CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

WILLIAM L. KOVACS
VICE PRESIDENT
ENVIRONMENT, TECHNOLOGY &
REGULATORY AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
(202) 463-5457

June 29, 2007

Mr. Howard Borgstrom, Director
Business Operations Center
Office of the Chief Financial Officer
U.S. Department of Energy
Mailstop CF-60, Room 4A-221
1000 Independence Avenue, S.W.
Washington, DC 20585

Re: Proposed Rule on Loan Guarantees for Projects that Employ Innovative Technologies [RIN 1901-AB21]

Dear Mr. Borgstrom:

The U.S. Chamber of Commerce (Chamber) is pleased to send you this letter in response to the call for comments concerning[1] the Department of Energy's (DOE) *Proposed Rule on Loan Guarantees for Projects that Employ Innovative Technologies* (Rule). The Chamber is the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region.

Many of the Chamber's members are either engaged in activities involving the deployment of innovative technologies or are likely to engage in this activity in the future, inclusive of those projects addressed in the proposed Rule. As such, the Chamber appreciates this opportunity to comment on the proposed Rule.

DOE is proposing policies and procedures applicable to it's loan guarantee program authorized by Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511–16514). The Rule also aims to further President Bush's Advanced Energy Initiative. Title XVII authorizes the Secretary of Energy to make loan guarantees for projects that "avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued." Title XVII also identifies ten categories of technologies that, if employed in commercial projects, are potentially eligible for a loan guarantee. A principal goal of Title XVII is to encourage commercial use in the United States of new or significantly improved energy-related technologies. Accelerated commercial use of new and improved technologies will help sustain economic

[1] U.S. Department of Energy, Proposed Rule on "Loan Guarantees for Projects that Employ Innovative Technologies", *Federal Register* 72(94): 27471–27488; May 16, 2007.

growth, yield environmental benefits, and produce a more stable and secure energy supply and economy for the United States.

The Chamber has examined the proposed rule and has concluded that certain passages of text in the proposed rule require revision.[2] Specifically:

- A more comprehensive and inclusive definition and discussion of the term "United States" should be included in the rule;
- The term "technology" is not defined;
- There is an apparent advantaging of foreign commercial technologies over domestic technologies;
- There is apparent uncertainty concerning the eligibility of certain projects for loan guarantees based on geographic location;
- There is apparent confusion about the component nature of a "project";
- There are apparent unresolved uncertainties concerning what projects are eligible for loan guarantees; and
- The "risk of project default" does not appear to be adequately addressed in the proposed regulation.

The text that follows discusses these matters in more detail.

[1] A more comprehensive and inclusive definition and discussion of the term "United States" should be included in the rule.

DOE defines "United States" as follows:[3]

> *United States means the several states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa or any territory or possession of the United States of America.*

DOE further states that:[4]

> [loan guarantee] *Applications will be denied if: (1) The project will be built or operated outside the United States…*

Many planned off-shore renewable energy projects are designed to derive energy from wind as well as the tides, waves, currents, thermal differences and other properties of ocean waters. However, it is unclear to what extent the definition of "United States" as, included in DOE's proposed rule, would exclude the loan guarantee eligibility of such

[2] In addition, DOE will be receiving comments from various members of the Chamber that address concerns specific to their business operations. Their comments are not included in this communication.
[3] Footnote 1, P. 27481, *Ibid.*
[4] P. 27483, *Ibid.*

contemplated projects. This is because, owing to the definition of "United States" it is unclear whether such projects would be considered as "built or operated outside the United States". To address this concern, DOE should modify the proposed rule to state that in addition to the definition provided, the term "United States" includes:

> *all ocean waters (and airspace above them) of the Atlantic Ocean (including the Gulf of Mexico) and the Pacific Ocean within the jurisdiction of the United States from which energy may be derived through application of winds, solar energy collection, tides, waves, currents, thermal differences, or other means to produce renewable or low carbon energy.*

There is precedent for using such a definition of ocean waters as they relate to the United States: DOE has used a similar definition in its Final Rule on Renewable Energy Production Incentives.[5]

[2] The term "technology" is not defined.

DOE provides[6] definitions of "commercial technology" and "new or significantly improved technology," but it does not provide a definition of the word, "technology" itself. This creates uncertainties. For example, is software that performs complicated energy audits and that when used can lead to large energy savings through reliable identification of energy efficiency opportunities considered a "technology"? Is complex software that directly monitors and adjusts operational energy efficiency controls a technology as construed in Title XVII? The Chamber is confident that DOE as well as stakeholders can identify numerous other examples that necessitate a clear definition of what is a "technology". Therefore the proposed rule should include a transparent, reasonable definition of the term, "technology".

[3] There is an apparent advantaging of foreign commercial technologies over domestic technologies.

DOE states in the proposed rule that:[7]

> *The Department notes that … a project may be eligible for a Title XVII loan guarantee if it uses technology that has been used in any number of projects outside the United States and for any period of time outside the United States, so long as the technology is not in "general use" in the United States.*

The Chamber recommends that this statement be modified by adding at the end of the text the following words:

> [… so long as the technology is not in "general use" in the United States]*, is not otherwise available from any domestic source, and there is a clear and compelling*

[5] *FR* 71(156), August 14, 2006, p. 46386
[6] Footnote 1, P. 27480, *Ibid.*
[7] P. 27474, *Ibid.*

> *technological advantage that would serve the energy needs of the United States that cannot otherwise be fulfilled by other, alternative,e and reasonable means available domestically.*

[4] There is apparent uncertainty concerning the eligibility of certain projects for loan guarantees based on geographic location.

DOE states that:[8]

> [loan guarantee] *Applications will be denied if: (1) The project will be built or operated outside the United States.*

A question arises as to whether this statement of ineligibility applies in the case of projects that are international in character, for example, projects that ***in part*** are carried out within the United States and ***in part*** are carried on outside the boundaries of the United States. For example, some contemplated projects may have an international character (such as a project for using innovative technology to capture carbon dioxide in the United States and sequestering it in a geological formation located in Canada or using the carbon dioxide captured in the United States for enhanced oil recovery in Canada. In view of this observation, DOE should state what projects that have in part a transboundary or extraterritorial character are eligible to apply for loan guarantees.

[5] There is apparent confusion about the component nature of a "project".

Referencing the Energy Policy Act of 2005 (Act), Section 1703(a), which reads:

> *In General. – The Secretary may make guarantees under this section only for projects that*

and Section 1703(a)(2) of the Act, which reads:

> *employ new or significantly improved technologie**s*** [emphasis added] *as compared to commercial technologies in service in the United States at the time the guarantee is issued.*

it follows from the above text found in the Act that a project eligible for loan guarantees may consist of one or more "technologies". DOE should therefore revise the language found in the proposed Rule to support the observation that a project may in fact be composed of several different technology components and not just one technology.

DOE should also provide direction concerning projects that propose to use one or more proven (demonstrated) technology components (i.e., those proven technologies that are ***ready*** for commercialization) that have not yet been used in ***any*** commercial application. DOE's intentions on this matter are presently unclear.

Consider also the following passage in DOE's proposed rule:[9]

---

[8] Footnote 4, *Ibid.*

> …*Projects that are* ***solely*** [emphasis added] *research, development* ***or*** [emphasis added] *demonstration projects (i.e., a project designed* ***exclusively*** [emphasis added] *for research and development or to demonstrate feasibility of a technology on any scale) should not be eligible for Title XVII loan guarantees, and DOE is proposing to make such research, development or demonstration projects ineligible for a loan guarantee under Title XVII.*

The above text does not appear to exclude projects composed of a ***mix*** of proven (demonstrated) and unproven (not yet demonstrated) technology components. Rather the passage only appears to exclude projects that are ***solely*** composed in entirety of unproven technology components. In other words the text appears to imply that loan guarantees could be applied to projects that are **in part** technology demonstration projects, but could not be applied to projects that are ***exclusively*** technology demonstration projects. DOE should clarify the language of this text in view of these observations. Note that projects that ***in part*** have a demonstration component to prove a technology are in fact allowed for consideration for loan guarantees. For example consider the following text in the Energy Policy Act of 2005, Title XVII, Section 1703(c)(1)(B)(5):

> [gasification projects] *shall* ***demonstrate*** [emphasis added] *the ability to use coal with an energy content of not more than 9,000 Btu/lb;*

Perhaps this dilemma could be resolved if DOE were to clearly state what the difference is between a ***technology demonstration*** (i.e., proving a technology) and ***demonstrating (proving) the commercial viability*** of a proven technology in a particular marketplace. Arguably, all first technology movers (proven and otherwise) in the commercial marketplace aim to demonstrate and ensure prospects for competitive viability over the long term as the proven technology is ***im***proved through lessons learned.

[6] There are apparent unresolved uncertainties concerning what projects are eligible for loan guarantees.

Consider the following passage in DOE's proposed rule:[10]

> …*the Title XVII loan guarantee program should only be open to projects that employ a* ***technology*** [emphasis added] *that has been used in a very limited number of commercial projects* ***or*** [emphasis added] *for only a limited period of time.*

It appears from the section of the above text which reads: "***or*** *for only a limited period of time"* that a proven (demonstrated) technology in general use (i.e., used in more than just a limited number of projects), but only for a limited period of time, is still eligible for the loan guarantee program. This appears to be the case, because use of the conjunction "or" in the

---

[9] Footnote 1, P. 27473, *Ibid.*
[10] P. 27474, *Ibid.*

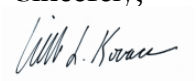
above passage found in the proposed rule implies that what follows "or" holds true regardless whether the technology is or is not in general use. If this assessment is correct, DOE should more clearly make this point. If this assessment is not correct, DOE should modify the statement.

[7] The "risk of project default" does not appear to be adequately addressed in the proposed regulation.

Specific, transparent details should be provided in the regulation of how DOE will develop and use a comprehensive, reliable, and transparent estimate of the "risk of project default" in making decisions on loan guarantees, inclusive of an explicit specification of exactly what information applicants must provide to DOE to assist the agency in developing such a risk of project default estimate. DOE should also provide a detailed and transparent explanation of how it will weight and use "risk of project default" estimates in determinations of project viability for the purpose of making loan guarantees. It is not impractical to develop such estimates of "risk of project default" on loan guarantees. Private credit rating agencies as well as the United States government have the capability to make such estimates.[11]

The Chamber appreciates this opportunity to comment on DOE's proposed Rule. Thank you for your attention to the matters raised in these comments. Please feel free to contact me at (202) 463-5457 if you have any questions or require additional information.

Sincerely,



William L. Kovacs

[11] See for example the discussion found at: http://www.cbo.gov/ftpdoc.cfm?index=4206&type=0&sequence=0]