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Department of Energy Issues Proposed Rules for Loan Guarantees Under Title XVII of Energy Policy Act

On May 10, 2007, the Department of Energy issued a Notice of Public Rulemaking (NOPR) containing its proposed rules for the Loan Guarantee Program authorized and outlined by Title XVII of the Energy Policy Act of 2005 ("EPAct of 2005"). The proposed rule, later published in the Federal Register (*Loan Guarantees for Projects that Employ Innovative Technologies*, 10 Fed. Reg. 27,471 (May 16, 2007)), embodies the government's desire to promote the commercial use of new or significantly improved energy-related technologies, as announced in the EPAct of 2005.

Under EPAct, the Secretary of Energy was authorized 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." The loan guarantees would function as an incentive for the use of new or improved technologies to accelerate their commercial development. By the issuance of this NOPR, the DOE is requesting comments on the proposed rule be filed with the DOE on or before July 2, 2007.

Brief History of Loan Guarantee Program

The NOPR's proposed regulations are similar to the guidelines published by the DOE in 2006 that were used in the first solicitation of "Pre-Applications" for loan guarantees for eligible projects under Title XVII. *See Loan Guarantees for Projects that Employ Innovative Technologies; Guidelines for Proposals Submitted in Response to the First Solicitation*, 71 Fed. Reg. 46,451 (August 14, 2006) ("Guidelines"). This first solicitation focused on the technologies that would advance President Bush's Advanced Energy Initiative and did not include all of the projects that would be potentially eligible for loan guarantees. While the Guidelines issued at that time were not legally binding, they did outline the goals and requirements promulgated by the EPAct of 2005 that are now embodied by the proposed rules. The Guidelines stated that they would only apply to the first Title XVII solicitation. According to the May 16 NOPR, the proposed rules, once finalized, would not apply to the Pre-Applications, Applications, Conditional Commitments or Loan Guarantee Agreements issued or filed pursuant to the initial August 2006 solicitation. However, this prohibition is not necessarily permanent. If the DOE does not accept a Pre-Application filed pursuant to the August 2006 solicitation (governed by the Guidelines) and does not invite the Pre-Applicant to submit an

Application, any subsequent Application would be subject to the final regulations resulting from the NOPR.

As noted in the Guidelines themselves, their publication was only an initial step in adopting final regulations concerning the Loan Guarantee Program, as the program still required an appropriation of funds and the formal adoption of regulations. On February 15, 2007, President Bush signed into law the Revised Continuing Appropriations Resolution which authorized the DOE to issue guarantees under the Title XVII program for loans in the total principal amount, any part of which is to be guaranteed, of $4 billion. (In its FY'08 budget request, DOE asked for $9 billion in loan guarantee authority). This resolution enabled the DOE to authorize loan guarantees under the program once final regulations are adopted. The proposed regulations contained in the NOPR, once adopted, are the next step in the process and will govern all subsequent solicitations and applications pursuant to this Title.

DOE's Loan Guarantee Program

As previously stated, the goal of the Loan Guarantee Program authorized under Title XVII is to encourage the commercial use in the United States of new or significantly improved energy-related technologies, with the hope that these technologies will help sustain economic growth, yield environmental benefits, and produce a more stable and secure energy supply. By the issuance of the NOPR, the DOE is seeking to establish generally applicable policies, procedures and requirements for the Loan Guarantee Program. In doing so it does not seek to apply these regulations to Pre-Applications or Applications filed in response to the solicitation issued under the 2006 Guidelines, except to note that resubmissions by Pre-Applicants not invited to submit an Application under the Guidelines will be governed by the final regulations adopted here.

Under Title XVII, the DOE seeks a broad portfolio of large and small projects, from a wide variety of technologies, as is reflected in the list of eligible projects included in the NOPR (and also included below). Within DOE's FY'08 budget request to guarantee up to $9 billion in loans, the DOE proposed to guarantee $4 billion in loans for central power generation facilities such as nuclear facilities or carbon sequestration optimized coal power plants; $4 billion in loans for projects that promote biofuels and clean transportation fuels; and $1 billion in loans for projects using new technologies for electric transmission facilities or renewable power generation systems. According to DOE, projects seeking loan guarantees will undergo the rigorous review necessary to take proper account of the potential risks of a project. Ultimately, the issuance of these loan guarantees will depend on the merits and benefits of particular project proposals and their compliance with statutory and regulatory requirements.

Title XVII specifically makes the following types of projects eligible for loan guarantees:

1) Renewable energy systems
2) Advanced fossil fuel energy technology (including some coal gasification projects)
3) Hydrogen fuel cell technology
4) Advanced nuclear energy facilities
5) Carbon capture and sequestration practices and technologies (including agricultural and forestry practices that store and sequester carbon)
6) Efficient electrical generation, transmission, and distribution technologies
7) Efficient end-use energy technologies
8) Production facilities for fuel efficient vehicles (includes hybrid and advanced diesel vehicles)
9) Pollution control equipment
10) Refineries (that refine crude oil into gasoline)

In highlighting these specific areas as being eligible for the loan guarantees, the NOPR notes that the list is non-exclusive and does not prohibit or seek to dissuade an Application concerning a technology not listed among these areas.

Summary of Proposed Regulations

As outlined in the NOPR, the proposed regulations provide the following:

- The Title XVII Loan Guarantee Program will be implemented through a series of solicitations. The solicitations may target specific or general technology areas.
- Pre-Applications and Applications must contain, in sufficient detail, terms and conditions to address the numerous requirements listed in Section 609.6 of the proposed regulations.
- Projects must employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the loan guarantee agreement is executed. The Loan Guarantee Program is not intended for technologies widely used commercially at the time of the application, but instead is directed at technologies used in a very limited number of commercial projects or technologies in use for a very limited period of time.
- The Loan Guarantee Program is not intended for technologies in the research and development or demonstration stages.
- Pre- Applications will be evaluated to determine whether the Applicant is eligible and whether the Pre-Application is responsive. Once the Pre-Application is deemed to be responsive, it will be assessed to determine whether the project is commercially viable and the technology and principals involved will be evaluated. The DOE will then determine whether to invite the Pre-Applicant to submit an Application.

- An Application will be evaluated on the following factors: to what extent the proposed project reduces, avoids or sequesters air pollutants or greenhouse gases, the extent of the use of new or improved technology and the commercial viability of that use, the likelihood of the project producing significant revenue to service debt obligations, the capacity and expertise of those involved in the project, the overall risk of the project and other various financial considerations.
- Applications will be rejected if the project will be built outside of the United States, does not avoid, reduce or sequester air pollutants or greenhouse gases; and is not commercially viable, among other factors.
- The Secretary must determine that there is a "reasonable prospect" of repayment of the guaranteed debt.
- DOE must charge and collect fees sufficient to cover applicable administrative expenses.
- Borrower-paid Credit Subsidy Costs and administrative fees paid to DOE may not be included within total project costs for the purposes of determining the amount of guarantees that DOE can issue for a project.
- DOE may guarantee up to 90% of the amount of any loan as long as DOE does not issue guarantees for more than 80% of the total cost of a project.
- In the event of a loan default, DOE will have a superior lien on all project assets pledged as collateral for the guaranteed loan.
- Receipt of other governmental assistance does not disqualify a project from receiving a Title XVII loan guarantee; however, when evaluating a project's application for a Title XVII loan guarantee, DOE will consider the extent to which a project will receive other governmental assistance, (e.g., grants, tax credits, other loan guarantees).
- The guaranteed portion of a partially guaranteed loan or debt obligation may not be separated from or "stripped" from the non-guaranteed portion of the loan if the loan is participated, syndicated or otherwise resold in the secondary debt market.
- The borrower must have a significant equity stake in a project.

Opportunity for Public Comment

The NOPR invites the public to submit comments that contain arguments, their general views on the subject and any supporting data concerning any of the issues discussed in the notice. The DOE specifically seeks comment on a number of issues including the definition of certain key terms or concepts, such as what constitutes a new or innovative technology and length of commercial use to still qualify for funds under the program, and various cost and financial structure considerations. Interested parties are encouraged to attend a public meeting that will be held on Friday June 15, 2007, in Washington, D.C., although interested persons must telephone or write the DOE’s Loan Guarantee Program Office if they desire an opportunity to speak at this meeting.

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