculation should be transparent and should reflect the low risk of default from commercially viable technologies. Additionally, DOE and OMB should consider a portfolio approach, which would establish a standard calculation for the same types of projects.
- Arbitrary commercialization requirement. In its July 29 solicitation for the Section 1703 Program, DOE newly requires that, prove that they are ready to proceed to commercialization, applicants must "provide in their applications a minimum of 6 months operating and performance data, including 1,000 to 2,000 hours of operation data, obtained from their demonstration project." This is not required by the Energy Policy Act, the Recovery Act or the Final Rule. These criteria arbitrarily limit the ability of many worthy clean energy projects to use the loan guarantee program. Applicants should bear responsibility to demonstrate that their technology has been proven, but should have flexibility to do so in a fashion appropriate to the technology and their projects.

We urge you to consider these comments in amending the Final Rule and in the course of further implementing the LGP. The LGP has the potential to increase significantly access to debt financing for clean energy projects at a time when sources of capital in the private markets have been substantially reduced. We believe these various adjustments would contribute significantly to the LGP achieving that potential.

Sincerely,



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