DEPARTMENT OF ENERGY

10 CFR Part 950

RIN 1901–AB17

Standby Support for Certain Nuclear Plant Delays

AGENCY: Department of Energy.

ACTION: Interim final rule and request for comment.

SUMMARY: The Department of Energy (Department) is promulgating interim final regulations to implement section 638 of the Energy Policy Act of 2005, which authorizes the Secretary of Energy to enter into Standby Support Contracts with sponsors of advanced nuclear power facilities to provide risk insurance for certain delays attributed to the regulatory process or litigation.

DATES: *Effective Date:* This interim final rule is effective June 14, 2006, except for §§ 950.10(b), 950.12(a) and 950.23 which contain information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Department of Energy will publish a document in the **Federal Register** announcing the effective date of those sections.

Comment Date: Written comments must be received by June 14, 2006. Comments may be mailed to the address given in the **ADDRESSES** section below. Comments also may be submitted electronically by e-mailing them to: *StandbySupport@Nuclear.Energy.gov.* We note that e-mail submissions will avoid delay currently associated with security screening of U.S. Postal Service mail.

ADDRESSES: You may submit written comments, identified by RIN Number 1901–AB17, by any of the following methods:

1. E-mail to *StandbySupport@Nuclear.Energy.gov.* Include RIN 1901–AB17 and ''Interim Final Rule Comments'' in the subject line of the e-mail. Please include the full body of your comments in the text of the message or an attachment.

2. Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

3. Mail: Address the comments to Kenneth Chuck Wade, Office of Nuclear Energy, (NE–30) U.S. Department of Energy, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585. The Department requires, in hard copy, a signed original and three copies of all comments. Due to potential delays in the Department's receipt and processing of mail sent through the U.S. Postal Service, we encourage commenters to submit comments electronically to ensure timely receipt.

FOR FURTHER INFORMATION CONTACT: Kenneth Chuck Wade, Project Manager, Office of Nuclear Energy, NE–30, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. (301) 903–6509 or Marvin Shaw, Attorney-Advisor, U.S. Department of Energy, Office of the General Counsel, GC–52, 1000 Independence Avenue, SW., Washington, DC 20585. (202) 586–2906.

SUPPLEMENTARY INFORMATION:

I. Section 638 of the Energy Policy Act of 2005

On August 8, 2005, President Bush signed into law the Energy Policy Act of 2005 (the Act) (Pub. L. 109–58, 119 Stat. 594). Section 638 of the Act addresses the President's proposal to reduce uncertainty in the licensing of advanced nuclear facilities. (42 U.S.C. 16014). The purpose of section 638 is to facilitate the construction and full power operation of new advanced nuclear facilities by providing risk insurance for such projects. Such insurance is intended to reduce financial disincentives and uncertainties for sponsors that are beyond their control in order to encourage investment in the construction of new advanced nuclear facilities. By providing insurance to cover certain of these risks, the Federal government can reduce the financial risk to project sponsors that invest in advanced nuclear facilities that the Administration and Congress believe are necessary to promote a more diverse and secure supply of energy for the Nation.

Section 638 contains a number of provisions to establish the Standby Support Program (the ''Program''). These provisions are related to (1) the Secretary's authority to enter into contracts and details related to such contracts, (2) the establishment of funding accounts, (3) the funding of these accounts, (4) the types of regulatory and litigation delays Congress determined were to be covered by the Program, (6) the types of delays that Congress determined were to be excluded from coverage, (7) the amount of coverage for up to six advanced nuclear facilities with a distinction made for the initial two reactors and the subsequent four reactors, (8) the types of costs to be covered by the Program, and (9) reporting requirements by the Nuclear Regulatory Commission (''Commission'').

Section 638(g) provides for regulations necessary to carry out section 638. This section directs the Secretary to issue an interim final rule within 270 days after enactment of the Act and to adopt final regulations within one year after enactment.

II. Rulemaking History

Prior to developing and issuing this interim final rule, the Department issued a Notice of Inquiry (NOI) and request for comments to provide an opportunity for public input. (70 FR 71107, November 25, 2005) The NOI discussed the major topics related to section 638, including the types of sponsors and facilities covered, the Secretary's contracting authority, appropriations and funding accounts, covered and excluded delays, covered costs and requirements, and disagreements and dispute resolution. For some topics, this NOI indicated implementation approaches and interpretations under consideration by the Department. The NOI included a general request for comments and identified certain topics on which the Department specifically requested comments. Among other matters, the Department sought comment about how the statute could be implemented most effectively to achieve the objective of reducing the risks associated with certain delays in the advanced nuclear facility licensing process and thereby facilitating the expeditious construction and operation of new advanced nuclear facilities.

On December 15, 2005, the Department sponsored a public workshop to allow the public to provide oral comments about section 638 and the NOI. Over 60 people attended the public workshop. A transcript of the

proceedings is posted at *www.nuclear.gov.*

The Department received nine written comments on the NOI, including comments from the Commission, a nuclear energy trade association, several utilities and other potential sponsors, an economic consulting firm, and a public advocacy group. In addition to responding to the questions posed in the NOI, the commenters provided their general views on implementing section 638.

III. Interim Final Rule

A. Overview of the Rule

The interim final rule establishes a new part 950 in Title 10 of the Code of Federal Regulations (CFR). The rule sets forth the procedures, requirements and limitations for the award and administration of Standby Support Contracts indemnifying a project sponsor for certain costs that may be incurred due to a delay in full power operation of the sponsor's advanced nuclear facility.

Subpart A sets forth the purpose, scope and applicability, and definitions of the regulation.

Subpart B sets forth provisions addressing the Standby Support Contract process, including the process whereby a sponsor and the Program Administrator would enter into a Conditional Agreement prior to a Standby Support Contract, obligations of a sponsor prior to entering into a Conditional Agreement, the provisions of that Conditional Agreement, conditions precedent that a sponsor must satisfy prior to entering into a Standby Support Contract, funding issues related to the Standby Support Program, reconciliation of costs, and termination of a Conditional Agreement. Subpart B also addresses the provisions for each Standby Support Contract. These include general contracts terms, including the contract's purpose, the advanced nuclear facility that is the subject of the contract, the sponsor's contribution, the maximum aggregate compensation, the term of the contract, cancellation provisions, termination by sponsor, assignment, claims administration, and dispute resolution; and specific contract terms that implement section 638's provisions related to covered events, exclusions, covered delay, and covered costs.

Subpart C sets forth the claims administration process, including the submission of claims and payment of covered costs under a Standby Support Contract. This subpart includes sections addressing notification by a sponsor of a covered event, covered event determinations made by the Department's Claims Administrator, certification of covered costs by the sponsor, determination of covered costs by the Claims Administrator, issuance of a Claim Determination of a covered delay and covered costs by the Claims Administrator, conditions for payment of covered costs, and adjustments for and payment of covered costs.

Subpart D sets forth provisions related to dispute resolution, including disputes involving covered events and disputes involving covered costs. In each case, subpart D provides a two-step process, first requiring non-binding mediation and then binding arbitration, if the parties cannot reach agreement.

Subpart E sets forth miscellaneous provisions about the Department's authority to monitor and audit a sponsor's activities and the public disclosure of information provided by a sponsor to the Department.

B. Section-by-Section Analysis

Subpart A—General Provisions

Section 950.1 Purpose

The Department is adopting this interim final rule to provide risk insurance to facilitate the construction and full power operation of new advanced nuclear facilities. Section 638 provided for such insurance to reduce the financial disincentives that make sponsors reluctant to invest in construction of new advanced nuclear facilities, including the risk that a facility may be constructed but may not achieve full power operation in a timely manner.

In response to the NOI, commenters stated that there are additional factors that the Department should consider in implementing the statute. These include having well-defined regulations that are sufficiently definite and realistic, protecting taxpayer funds from being unreasonably allocated to the nuclear industry, and ensuring that the regulations do not undermine the government's traditional role of ensuring the safe design and operation of nuclear facilities.

The Department agrees with these general comments. Accordingly, the Department has implemented section 638 in a transparent manner that is sufficiently detailed, workable, and fair. This regulatory framework will provide sponsors risk insurance for certain regulatory and litigation delays, while protecting taxpayer funds by having sponsors contribute a portion of the premium for this insurance. Further, the Department intends that this insurance reflects the magnitude of the risk and the extent of the protection provided. The Department also is mindful that in facilitating the construction and full power operation of advanced nuclear facilities, its efforts should not undermine the responsibility of government agencies to address safety concerns during the permitting and licensing processes for such new facilities.

In the NOI, the Department requested comment on whether a sponsor should be eligible to participate in the Standby Support Program as well as any loan guarantee program for which the sponsor may be eligible pursuant to Title XVII of the Act, or the production tax credits for advanced nuclear facilities in section 1306 of the Act. (Subsequent to the NOI, the Department has become aware of other Federal programs such as the Rural Utility Service that may provide subsidies to a sponsor. Accordingly, any consideration of multiple subsidies would include such additional programs). The Department 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.

Section 950.3 Definitions

Certain definitions set forth in the Act are included in the interim final rule verbatim from the Act, and are repeated in the rule for ease of reference. In several areas, the interim final rule clarifies or further defines terms in the statutory definitions. In addition, the interim final rule defines certain terms that are either referenced in section 638 but not defined or are in addition to terms in the statute. The following provides an explanation of certain key definitions that may benefit from additional description and clarification here. Other terms are discussed in the section discussing subpart B.

Advanced nuclear facility. Several commenters suggested that further clarification of the definition of advanced nuclear facility is warranted because it relates to the issue of project eligibility. Commenters also specifically requested further clarification of the phrase ''substantially similar'' in the statutory definition of the term advanced nuclear facility. One commenter suggested that the definition include the concept that no reactor design that is certified by the Commission after December 31, 1993 should be considered ''substantially similar'' to a design certified by the Commission prior to that date, and that the rule should not include a ''no later

than'' date for design certification, thereby providing sponsors the ability to proceed with design certification and combined licensing on a parallel process.

The definition of advanced nuclear facility in the interim final rule is taken verbatim from the Act. After reviewing current reactor designs, the Department concludes that there are likely no reactor designs that have been approved after December 31, 1993 that are ''substantially similar'' to designs that were certified before that date for which potential project sponsors have suggested interest. The Westinghouse System 80-plus design is the only reactor design which is somewhat similar to a pre-1993 design, called the System 80. However, there are enough differences between the two designs to indicate that they should not be considered substantially similar. Based on the Department's review, any reactor design that obtains design certification by the Commission after December 31, 1993 likely will not be considered substantially similar. In particular, appendices to 10 CFR part 52 (Appendix A, ''Design Certification Rule for the U.S. Advanced Boiling Water Reactor, Appendix B, ''Design Certification Rule for the System 80+ Design,'' and Appendix C, ''Design Certification Rule for the AP600 Design'') specify reactor designs that have received certification by the Commission. Nevertheless, the Department reserves the right to make a final determination if a project sponsor chooses a design that the Department has not anticipated. This interpretation meets the statute's intent to promote advanced nuclear reactor designs by eliminating from eligibility a nuclear reactor design whose major elements had been reviewed and approved by the Commission prior to December 31, 1993.

In recognition of the fact that some sponsors may pursue design certification in tandem with the combined license process, the Department has decided not to impose a ''no later than'' date for Commission design, review, and approval. However, at the time a sponsor has satisfied the other conditions precedent to enter into a Standby Support Contract with the Department, including obtaining a combined license and commences construction, a determination would then be made as to whether the sponsor's reactor design was approved after December 31, 1993 and is not ''substantially similar'' to a reactor design of comparable capacity that was approved on or before that date.

Commencement of construction. Several commenters also requested that the Department define the phrase ''commencement of construction'' in the regulations, and suggested an appropriate definition would include the pouring of safety-related concrete. It was noted that this action by a sponsor was an accurate and clear indicator of a ''real'' project, with a high likelihood of achieving commercial operation, thereby satisfying the Act's statutory intent. Clarity on this topic is particularly important since a sponsor is eligible for a Standby Support Contract only if, in addition to receiving a combined license, the sponsor has commenced construction. Commencement of construction is defined to mean the point in time when a sponsor initiates the pouring of safety-related concrete for the reactor building. This definition represents a clear and unambiguous event, and an event that denotes a firm commitment to nuclear plant construction in accord with the purposes of the Act.

Combined license. One commenter suggests that the term ''combined license'' not be altered since it was established by the Commission and should therefore be identical to that in 10 CFR part 52. The definition of combined license in the interim final rule is taken verbatim from section 638 of the Act. The Department notes that the definition of combined license is somewhat different in the Commission's licensing regulations, 10 CFR part 52, although the Department believes that this difference is not significant. Nevertheless, to clarify, the Department interprets the definition of ''combined license'' in the Act and part 950 as having the same meaning as that term is given in the Commission regulations at 10 CFR 52.3.

Sponsor. The Department sought comment in the NOI on the definition of sponsor. Many commenters agreed a definition was necessary because it addresses the question of contract eligibility. In particular, commenters requested further clarification of the phrase ''applied for'' in the definition of sponsor. They suggested that an appropriate clarification would indicate that ''applied for'' meant that a sponsor's application was accepted as sufficient for docketing by the Commission, and not merely submitted to the Commission.

The Department agrees that clarification of the phrase ''applied for'' is warranted, and the clarification suggested by the commenters is reasonable and appropriate. The intent of the Act is to encourage the development of advanced nuclear facilities. An initial and essential step toward that goal is the submission of a combined license application to the Commission. While the Department fully supports this goal, it is also important that the Department utilize its limited resources to enter into Conditional Agreements only with those entities that have provided the Commission with an application of sufficient quality to be docketed by the Commission. Under the Commission's regulations, any person may submit an application for a combined license. However, the Commission will accept such an application for docketing only after it has conducted a preliminary review to determine whether the application is complete and contains sufficient information to support the Commission's detailed technical review. The Department believes it is appropriate to clarify that a sponsor is any person that has ''applied for'' a combined license and such application by the person has been docketed by the Commission. The Department is aware of the possibility that one entity may be receiving payments for a covered event, but that the debt obligation may actually be held by an entity other than the sponsor. The Department emphasizes that only a sponsor is eligible to enter a Standby Support Contract and thus be eligible for covered costs under the Standby Support Program. If necessary, the Department may include provisions in the Standby Support Contract to ensure that only a sponsor is eligible for payments under the Program.

Subpart B—Standby Support Contract Process

Section 950.10 Conditional Agreement

Purpose

Section 638(b) authorizes the Secretary to enter into Standby Support Contracts with sponsors of advanced nuclear facilities. That paragraph directs that sufficient funding be placed in designated Departmental accounts before the contracts are executed. In the NOI, the Department noted that the Secretary has considerable discretion as to the timing and method of entering into Standby Support Contracts. The NOI then stated the Department's tentative goal of permitting sponsors to enter into Standby Support Contracts as early as practicable, while recognizing that entering into a contract with a sponsor before the sponsor receives a combined license and commences construction may raise implementation issues. Consequently, the NOI stated that the Department should consider entering into ''binding agreements'' with sponsors that submit combined license

applications that are docketed by the Commission. Although the Conditional Agreements between the Department and project sponsors would not themselves be Standby Support Contracts, they would commit the Department to enter into Standby Support Contracts with the first 6 project sponsors who have met the requirements of the conditional agreements and section 638 (including the provision of adequate budgetary resources) have been satisfied.

Commenters generally agreed with the Department's discussion of the benefits of a two-step approach in which an agreement could be converted into a Standby Support Contract when a combined license is issued by the Commission and construction commences, and the requirements of the statute, including adequate budgetary resources, are otherwise satisfied. Industry commenters noted that long before construction, a project developer would need to obtain approval from its Board of Directors and obtain construction financing. In contrast, one commenter stated that the Department should not enter into binding agreements, which it stated was inconsistent with section 638's provision that the Secretary ''shall not enter into a contract unless sufficient funds are already in the Standby Support Program Account to cover the facility's debt costs.'' In addition to these general comments about a two-step implementation process, commenters provided additional detailed comments which will be addressed below.

The Department concludes that it is consistent with the provisions in section 638 and the statutory goal of facilitating the construction and operation of advanced nuclear facilities to implement a two-step process involving a Conditional Agreement, which then can, for the first six qualifying sponsors, be converted into a Standby Support Contract at a later date, if the sponsor meets certain conditions and budgeting resources are provided. Specifically, the Department has significant discretion to establish the procedures needed to manage the Standby Support Program, provided that they are consistent with section 638. Such a two-step implementation process allows the Department and potential sponsors to manage the difficult timing issues inherent in both the federal appropriations process and business concerns in planning and financing a multi-billion dollar advanced nuclear facility. In making this determination to require a Conditional Agreement, the Department reviewed other similar federal programs, including the Department of Transportation's Transportation Infrastructure Finance and Innovation Act (TIFIA) program, which provides loans for surface transportation projects. (See 64 FR 29742, June 2, 1999.) The TIFIA program first requires a potential recipient to enter into a ''conditional term sheet,'' which commits the Department of Transportation to provide federal assistance to a project at a future point in time upon satisfaction of specified conditions. The Conditional Agreement is similar in concept to the TIFIA program. Unlike TIFIA (under which funds are obligated at this ''commitment'' point), no funds would be obligated when the Conditional Agreement is signed. Rather, a Standby Support Contract would be executed only after sufficient budgetary resources are available.

Eligibility

In the NOI, the Department discussed tying the implementation of the Standby Support Program to the Commission's process for issuing a combined license set forth in 10 CFR part 52. Specifically, the NOI stated that the Department should be able to enter into an initial agreement with a sponsor that submits a combined license application at any time on or after such application is submitted. Commenters, including the Commission, generally agreed with tying the initial agreement to the Commission's analysis of combined license applications. Accordingly, the Department in § 950.10(b) of the interim final rule specifies that a sponsor is eligible to enter into a Conditional Agreement with the Program Administrator after the sponsor has submitted a combined license application and the Commission has docketed the combined license application, and after the sponsor has submitted information to the Department and the Program Administrator has determined that information to be complete, accurate and the Conditional Agreement is consistent with applicable statutes and regulations. (The Department notes that in today's interim final rule, the notice distinguishes the terms ''Program Administrator'' and ''Department.'' ''Program Administrator'' is used to identify situations involving the execution of a Conditional Agreement or a Standby Support Contract; whereas, ''Department'' is used to identify general statements of policy and situations involving more general matters such as funding and appropriations). The Department notes that it costs millions of dollars to prepare an application for a combined license and that the Commission has the discretion to reject any such application that is incomplete. The Department further notes that section 638 provides the Secretary with broad discretion to issue regulations implementing the Standby Support Program. Accordingly, the Department has determined that it is appropriate to allow a sponsor to enter into a Conditional Agreement at any time on or after the Commission dockets a combined license application, because the sponsor has shown sufficient seriousness and its combined license application is of sufficient quality.

Section 950.10(b) further indicates that a sponsor may enter into a Conditional Agreement from the time the Commission dockets its combined license application but before the Commission has issued the license. The Department notes that it will likely take several years for the Commission to issue the combined license, a time period which the Department has determined is sufficient for a sponsor to decide whether it wants to participate in the Standby Support Program.

In section 950.10(b), the Department further requires a sponsor that plans to enter into a Conditional Agreement to provide certain information including: (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 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 plan of intended 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 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.

The Department notes that this information is needed to determine the score under the Federal Credit Reform Act of 1990 (FCRA). This documentation requirement should pose only a nominal burden on a sponsor

because the sponsor likely has this information readily available in the normal course of obtaining financing for the advanced nuclear facility and Commission approval for a combined license. The Department will not use this documentation to select among potential sponsors. Rather, the actual awarding of a Standby Support Contract is based on fulfillment of the requirements and conditions in the Conditional Agreement, including the Commission's issuing of a combined license and the sponsor's commencement of construction (i.e., the pouring of safety-related concrete for the reactor building). This documentation will allow the Department's representative, the Program Administrator, to enter into a Conditional Agreement and to monitor the progress of various competing sponsors, prior to entering into Standby Support Contracts. This relatively modest information requirement is in lieu of an application process similar to those required by the Department of Transportation's Transportation Infrastructure Finance and Innovation Act (TIFIA) program or the Overseas Private Investment Corporation (OPIC). For these reasons, the Department generally agrees with the commenters who, in response to the NOI, noted that it would be appropriate for the Department to request the combined license application in lieu of a separate application to the Department to be eligible for a Standby Support Contract.

In section 950.10(c), the Department sets forth the bases upon which it will determine whether to enter into a Conditional Agreement. This determination will be based on a review of the information provided by the sponsor under § 950.10(b) to determine eligibility for a Conditional Agreement, and the accuracy and completeness of the information provided. The Department also will determine whether the Conditional Agreement may be executed consistent with applicable statutes or regulations, including the National Environmental Policy Act (NEPA). The Department anticipates that its environmental review under NEPA for the Conditional Agreement or Standby Support Contract would acknowledge or be based upon the NEPA review conducted by the Commission in relation to its review and approval of the sponsor's combined license application.

Section 950.11 Terms and Conditions of the Conditional Agreement

General

Section 950.11(a) requires that the Conditional Agreement include a provision requiring the Program Administrator and the sponsor to enter into a Standby Support Contract, provided that a sponsor is one of the first six sponsors to fulfill the conditions precedent to a contract, and subject to certain statutory funding requirements and limitations, which are set forth in § 950.12, and any other applicable contractual, statutory and regulatory requirements. Upon a satisfaction of these conditions precedent, the Program Administrator will enter into a Standby Support Contract with the first six sponsors. Imposing such requirements is consistent with the goal of section 638 which is for the Department to enter into such a contract to facilitate the construction and full power operation of advanced nuclear facilities.

This approach strikes a balance between two different concerns expressed by commenters. Most industry commenters stated that the ''binding'' agreement should be binding on the Department without conditions, not be contingent on subsequent appropriations, and be subject to specific performance. Other commenters stated that it was inappropriate for the Department to needlessly commit itself to such contracts. The Department believes that given the statutory constraints, a sponsor has as much certainty as possible that it can rely on the Conditional Agreement in which the Program Administrator agrees to enter into a Standby Support Contract, provided the critical regulatory and statutory conditions precedent are met. The Department further believes that it would be imprudent to commit the Secretary and future Secretaries to enter into a Standby Support Contract, absent any of these conditions precedent. This commitment, of course, remains subject to the normal budgetary process and does not (and could not) obligate the President to seek, nor the Congress to provide, budget authority for a Standby Support Contract.

In both the public workshop and in comments to the NOI, several potential sponsors stated that it was critical to understand the pricing of the loan costs related to the Program Account, prior to a sponsor entering into such a Standby Support Contract. They noted that the key to an effective Standby Support Program would be the premium charged to cover the principal or interest of a loan. If the sponsor's portion of the premium were too high, project sponsors likely would elect not to use the coverage. Industry commenters recommended that the loan costs be priced similarly to other insurance coverage provided by OPIC and other private and public insurers against sovereign political risk. These commenters stated that OPIC risk insurance carries an annual premium of 40–70 basis points of the face value of coverage and that the commercial insurance market carries an annual premium of 100 basis points. Accordingly, a $500 million Standby Support Contract would cost a sponsor $5 million per year.

The Department agrees with the general proposition that a sponsor should know its funding needs prior to execution of the Standby Support Contract, and has included § 950.11(b), (c) and (d) in the regulations to reflect the need for specificity, transparency and accuracy on funding of Standby Support Contracts prior to execution. Nevertheless, the Department emphasizes that the sponsor's contribution is based on the amount of appropriated funds, and that the cost estimate for the Program Account will be calculated consistent with FCRA.

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. Such risk diversification is not possible in the Standby Support Program. Moreover, the average size of an individual liability is smaller for an OPIC insured policy than for Standby Support, allowing OPIC to have greater risk diversification for an equal amount of underwritten policy.

In response to the NOI and at the public workshop, several potential sponsors indicated little interest in obtaining coverage for incremental costs. Given the differences between the Program Account and the Grant Account, the Department believes that it is reasonable to expect that the amount of funding a sponsor would be willing to provide for the Grant Account, if it decides to obtain coverage for incremental costs, would be less than for the Program Account. As with the

Program Account, the sponsor and the Department will be required to indicate the anticipated amounts each would expect to contribute to the Grant Account. For each account, the Department has no obligation to make contributions in excess of any amounts appropriated for that purpose.

Allocation of Coverage and Funding

Section 950.11(b) and (c) address the issues related to section 638(b)(2), which establishes a funding requirement that must be met before the Program Administrator can enter into a Standby Support Contract. To carry out these statutory provisions and depending on whether the coverage is for one of the initial two or for the subsequent four reactors, the Department requires in § 950.11(b) that the Conditional Agreement include a provision addressing how to allocate the $500 million or the $250 million between the accounts. The Department notes that there is a certain degree of uncertainty inherent at the Conditional Agreement stage, given that this step precedes entering into a Standby Support Contract possibly by several years and that funding and appropriations issues likely will have not yet been decided. Accordingly, the Department believes that it is sufficient at the time of the Conditional Agreement to have the parties agree upon the anticipated amounts for each account.

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. Section 638(b)(2) specifies that consistent with the cost of a loan guarantee under FCRA, the Program Account receives appropriations or loan guarantee fees in an amount sufficient to cover the loan costs in advance of the Standby Support contract; this may be a combination of appropriated funds and loan guarantee fees from the sponsor or other non-Federal source. The funds in the Program Account must be in an amount sufficient to cover the loan costs for the principal or interest on the debt obligation of the advanced nuclear facility covered by a Standby Support Contract for the time period of covered delay in full power operation, as described in section 638(d)(5)(A). Section 638(b)(2)(C)(ii) specifies that the Grant Account must receive funds appropriated to the Secretary, funds paid to the Secretary by the sponsor, or a combination of both appropriated funds and sponsor payments. The funds in the Grant Account must be sufficient to cover the incremental cost of replacement power the sponsor may need to purchase to fulfill power supply contracts for the time period of covered delay in full power operation, as described in section 638(d)(5)(B). (Section 638(c)(ii) refers to three different paragraphs in paragraph (d)(5); however, only one of those referenced paragraphs, (d)(5)(B), was enacted into law.) With respect to the Grant Account, the Secretary's responsibility to pay covered costs is expressly limited in section 638(d)(4) to the payment of those costs for which the Secretary has received appropriations or payments from a non-federal source in an amount sufficient to pay the covered costs. Section 638 does not contain such a limitation with respect to the Program Account. For either account, section 638(d)(4)(B) permits the Secretary to receive and accept payments from any non-federal source.

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. The Department has structured its regulations to reflect this statutory intent. An explanation of the funding requirements for each account is described below.

Pursuant to section 638, § 950.11(c) requires that each Conditional Agreement contain a provision that the Program Account or the Grant Account be funded in advance of the Standby Support Contract. The Program Account is required to be funded by appropriated funds that are received by 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. Section 950.11(c)(1) further 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. The purpose of this provision is to obtain some specificity as to the anticipated funding responsibilities of the Department and the sponsor, and thereby aid both the Department and the sponsor in preparing for a Standby Support Contract in the future.

Section 950.11(c)(2) requires each Conditional Agreement contain a provision that the Grant Account be funded in an amount equal to the amount of coverage allocated to cover incremental costs. Section 950.11(c)(2) further requires the parties to 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.

The similar language in § 950.11(c)(1) and (2) reflects the Department's understanding that funding for each account may come from a combination of Department appropriations and contributions by the sponsor or other non-federal source, and that these options should be available for the parties to consider. The Department believes it is reasonable and consistent with Congressional intent to maintain the option that some or all of the funding may be provided by the sponsor, while recognizing that the same option holds true for Congressional 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. In that regard, the Department would expect that sponsors would view funding the Program Account similar to an insurance contract. That is, like an insurance contract, the sponsor (insured) is responsible for paying the insurance premium and the Department

(insurer) is responsible for paying the cost of any valid claims covered by the insurance.

The most significant difference between funding the Program Account and Grant Account is that only the Program Account is subject to the FCRA. In section 638, Congress clearly directed that the funding in the Program Account is to be the ''loan cost'' associated with the covered costs for principal or interest on the debt obligation of the sponsor's advanced nuclear facility, where loan cost has the same meaning as ''cost of a loan guarantee'' under FCRA. FCRA is a federal law designed to improve the cost structure and budgetary basis of federal credit programs. Under FCRA, the cost to the federal government of a loan guarantee made to a private entity is generally equal to the net present value of the estimated costs to cover defaults and delinquencies, interest, or other payments under the loan. In other words, the amount of the loan cost is not the same as the loan amount itself, but a lesser amount that represents the net present value of anticipated long-term costs to the Government of providing the loan guarantee.

In accordance with section 638, the Department defines the loan costs for a Standby Support Contract consistent with FCRA. In so doing, the Department necessarily adopts the method for calculating the amount of funding for the account, that is, the loan cost, consistent with FCRA. Further, the Department interprets section 638, and the specific requirement in section 638(b)(2) that the Program Account need only contain amounts sufficient to cover the loan costs, to mean that the Program Account does not need to be funded in an amount equal to the costs for which coverage is provided and that are specified in section 638(b)(5)(A). This method of funding the Program Account is consistent with FCRA, and is a logical outgrowth of the Congressional directive in section 638(b)(2) to define loan costs consistent with the cost of a loan guarantee under FCRA. Similarly, the Department's responsibilities under section 638 to pay covered costs out of the Program Account are consistent with loan guarantee programs under FCRA. (See 2 U.S.C. 661a(3)). That is, the 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 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. Though it would have been desirable had such language been included in section 638, its absence does not negate the Department's obligation to pay the covered costs under section 638 and FCRA, nor does its absence prevent the Department from entering into a contract 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 applicability of FCRA to the Program Account contrasts with the Secretary's obligation to pay covered costs under the Grant Account. Section 638(d)(4) specifies conditions on the Secretary's obligation to pay certain covered costs. That provision limits the Secretary's obligation to pay covered costs under section 638(d)(5)(B) (i.e., incremental costs) to the receipt of funds sufficient to pay those covered costs. Congress did not place a similar restriction on the Department's obligation to pay covered costs under section 638(d)(5)(A) (i.e., principal or interest on debt obligation).

Reconciliation. Given the potentially lengthy period of time between execution of a Conditional Agreement and execution of a Standby Support Contract, the Department believes it is necessary to re-assess the amount of funds necessary prior to execution of the Standby Support Contract. Accordingly, in § 950.11(d), each Conditional Agreement is required to include a provision that the sponsor provide no later than 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 consideration whether the sponsor's advanced nuclear facility is one of the initial two reactors or the subsequent four reactors. The Department believes that having the reconciliation process within 90 days of executing the Standby Support Contract provides the sponsor and Department additional certainty that the pricing will realistically reflect the risks associated with the Standby Support Contract.

Limitations

Section 950.11(e) addresses limitations related to the Department entering into a Standby Support Contract. In particular, each Conditional Agreement is required to include a provision limiting the Department's obligations to contribute 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. The purpose of this provision is to recognize and clarify that the Department's contribution is contingent upon Congressional appropriations.

Section 950.11(e) further provides that if the amount of appropriated funds is not sufficient to fund the Department's anticipated contribution under the Conditional Agreement, the sponsor has the option to either (1) not execute a Standby Support Contract or (2) provide additional contributions to fund the total amount of coverage in either the Program Account, Grant Account, or both accounts as specified in the Conditional Agreement. The Department believes that these provisions take into account the change in circumstances that may occur between the time of the Conditional Agreement and the Standby Support Contract. The provision also provides a sponsor the option either to enter into a contract or forego that opportunity. Nevertheless, if the sponsor elects to execute the Standby Support Contract, it is required to make up the difference attributable to the Department and fully fund the total amount of costs as specified in the Conditional Agreement. Moreover, the sponsor may not elect to change the allocation of coverage for either account based on the Department's lowered contribution level and thereby potentially negate its additional contribution. This provision is reasonable and consistent with the purposes of section 638 to provide more coverage to those sponsors that are first in line in the construction and operation of advanced nuclear facilities.

Termination of Conditional Agreements

The Department has determined that it is appropriate to specify situations in which the Conditional Agreement should no longer remain in effect. These

situations, specified in § 950.11(f), include when a sponsor enters into a Standby Support Contract with the Program Administrator, when the sponsor has commenced construction of an advanced nuclear facility but declines to enter into a Standby Support Contract within 30 days after commencement of construction, when the sponsor notifies the Program Administrator that it wishes to terminate the Conditional Agreement, when contracts for three different reactor designs have been executed and the Conditional Agreement is for another reactor design (thereby implementing section 638(b)(1)), and when the Department has reached the statutory limit and entered into six Standby Support Contracts. In addition to being the logical outgrowth of administering a regulatory program, this provision allows other sponsors to take advantage of the Standby Support Program when a different sponsor wishes to terminate coverage. Such flexibility anticipates evolving circumstances and is consistent with the Department's goal to facilitate the full power operation of advanced nuclear facilities. Further, it is consistent with several commenters' concern that this risk insurance might be tied up by a sponsor but not be used.

Sections 950.12, 950.13 and 950.14 Standby Support Contract

Section 950.12 sets forth the conditions and limitations associated with the execution of a Standby Support Contract. Section 950.13 addresses the contract's purpose, identification of the advanced nuclear facility covered under the contract, amount of sponsor contribution, maximum aggregate compensation, term, cancellation, termination by sponsor, assignment, claims administration, and dispute resolution. In addition, § 950.14 sets forth provisions addressing the interrelated issues of covered events, exclusions, covered delay, and covered costs. Each of these provisions will be discussed below.

In the NOI, the Department addressed whether to include various terms and conditions via regulation or in a sample contract. A few commenters recommended that the Department provide a standard contract format, which they believed would allow them to evaluate its effect on risk allocation and the resulting impact on financing.

The Department has determined that it is sufficient to include the critical contract terms in this regulation rather than provide a sample contract at this time. The Department believes that a sponsor can appropriately evaluate the potential contract's effect on risk allocation and financing during the pre-contract discussions set forth in §§ 950.10 and 950.11. Accordingly, including a sample contract is not necessary.

Section 950.12 Standby Support Contract Conditions

Conditions Precedent

In § 950.12(a), the Department sets forth nine conditions precedent that a sponsor must fulfill to be eligible to enter into a Standby Support Contract. These provisions must be included in the Standby Support Contract. By requiring satisfaction of the conditions precedent prior to obtaining a Standby Support Contract, the Department intends to ensure that the sponsor will be able to construct an advanced nuclear facility. Accordingly, such protections are consistent with some commenters' concerns that the Standby Support Contracts only be awarded to viable entities. The Department has undertaken to require practicable and necessary conditions precedent that should not impose an unreasonable burden on a sponsor. The conditions precedent are the logical outgrowth of the provisions of section 638 of the Act and the Commission's licensing process. Some of these conditions precedent relate to the regulatory process, while others closely correlate to the actual construction of the advanced nuclear facility. Among those tied to the regulatory process are the need for the sponsor to have: (1) A Conditional Agreement with the Department, (2) a combined license issued by the Commission, (3) the payment of any required fees into the Program Account and the Grant Account, (4) a detailed schedule for the completion of the sponsor's performance of inspections, tests, analyses and acceptance criteria (ITAAC) and for informing the Commission of such completion, and (5) a detailed system-level construction schedule identifying projected dates of construction, testing and full power operation of the advanced nuclear facility. The regulation requires the sponsor to provide the detailed schedule for completing ITAAC and informing the Commission of ITAAC completion, and the systems-level construction schedule no later than ninety days prior to execution of the Standby Support Contract. This timing requirement will facilitate the contracting process so it is done in an orderly fashion. Among those tied to any construction project include documentation that the sponsor has: (1) Obtained all Federal, State or local permits required by law to commence construction, (2) commenced construction, and (3) obtained coverage of required insurance for the project. Further, no later than ninety days prior to execution of the Standby Support Contract, the sponsor must provide to the Program Administrator, 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, including the projected cash flows for all debt obligations of the advanced nuclear facility.

The Department will review the foregoing information, as well as any applicable statutes and regulations, and enter into a Standby Support Contract upon satisfaction that the conditions precedent have been met, the contract is consistent with applicable statutes and regulations, and the necessary funding is in place.

Funding and Limitations

In § 950.12(b), the Department requires that no later than thirty days prior to execution of the Standby Support Contract, funds in an amount sufficient to fully cover the loan costs or incremental costs as specified in the Conditional Agreement shall be deposited in the Program Account or the Grant Account. The purpose of this provision is to ensure that the administration and funding of the Standby Support Program occurs in an efficient and orderly manner.

In § 950.12(c), the Department provides limitations about entering into a Standby Support Contract, based on statutory direction in section 638, that sufficient funding for a contract must be deposited in either the Program Account of Grant Account prior to execution of the contract.

Section 950.13 Standby Support Contract: General Provisions

General Contract Provisions

In § 950.13, the Department specifies that each Standby Support Contract include provisions addressing basic contract terms, including the contract's purpose, covered facility, sponsor contribution, maximum aggregate compensation, the term, cancellation, termination by a sponsor, assignment, claims administration, and dispute resolution.

Covered Facility. Section 950.13(b) requires each Standby Support Contract to include a provision specifying that the Secretary provide coverage only for an advanced nuclear facility, which must be owned by a non-federal entity, pursuant to section 638. In addition, this section requires the contract to

include the specific advanced nuclear facility to be covered, the reactor design, and its location. Inclusion of the facility's location is standard for any property insurance contract. Inclusion of the reactor type is necessary to implement section 638(b)(1).

Sponsor Contribution. Section 950.13(c) requires each Standby Support Contract to include a provision specifying the amount that a sponsor has contributed to fund each type of account. This is necessary to implement the funding and appropriations considerations in section 638(b), which distinguish between the Program Account and the Grant Account.

Maximum Aggregate Compensation. Section 950.13(d) requires each Standby Support Contract to include a provision specifying the maximum amount of coverage permitted by section 638(d). Specifically, the provision states that the Department is prohibited from paying 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. In addition, the Secretary may include a provision setting a minimum amount of coverage, given that the Department will incur significant costs in implementing and administering the program. These potential costs include evaluating the funding for coverage, contract negotiations, monitoring, claims administration, and dispute resolution.

Term. Section 950.13(e) requires each Standby Support Contract to include a provision specifying the date at which the contract commences as well as the term of the contract. The Department notes that the contract's effective date will be the date at which it has been signed by both the sponsor and the Program Administrator. Subject to the cancellation provisions in paragraph (f), the contract terminates when full power operation is achieved, and when all claims have been paid or any disputes involving claims under the contract have been resolved in accordance with the claims administration process in subpart C and the dispute resolution process in subpart D.

Cancellation Provisions. Section 950.13(f) requires each Standby Support Contract to include a provision specifying that the parties may cancel the contract under certain conditions. First, the Program Administrator may cancel the contract if the sponsor abandons the project, provided that the abandonment is not caused by a covered event or force majeure. Second, the sponsor may cancel the contract if the sponsor determines that it no longer requires continued coverage. In either case, this provision requires the party canceling the contract to provide written notification to the other party. Third, the parties may cancel the contract for other causes as agreed upon. Such cancellation provisions are consistent with requests by commenters that the Department should have the right to cancel a contract where a project has been abandoned. However, the Department decided not to require a fixed timeframe for determining that a sponsor is experiencing an unexcused, extended suspension of construction, because the Department believes mandating cancellation based on a fixed timeframe would inappropriately reduce the Department's flexibility in assessing a particular situation. Nevertheless, the Department's general decision to include cancellation provisions is consistent with the Department's goal of facilitating the construction and operation of advanced nuclear facilities.

Section 950.13(g) contains a limitation that if a sponsor elects to terminate a Standby Support Contract, then the sponsor or any related party is prohibited from entering into another Standby Support Contract. Such a provision is necessary to prohibit potential sponsors from ''gaming'' the Standby Support Program. Specifically, a sponsor could be on the verge of full power operation of an advanced nuclear facility, without the need to make any claims on the Standby Support Program. Absent this provision, the sponsor could terminate its initial Standby Support Contract and then enter into a new contract for a different facility.

Assignment. Several commenters stated that it is necessary to permit a sponsor to transfer its rights and obligations under the contract. This would allow project lenders or other entities to complete a project. These commenters requested that the sponsor have full discretion to assign its rights under the contract.

The Department generally agrees that it may be appropriate to allow a sponsor to assign its rights under the Standby Support Contract. Accordingly, § 950.13(h) requires each Standby Support Contract to include a provision specifying the assignment of a sponsor's rights and obligations under the contract. Specifically, this provision states that the sponsor is permitted to assign the rights under the contract with the Secretary's prior approval. The sponsor must obtain this approval, in writing, prior to assigning such rights. The Department believes that it is necessary to retain oversight related to the assignment of such rights, given that such assignments typically involve significantly changed circumstances with new parties. The Department notes that any transfer of control over a license requires prior Commission approval.

Claims Administration. Section 950.13(i) requires each Standby Support Contract to include a provision specifying a mechanism for administering claims pursuant to the procedures set forth in subpart C.

Dispute Resolution. Section 950.13(j) requires each Standby Support Contract to include a provision specifying a mechanism for resolving disputes about the terms of the Standby Support Contract pursuant to the procedures set forth in Subpart D.

Reestimation. Section 950.13(k) requires each Standby Support Contract to include a provision specifying that consistent with the Federal Credit Reform Act (FCRA), the sponsor provide all needed documentation to allow the Department to annually re-estimate the loan cost needed in the financing account under 2 U.S.C. 661a(7) funded by the Program Account. The ''financing account'' is defined by FCRA as ''the non-budget account or accounts associated with each credit program account which holds balances, receives the cost payment from the credit program account, and also includes all other cash flows to and from the Government resulting from direct loan obligations or loan guarantee commitments made on or after October 1, 1991.''

Section 950.14 Covered Events, Exclusions, Covered Delay, and Covered Costs

Section 638(c) specifies situations in which the Secretary will pay ''covered costs.'' Among the situations expressly set forth in paragraph (c)(1) are: (A) ''the failure of the Commission to comply with schedules for review and approval of inspections, tests, analyses, and acceptance criteria [ITAAC] established under the combined license or the conduct of preoperational hearings by the Commission * * *'' or (B) ''litigation that delays the commencement of full-power operations * * *''

Covered Events

Section 950.13(a) requires each Standby Support Contract to include a provision setting forth an agreement between the parties that addresses the contract's purpose, which is for the Secretary to provide compensation for covered costs incurred by a sponsor against covered events that result in a covered delay of full power operation of

an advanced nuclear facility. Aside from the term ''covered event,'' these other terms—Secretary, covered costs, sponsor, covered delay, full power operation, and advanced nuclear facility—are referenced in section 638. The Department determined it is necessary to add the term ''covered event'' to reflect that not all events appearing to fall under section 638(c)(1) will warrant compensation. 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. In addition, there may be a delay in meeting the ITAAC review schedule but the ITAAC-related delay may have no actual effect on a facility obtaining full power operation. The same may be true for delays attributable to the pre-operational hearing or litigation.

ITAAC Delays. In the NOI, the Department first noted that the covered delay set forth in paragraph (c)(1)(A) are closely related to the Commission's part 52 combined licensing process. The Commission requires verification that the licensee has completed the required inspections, tests, and analyses, and that the acceptance criteria have been met before the reactor can operate. However, the Commission's regulations do not set any schedules for completing ITAAC review. Rather, under the combined license application, the licensee sets the schedule for ITAACs and may change the schedule as circumstances warrant. Although the Commission may set informal, internal schedules for auditing the licensee's performance of its ITAAC and will provide public notice upon completion of its review, there is no regulatory requirement for the Commission's conduct or timing of such auditing.

Potential sponsors commented that realistic, definite schedules for review and approval of ITAAC be included in the contracts executed in accordance with section 638. The nuclear energy trade association commented that ITAACs were not unreasonably complex, because they are precise, quantitative and unambiguous indicators that provide unambiguous and unequivocal proof that the plant will operate safely. It then stated that the small percentage of total ITAAC that are completed late in the process, but on schedule should not represent a potential source of delay in commercial operation.

In its comments to the NOI, the Commission again emphasized that its regulations do not require any schedule for completing ITAAC review. It further stated that the licensee is not bound to any schedule for completion of an ITAAC. Nor is the Commission staff bound to any schedule for review of a licensee statement that an individual acceptance criterion has been met or that all ITAACs have been met. Notwithstanding the complexity of the ITAACs, their facility-specific nature, the lack of a required review schedule, and the possibility that a licensee may leave large numbers of ITAAC for resolution in the last few weeks before fuel load, the Commission did note that:

> The NRC staff intends to coordinate its schedule for ITAAC review with the licensee's schedule for performing the [ITAACs] and submitting ITAAC determination letters. In order to do so, the NRC would have to develop guidance on the length of ITAAC reviews, particularly those reviews occurring during the final 20% of construction schedule and the six months before the schedule fuel load * * * The staff believes this process could be used for setting the schedules for ITAAC review to which Section 638 refers. The staff envisions that a licensee would submit its schedule for meeting the ITAAC to be completed in the final 20% of the construction schedule as soon as the licensee develops such a schedule. Without comment on the licensee's schedule or otherwise reviewing it, the NRC would determine the review time for each ITAAC in accordance with the guidance and issue a schedule for ITAAC review that could be referenced in the insurance contract.

Based on these comments and the Department's understanding of the ITAAC process, § 950.14(a)(1) requires each Standby Support Contract to include a provision setting forth a two-tier level of review for assessing whether an ITAAC-related delay should be considered a covered event. The Department further notes that the Commission issued a notice of proposed rulemaking in which it is considering modifying the ITAAC process (*See*, 71 FR 12782, March 13, 2006). If between the Department's issuance of this interim final rule and determining whether there has been an ITAAC-related delay under a Standby Support Contract, the Commission issues any rule, guidance, audit procedures or formal opinions setting schedules for its review of ITAACs, then such Commission rules—whether formal or informal—would guide the Department in determining whether a delay in a sponsor's ITAAC schedule should be considered a covered event. Given that the Commission is considering amending part 52 and addressed the issue of ITAAC schedules in a public workshop held on March 14, 2006, it is possible that the Commission will issue such guidance by the time the Standby Support Contracts take effect.

The Commission has indicated that it intends to issue such guidance, and would initially set a schedule for reviewing the sponsor's completion of ITAAC, based on the sponsor's schedule for informing the Commission that the ITAAC have been completed. The Commission has also indicated that it would make its review schedule available to the sponsor and the Department. In any event, the Commission commented that nothing in this rule shall be interpreted to require or encourage the Commission or its staff to render any required safety determination without the necessary and sufficient documentation of information from the sponsor/licensee (including any of its contractors, sub-contractors, vendors, manufacturers, consultants, etc.) needed to ensure adequate protection and common defense and security under the Commission's regulations.

Nevertheless, if the Commission has not provided any rules, guidance, audit procedures or formal opinions setting schedules for ITAAC review, then the Department, pursuant to § 950.14(a)(2), would evaluate the sponsor's proposed schedule for Commission review of ITAAC completion, subject to the Department's review and approval for such a schedule. In such a situation, the sponsor is required to submit its initial schedule for informing the Commission of ITAAC completion, along with any revisions of that schedule and a suggested schedule for review of completed ITAAC by the Commission.

Preoperational Hearing. Section 638(c)(1)(A) refers to delays in full power operation of advanced nuclear facilities caused by ''the conduct of preoperational hearings by the Commission * * *''. In the NOI, the Department requested comment about two possible interpretations: (1) To allow coverage only for delays associated with preoperational hearings under part 52 or (2) to allow coverage for delays associated with any preoperational hearings, regardless of who requested or caused the hearing and regardless of whether there was a ''failure'' of any kind by the Commission.

Several potential sponsors commented that the phrase ''the conduct of pre-operational hearings by the Commission'' should include any delay covered by any pre-operational hearings. These commenters contend such an interpretation reflects the plain language and intent of the statute. In

contrast, one commenter stated that only hearings under 10 CFR 52.103 should be covered, given that a broader reading would undermine the Commission's safety mission. The Commission commented that the scope of a pre-operational hearing concerns only whether the ITAAC have been or will be satisfied. In addition, the Commission commented that a person seeking such a hearing must meet the standards of 10 CFR 52.103(b), i.e., the petitioner must show *prima facie* that one or more of the acceptance criteria have not been met and the specific operational consequence of nonconformance would be contrary to public health and safety.

The Department has determined that for purposes of the Standby Support Contracts, the phrase ''the conduct of pre-operational hearings by the Commission'' means the non-mandatory hearing conducted by the Commission in accordance with 10 CFR 52.103. The Department included a definition of this term in the regulations to avoid any confusion that this term referred to more than one type of pre-operational hearing or to some other hearing that the Commission may conduct in the context of a part 52 licensing proceeding. The Department believes that it would be inappropriate and unnecessary to broaden the term to include all hearings taking place prior to operation or fuel load, particularly in light of the Commission's comment about how it views the § 52.103 hearing. Under the Commission's rules addressing part 52, it is unlikely that any other hearing would be held by the Commission other than the one already expressly set forth at § 52.103.

Litigation. Section 638(c)(1)(B) refers to ''litigation that delays the commencement of full-power operations * * *'' In the NOI, the Department noted that the Act is silent as to what type of litigation section 638 refers. The Department further noted its inclination to interpret the term ''litigation'' in paragraph (c)(1)(B) as meaning only litigation in State, Federal, or tribal courts, including appeals of Commission licensing decisions, and excluding administrative litigation that occurs at the Commission as part of the combined license process, because paragraph (c)(1)(A) already refers to certain Commission proceedings that may delay full power operation. The Department requested comment as to what type of litigation-related delays should be covered by the Program.

Several commenters suggested the definition of litigation should be broadly defined, while other commenters suggested the definition should be narrow. Under a broad definition, litigation would encompass both judicial and administrative litigation, including any hearings under 10 CFR 52.103 and any litigation commenced before or after issuance of the combined license, as well as litigation initiated by a sponsor, a governmental agency or a third party. Under a narrow definition suggested by some commenters, litigation would not include administrative litigation before the Commission, appeals of Commission decisions to the courts, or any litigation other than frivolous claims.

The Department has decided to define litigation in the interim final rule 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. On the other hand, the Act does not suggest a limitation based on what party brings suit. Hence, the interim final rule would apply to litigation, if in federal, State or tribal court, initiated by a sponsor, a governmental agency or a third party. In addition, any appeal of a Commission decision to an appropriate court would be considered ''litigation.'' The Department interprets this term 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. It does not apply to or cover delays that are only secondarily caused by the litigation, e.g., a company's decision to delay operation because a matter is in litigation, even though a court has not barred operation or the permit at issue is in effect.

Exclusions

Section 638(c)(2) expressly precludes the Secretary from paying costs resulting from three general areas: ''(A) The failure of the sponsor to take any action required by law or regulation; (B) events within the control of the sponsor; or (C) normal business risks.'' In the NOI, the Department requested comment on how best to interpret and apply this section, including examples of each category of exclusion.

No commenter addressed situations involving the failure of the sponsor to take any action required by law or regulation. Nevertheless, the Department has decided to require each Standby Support Contract to include a provision addressing this exclusion of coverage for the failure of a sponsor to take actions required by law or regulation. For example, in the construction of any large commercial project, including an advanced nuclear facility, a builder is required to obtain permits and take other steps required by Federal, State, and local laws, regulations and ordinances. In particular, a builder typically has to comply with environmental laws such as those related to pollution abatement or protection of human health or the environment (including ambient air, surface water, ground water, and land surface requirements). Further, with respect to an advanced nuclear facility, a sponsor may have to comply with other laws or regulations due to its unique characteristics. Where a sponsor had failed to take any of these or similar types of actions required by law or regulation, any associated delay would not be covered. Section 950.14(b) further requires the Standby Support Contract to include a provision that excludes coverage for events in which the sponsor either must re-perform an ITAAC due to a Commission disapproval of the sponsor's ITAACs or redress deficiencies in ITAACs as a result of a Commission disapproval of fuel loading.

All commenters agreed that standby support should not extend to delays and losses caused by factors that fall within the control of a sponsor. Potential sponsors and the nuclear industry trade association stated that situations like the late delivery of equipment should not be covered. Several commenters stated that the Department needs to provide examples of such events and define the terms ''events within the control of the sponsor'' and ''normal business risk.''

The Department agrees with those commenters that requested examples of events it considers within the control of the sponsor. To this end, the Department reviewed commercial insurance contracts and practices, particularly for large construction projects, in developing § 950.14(b)(2) which sets forth a list of examples of such situations. Based on this review, the Department provides the following, non-exhaustive set of examples for situations within the control of a sponsor. These include delays attributable to a range of project planning and construction problems including wear and tear, rust,

deterioration, latent defects in property and routine construction delays; and labor-management disputes. In addition, other events the Department considers within the sponsor's control include (1) the sponsor's performance of inspections, tests, analyses, and acceptance criteria in accordance with its schedule, (2) the sponsor's obtaining adequate funding for construction and testing of the advanced nuclear facility, and (3) the sponsor's decision not to continue construction or not to attain full power operation as the result of litigation in which the sponsor is not subject to a court order.

With respect to normal business risks, a utility recommended that it would be appropriate to define this term as ''traditional exposures for which insurance is currently available on commercially reasonable terms and conditions.'' Commenters further recommended that the Department follow generally accepted practices in the insurance industry.

The Department generally agrees with the commenters and has provided examples of normal business risk consistent with standard industry practice. These include events where businesses normally would be expected to absorb any additional cost burdens including costs resulting from changing economics or market conditions, weather delays, labor difficulties, supplier/contractor failures, and other difficulties. Normal business risks also would include those related to obtaining approvals or permits from regulatory agencies, except for the regulatory approvals that constitute a covered delay under the Standby Support Contracts. In other words, the Department interprets ''normal business risk'' to mean all the typical risks of a commercial enterprise, except for those risks that ordinarily may be considered a ''normal business risk'' but, in this case, Congress determined should be covered risks under the contracts. Other examples of normal business risks set forth in standard commercial insurance contracts include (1) delays attributable to force majeure such as strike or weather delay, the failure of power or other utility services supplied to the location, (2) natural events such as earthquake, landslide, mudslide, volcanic eruption, other earth movement, flood, (3) government action meaning the seizure or destruction of property by order of governmental authority, (4) 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), (5) supplier or subcontractor delays in performance, (6) litigation, whether initiated by the sponsor or another party, that is not a covered event, (7) failure to timely obtain regulatory permits or approvals that is not a covered event, and (8) unrealistic and overly ambitious schedules set by the sponsor.

The Department agrees with commenters that it would be impracticable to develop an all-inclusive list addressing all such delays in all future situations. Accordingly, in addition to this preamble discussion providing some examples of exclusions, the Department has developed a claims administration process which is discussed in subpart C.

Covered Delay and Full Power Operation

Whether a covered event leads to covered delay depends on whether the covered event directly causes a delay in full power operation of an advanced nuclear facility. Accordingly, the concept of full power operation is a critical element in determining covered delay and covered costs under a Standby Support Contract.

Several commenters suggested that the Department should define full power operation to mean at or near 100 percent of power on a sustained basis. These commenters reasoned that defining full power operation to be operation at five percent or greater is not consistent with the intent of the Act, and that this interpretation, though applicable in the context of a part 50 reactor license, is not useful or applicable under a part 52 license where the regulations do not expressly require Commission authorization for power operations greater than five percent.

The Department notes that Congress did not define this term in the Act, leaving it to the Department's discretion. This term is defined in the interim final rule as that point at which the sponsor first synchronizes the advanced nuclear facility to the electrical grid. The Department notes that such an event typically occurs between 10 to 25 percent of a facility's licensed thermal power capacity. The Department believes that this definition of full power operation is appropriate because it is clear, addresses the sponsor's desire for coverage until it is able to generate revenue from the facility, and represents a point where the risks covered under the contracts are either not applicable or no longer likely to occur. Once the Commission has found that the acceptance criteria have been met in accordance with 10 CFR 52.103(g), the Commission's review of ITAAC is complete. The sponsor may then load fuel and begin power ascension testing. Hence, there is no opportunity after fuel load for a delay in full power operation caused by the Commission's failure to review and approve ITAAC on schedule. Similarly, any delay from a pre-operational hearing would not exist after fuel load, since the covered event also would only occur prior to loading fuel. The remaining risk, litigation in Federal, State or tribal court that delays the sponsor from achieving full power operation, is less likely to occur after fuel load and the first time the sponsor synchronizes to the electrical grid. Even if this type of delay could occur after first grid connection, there is no clear or reasoned basis to determine precisely when that time may occur in operating life of an advanced nuclear facility.

Based on these considerations, § 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. In addition, for a contract for one of the subsequent four reactors, payment for covered delay will occur only after the initial 180-day period of delay.

Due Diligence. Section 638(e) specifies that any Standby Support Contract requires ''the sponsor to use due diligence to shorten, and to end, the delay covered by the contract.'' In the NOI, the Department requested comments on how this term should be used in the context of a Standby Support Contract. Two commenters recommended that the Department define due diligence consistent with the concept of using commercially reasonable efforts to shorten and end the delay. They further commented that the Department should have the burden of demonstrating that a sponsor failed to use due diligence.

Section 950.14(c)(2) requires each Standby Support Contract to include a provision to require the sponsor to use due diligence to mitigate, shorten, and end covered delay under the contract. Similarly, § 950.23(b)(2)(iii) requires a sponsor to use due diligence to mitigate, shorten and end the covered delay and the associated costs. The Department notes that Black's Law Dictionary defines ''diligence'' as (1) a continual effort to accomplish something and (2) the attention and care required from a person in a given situation. In turn, Black's Law Dictionary defines ''due diligence'' as ''[t]he diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or a discharge of an

obligation.'' As several commenters noted, the claims administration process set forth in subpart C is the forum for determining whether a sponsor in fact acted with due diligence to mitigate, shorten or end the covered delay and associated costs under the Standby Support Contract. The Department notes that requiring a sponsor to use due diligence to mitigate costs associated with the Standby Support Contract is consistent with general principles of mitigating damages in contract disputes.

Covered Costs

Paragraph (d) of Section 638 provides for the coverage of costs that result from a delay during construction and in gaining approval for full power operation, specifically (A) principal or interest and (B) incremental cost of purchasing power to meet contractual agreements. In the NOI, the Department requested comments on how these costs should be documented, especially the extent to which they are used in calculating the funding needed prior to entering into a contract. In particular, although the Department stated that it anticipated only covering those costs specifically described in paragraphs (d)(5)(i) and (ii), it noted that it might consider providing coverage for costs in addition to those specifically described in those sections.

Commenters expressed divergent views on whether to have an expansive or limited interpretation of paragraph (d)(5) which states that the covered costs shall be those that result from certain delays ''including'' the costs specifically described in that provision (e.g., principal or interest). Two commenters agreed with a more limited reading of ''including.'' One stated that the statute clearly states ''including'' and does not state ''including but not limited to.'' That commenter stated that to interpret the statute otherwise would be an improper broadening of the law. In contrast, potential sponsors commented that the statute's use of the term ''including'' without any additional qualifying language such as ''and limited solely to'' suggests that Congress intended an inclusive and expansive definition of covered costs. They suggested coverage for additional costs such as operations and management including the costs of demobilization and remobilization, idle time costs incurred in respect to equipment and labor, increased general and administrative costs, and escalation of costs for completion of construction.

The Department believes 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). After reviewing the implications of interpreting the term broadly, the Department has concluded that it is more appropriate to limit the concept of covered costs to those expressly set forth in paragraph (d)(5). This will enable the Department to control the costs of the program, without undermining the purpose of section 638 which is to facilitate the construction and full power operation of advanced nuclear facilities. Moreover, expanding the coverage to down-time costs suggested by some commenters could reduce a sponsor's incentive to expeditiously complete a project. Accordingly, § 950.14(d) requires each contract to include a provision to specify that the covered costs under the Program Account are limited to principal or interest on any debt obligation financing the advanced nuclear facility. The Program Account would not cover penalty interest or other charges due to borrower delinquency or other failure to meet debt terms that are not related to a covered event. In other words, under the Program Account the Department will indemnify sponsors for the cost of principal or interest on the debt obligation for the period or duration of covered delay, less 180 days for one of the subsequent four reactors.

Covered costs under the Grant Account involve the incremental difference between (i) 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 the delay; and (ii) the contractual price of power from the advanced nuclear facility subject to the delay.

The Department has defined fair market price of power and contractual price of power as follows in § 950.25: 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 by its day ahead weighted average index price in $/MWh at the hub geographically nearest to the delayed nuclear facility posted the previous day by the Intercontinental Exchange (ICE) or an alternate electronic marketplace deemed as reliable by the Secretary. 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.

In addition, the contractual price of power is calculated as the price for which power would be sold if full power operation of the advanced nuclear facility had not been delayed. In the event of covered delay, standby support coverage would indemnify the sponsor for the extra costs that may be incurred purchasing replacement power at a higher price than the price at which the sponsor has sold it because the sponsor may be required to make firm power deliveries regardless of the delay and at sales prices that may be below the current market price of power in the sponsor's region. The amount indemnified is a function of the incremental difference between the current market price for replacement power purchase and the contractual selling price for firm power deliveries, as well as the quantity of power under contract. Only the quantity of power that is under contract at the time of the covered event, i.e., only power that had been contracted for prior to the occurrence of a covered event will be used to determine the amount of replacement power indemnified for the associated portion of covered delay. In addition, only supply contracts that have a definite date for delivery that cannot be met due to a covered delay would be eligible for cost recovery. The upper limit on the amount of power deliveries from the advanced nuclear facility can be no more than the net generating capability, which is calculated by using the average nuclear industry-wide capacity factor and site usage and line losses.

The Department determined that it would be inappropriate to adopt a commenter's recommendation to offer a pre-defined ''weekly indemnity'' for debt service and other costs when the Standby Support Contract is implemented. The commenter suggested that the Department emulate the Accidental Outage Policy or business interruption-type insurance provided by the Nuclear Electric Insurance Limited (NEIL). The Department notes that providing a pre-defined ''weekly indemnity'' patterned after NEIL would be inconsistent with section 638. A pre-defined amount might allow for payments in excess of those actually incurred by a sponsor.

Subpart C—Claims Administration Process

Subpart C of the regulation sets forth the procedures and conditions to be followed by a sponsor for the submission of claims and the payment of covered costs under a Standby Support Contract. In the NOI, the Department requested comment on how

it should determine covered costs and covered delay under the contracts. Recognizing the inherent difficulty in prescribing ahead of time all the factors that may determine whether a delay is covered by the contract or the costs are properly calculated and recoverable, several commenters suggested the Department institute a claims management process to handle such issues as they arise. They also recommended that the Department institute a claims procedure to expedite processing and payment of covered costs.

Industry commented that the insured should have the burden of making a good-faith showing of a covered delay and covered loss. The Department believes that a sponsor has the burden of establishing that there is a covered event, covered delay and covered loss, as the sponsor is the entity primarily in possession of the facts necessary to support aclaim. Accordingly, § 950.20 states that ''a sponsor is required to establish that there is a covered event, a covered delay and a covered loss.''

In establishing an efficient and workable claims administration process, the Department reviewed claims administration of other Federal agencies and private sector insurers of large construction projects, including the procedures established by the Department of the Treasury to implement its *Terrorism Risk Insurance Program* at 31 CFR part 50. (69 FR 39296, June 29, 2004)

Based on this analysis, the Department, in subpart C, establishes a two-step process for filing and payment of claims for covered costs. The first step in the process, covered in §§ 950.21 and 950.22, is a notice requirement regarding the occurrence of a covered event. The second step in the process, covered in §§ 950.23 through 950.28, is the requirements for certification of covered costs and the procedures for payment of those costs by the Department. The process is set up this way to ensure that the Department is receiving timely, advance notice of events that may result in covered delay, so that when the sponsor submits a claim for covered costs the Department can more quickly and accurately determine the duration of a covered delay and the associated covered costs. This bifurcation is particularly necessary given that the period of coverage will extend over several years, *i.e.*, from commencement of construction through testing to full power operation of the facility. A covered event may occur at various times during this multi-year period. On the other hand, a determination that covered delay occurred, and the exact duration of the delay, can only be made at the time when full power operation is scheduled to occur. This point in time may come several years after the covered event. Accordingly, the regulations provide for early notification of covered events that will enable the Department to determine whether an event qualifies for coverage, and any changes in schedules and other expectations as a result of the event. In addition, the regulations provide for payment of claims at the time when the sponsor expected to attain full power operation to enable the Department to determine accurately whether a covered delay occurred, the duration of the delay, and the amount of covered costs to be paid.

Covered Event Determination

The first step in the claims process, § 950.21, is for the sponsor to notify the Claims Administrator that a covered event has occurred, and provide certain information in support of the claim. For example, the sponsor provides information about the covered event, its duration, the sponsor's projection of the duration of covered delay, and any revisions to schedules for construction, testing or ITAAC review resulting from the event. An authorized representative of the sponsor is required to sign the notification of a covered event, and certify that the notification is made in good faith, and represents that the supporting information is accurate and complete to the best of the sponsor's knowledge and belief.

The Claims Administrator is the official within the Department responsible for the administration of the Standby Support Contracts, including the responsibility to determine whether claims are appropriate and should be paid. This information is reviewed by the Claims Administrator and, within 60 days of receipt, the Claims Administrator issues a determination whether the event is a covered event under the contract. The second step in § 950.22 provides the Department with the opportunity to evaluate the threshold question of whether the event is in fact an event covered by the contract. The Claims Administrator bases his or her decision on review of the conditions and exclusions under subpart B for a covered event. For example, if the Commission failed to review an ITAAC on the approved schedule under § 950.14(a), and this failure of the Commission was not caused by one of the events excluded from coverage under § 950.14(b), e.g., an event within the control of the sponsor, then the event is a covered event. If the Claims Administrator does not agree with the sponsor's representation of the event as a covered event, then the sponsor must invoke the dispute resolution procedures in subpart D. In addition, 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 in full power operation. The parties are bound by any Final Determination on Covered Events, and the sponsor may rely on that in any future claim for payment of covered costs.

Covered Cost Determination

The next step in the process under § 950.23 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. The sponsor's claim, referred to as the Certification of Covered Costs, establishes the sponsor's basis for the claim, including supporting documentation such as detailed information about the expected duration of the covered delay and associated covered costs. To the extent the sponsor cannot determine the total amount of covered costs in the requisite time period prior to the expected date of full power operation, either because all costs are not then known or new covered events occur after the time of filing the Certification, then the sponsor may file a Supplementary Certification of Covered Costs.

The Claims Administrator reviews the information in the Certificate of Covered Costs, and determines whether the costs should be paid based upon an evaluation of the duration of the delay in achieving full power operation caused by the covered event(s), adjusting for any delay in full power operation that is not the result of a covered event and therefore excluded from coverage. This evaluation and determination by the Claims Administrator is referred to as the Claim Determination. The Department pays those claims that are covered by the contract, pays an adjusted amount if determined appropriate, or rejects the claim. If the sponsor does not agree with the Claims Administrator's Claim Determination, then the procedures in subpart D are invoked to resolve the dispute.

To facilitate the process, § 950.25 specifies the method the Claims Administrator uses to calculate covered costs, and § 950.26 describes the adjustments to covered costs the Claims Administrator may make in that process.

Once a Claim Determination is rendered, and assuming there is no dispute, then the Department pays the covered costs in accordance with the Claim Determination and other conditions of payment as specified in § 950.27, such as a finding that the claim is not fraudulent, collusive, in bad faith, or otherwise designed to circumvent the purposes of the Act and the regulations. Other conditions include the limitation that payments may not exceed the aggregate amounts permissible under the Act; that is, no more than $500 million each for the initial two reactors and $250 million each for the subsequent four reactors.

Section 950.28 addresses the payment method for covered costs. Assuming all conditions are met, periodic payments are made when the sponsor has incurred and is obligated to pay the costs covered under the contract.

Subpart D—Dispute Resolution Process

In the NOI, the Department noted that as with any commercial insurance contract, a sponsor may disagree with the Department as to an interpretation of a provision in the Standby Support Contract. After further noting that the Act does not require any particular dispute resolution mechanism or procedure, the Department requested comment on how disputes between sponsors and the Department should be resolved, and what dispute resolution provisions should be included in the applicable regulations or contracts.

Industry commenters recommended the use of third party binding arbitration to settle claims about covered events and covered delay. The choice of binding arbitration as the preferred method of dispute resolution was to provide a forum that was fast, efficient and not subject to protracted litigation. The commenters recommended private arbitrators to administer the processing of these claims and to act as neutral evaluators.

Covered Events and Covered Costs Dispute Resolution

The Department generally agrees with the commenters' view that claims should be resolved as effectively and efficiently as possible. The dispute resolution methods that are set forth in subpart D address these concerns. Subpart D provides a two step dispute resolution process for resolving claims that first calls for mediation and then a Summary Trial with Binding Decision.

Specifically, subpart D addresses two types of disputes: those involving covered events in §§ 950.31 and 950.32 and those involving covered costs in §§ 950.33 and 950.34. For completeness, subpart D, §§ 950.36 and 950.37, also provides the same two step dispute resolution process for other contract matters that may be in dispute and would benefit from resolution in an efficient and effective manner.

If a sponsor initially disagrees with the Claims Administrator's determination on what constitutes a covered event or covered delay, it may file a rebuttal to that decision (Sponsor's Rebuttal). Within 15 days of the submission of the Sponsor's Rebuttal, subpart D requires the parties, i.e., the sponsor and the claims administrator, to attempt to resolve the claim dispute through mediation. The subpart further requires the mediation neutral(s) to be mutually selected by the parties and the cost of the process to be equally shared. Mediation is a flexible negotiation-based process whereby a third party neutral assists the parties in their dispute resolution efforts. If the parties reach settlement during the mediation process that settlement constitutes a Final Claim Determination. If, however, the parties cannot reach a settlement, they would proceed to the second available dispute resolution process for resolving the claim—the Summary Trial with Binding Decision.

This process has been used in the government contracts arena for many years. Scheduling of summary trials before the Department of Energy's Board of Contract Appeals (Board) is expedited, discovery is limited, and the parties try the matter informally, with relaxed rules of evidence, either before a single administrative judge or a panel of administrative judges. A summary or ''bench'' decision will be issued at the conclusion of the trial or as set forth in these regulations no later than 10 days post hearing. The parties agree in advance that the Board's decision is final and not appealable.

The Department has decided to use the Board rather than a third-party commercial arbitrator for dispute resolution because the services provided by the Board and a commercial arbitrator are essentially the same, but the Board does not charge for the use of its services. Consequently, any costs are minimal for the parties. In contrast, commercial arbitrators charge significant fees for conducting arbitration.

Subpart E—Audit Investigations and Other Provisions

As with any program in which the government is providing grants or other subsidies to the public, the Department may audit the costs associated with the Standby Support Program. Accordingly, in § 950.41, the Department reserves the right to examine any pertinent documents and records of a sponsor. The Department may also direct the sponsor to submit to an audit by a public accountant or equivalent acceptable to the Secretary. Such an audit provision is patterned after the Department's authority in 10 CFR part 800, *Loans for Bid or Proposal Preparation by Minority Business Enterprises Seeking DOE Contracts and Assistance.*

In section 950.42, the Department addresses the public disclosure of information received from a sponsor. Industry representative at the public workshop expressed concern that much information in the part 52 application process and under the Standby Support Program contained proprietary information that should not be disclosed to the public. In contrast, the advocacy group commented that all information under the Standby Support Program should be made public. The Department generally believes that such information should be made public, unless the sponsor demonstrates that the information, if made public, would divulge trade secrets or other proprietary information. Such an approach is consistent with the Freedom of Information of Act's approach to such information at 5 U.S.C. 552 and the Department's rules at 10 CFR part 1004.

IV. Regulatory Review Requirements

A. Review Under Executive Order 12866

The Department has determined that today's regulatory action is an ''economically significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), as amended by Executive Order 13258 (67 FR 9385, February 26, 2002). Accordingly, the Department submitted this interim final to the Office of Information and Regulatory Affairs of the Office of Management and Budget, which has completed its review under E.O. 12866.

This discussion assesses the potential costs and benefits of this rule. This regulation affects only those entities that voluntarily elect to apply for standby support and are selected to receive such standby support assistance. It imposes no direct costs on non-participants. The economic impact of this regulatory action is uncertain because the nature and size of the projects to be assisted will not be known until specific project applicants come forward and because it is not possible to predict the scope, frequency or timing of the events that would be subject to payment of standby support. The Department notes that the

costs are the amount of monies needed in the Program Account for the Federal government to extend Standby Support. The Department has not completed an estimate of the cost of this risk insurance for the interim final rule rule, but a preliminary analysis indicates that the rule may exceed $100 million in any one year, and will therefore be treated as an economically significant rulemaking. For purposes of review under E.O. 12866, the final rule will provide a best estimate of the cost to fund the full Standby Support Program.

To promote the construction of new nuclear power plants, the Secretary of Energy Advisory Board formed the Nuclear Energy Task Force (NETF) in July 2004 to ''assess the issues and determine the key factors that must be addressed if the Federal government and industry are to commit to the financing, construction, and deployment of new nuclear power generation plants to meet the nation's electric power demands in the 21st Century.'' NETF determined that the ITAAC process and the possibility of a hearing on satisfaction of the ITAAC may create regulatory disruption after substantial funds have been expended. Achieving the purpose of the revised regulatory process will be thwarted if the Commission does not keep the ITAAC process focused narrowly on those issues that must be subject to post-construction verification. NETF concluded that this new regulatory process which has not been tested in practice, poses a significant risk factor to generating companies. Similarly, the Department funded a report which defined critical risks and investment issues. (*Business Case for New Nuclear Power Plants: Bringing Public and Private Resources Together for Nuclear Energy,* Scully Capital, July 2002, available at *https://www.ne.doe.gov.home/bc/businesscase.html*). Its conclusions were similar to NETF's recommendations in that one of the critical risks with the construction of new nuclear power plants is the regulatory risk associated with the ITAAC process.

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. As a result there is no market mechanism available to mitigate this risk factor. The Standby Support Program is meant to address this market failure. The overriding purpose of the Standby Support Program is to facilitate the construction and full power operation of new advanced nuclear facilities so that project sponsors can invest in electric generation facilities that the Administration and Congress believe are necessary to promote a more diverse and secure supply of energy for the Nation.

Given that the cost to the government will be dependent on the state of the licensing process, Congress has mandated quarterly reports to Congress and the Secretary of the Department from the Commission summarizing the status of licensing actions associated with the advanced nuclear facility that voluntarily applies and is selected for a Standby Support Contract.

The Department anticipates that the Standby Support Program will facilitate the construction of new nuclear facilities by decreasing the financial risks related to the combined license process. The program establishes a maximum of $500 million in insurance as the limit for each of the first two reactors covered and $250 million for each of the subsequent four reactors.

Under the Federal Credit Reform Act of 1990 (FCRA), the amount of budget authority necessary to support a Federal credit instrument depends upon the subsidy cost (i.e., the net present value of the estimated cash flow of payments by the government to cover the expected value of the principal or interest on any debt obligation of the owner of an advanced nuclear facility during covered delay). This subsidy cost in Standby Support Program equates to the ''cost of a loan guarantee'' under section 502(5)(C) of FCRA. Under the Standby Support Program and FCRA, the Federal government is not authorized to extend credit assistance unless it has sufficient funds in the Program Account either in the form of budget authority or fees charged by the program to offset any potential losses. 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.

With respect to the Grant Account, section (b)(2)(C)(ii) states that that account should contain the total cash amount that would be needed to cover the cost of the incremental difference between the contractual price of power and the fair market value of power, as explained in § 950.14. Given that FCRA is not mentioned with respect to the Grant Account, the Grant Account is not funded as a present value of expected payments like the Program Account, but rather, is required to be funded with the upper limit of possible payments. For example, if a sponsor elects to have a maximum of $500 million to cover the incremental cost of purchasing power from the open market because of a delay covered by a Standby Support Contract occurred, then the Grant Account is required to be funded with $500 million, before the Department can enter into a Standby Support Contract with the sponsor covering the Grant Account. The Grant Account and Program Account, jointly, address the risks addressed by the studies mentioned above as well as respond to the Congress' requirements in section 638.

While the exact economic effects of the Standby Support cannot be determined, an estimate can be made from recent developments. The benefit estimate entails the investment by the private sector in nuclear power plants. The monetary value of reduced air pollution or monetarily subscribing a value to energy security is not included. To examine the benefits, the Westinghouse AP1000 reactor is used as an example of ''advanced nuclear reactor.'' In December 2005 the Commission approved the design of Westinghouse's AP1000 reactor that has a capacity of 1,117 megawatts. Plant costs can be referred in overnight capital costs terms. Overnight capital costs assume that the plant can be built ''overnight'', and do not include interest and financial costs. Initial overnight capital cost estimates are approximately $1,400 per kilowatt for the first couple of plants and decreasing to $1,000 per kilowatt for the nth plant. There are 1,000 kilowatts in a megawatt. Thus six plants represent an investment of $6.7 billion to $9.4 billion.

The Department has concluded that the Standby Support Program will promote the construction of new advanced nuclear facilities. The Standby Support Program will help decrease a critical regulatory risk factor that currently constrains the private sector from engaging in the construction of new advanced nuclear facilities. Electricity from nuclear energy promotes clean air by the lack of emissions, and national security by reducing dependence on foreign sources of energy, while being economically efficient. These benefits are anticipated to far surpass the direct costs to the Federal government and to the entities that elect to participate in the program.

B. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4779, February 7, 1996) imposes on Federal agencies the general duty to adhere to the following requirements: Eliminate drafting errors and needless ambiguity, write

regulations to minimize litigation, provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Section 3(b) requires Federal agencies to make every reasonable effort to ensure that a regulation, among other things: Clearly specifies the preemptive effect, if any, adequately defines key terms, and addresses other important issues affecting the clarity and general draftsmanship under guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department has completed the required review and determined that, to the extent permitted by law; this final rule meets the relevant standards of Executive Order 12988.

C. Review Under Executive Order 13132

Executive Order 13132 (64 FR 43255, August 10, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions.

Today's regulatory action has been determined not to be a ''policy that has federalism implications,'' that is, it does not have substantial direct effects on the states, on the relationship between the national government and the states, nor on the distribution of power and responsibility among the various levels of government under Executive Order 13132 (64 FR 43255, August 10, 1999). Accordingly, no ''federalism summary impact statement'' was prepared or subjected to review under the Executive Order by the Director of the Office of Management and Budget.

D. Review Under Executive Order 13175

Under Executive Order 13175 (65 FR 67249, November 6, 2000) on ''Consultation and Coordination with Indian Tribal Governments,'' the Department may not issue a discretionary rule that has ''tribal implications'' and imposes substantial direct compliance costs on Indian tribal governments. The Department has determined that this final rule does not have such effects and concluded that Executive Order 13175 does not apply to this rule.

E. Reviews Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires that an agency prepare an initial regulatory flexibility analysis for any regulation which a general notice of proposed rulemaking is required, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)). Given that no general notice of proposed rulemaking is required, no regulatory flexibility analysis is required.

F. Review Under the Paperwork Reduction Act

Section 950.10(b) contains information collection requirements pertaining to eligibility; § 950.12(a) contains information collection requirements pertaining to fulfillment of conditions precedent to a Standby Support Contract; and § 950.23 contains information collection requirements pertaining to submission of claims for payment of covered costs under a Standby Support Contract. As indicated in the DATES section of this notice of interim final rulemaking, these provisions will not become effective until the Office of Management and Budget (OMB) has approved them pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and the procedures implementing that Act, 5 CFR 1320.1 *et seq.* Shortly after publication of today's rule, the Department will issue a notice seeking public comment under the Paperwork Reduction Act on the information collection requirements in these sections of today's rule. After considering any public comments received in response to that notice, the Department will submit the proposed collection of information to OMB for approval pursuant to 44 U.S.C. 3507. An agency may not conduct, and a person is not required to respond to a collection of information, unless it displays a currently valid OMB control number. After OMB approves the information collection requirements, the Department will publish a notice in the **Federal Register** that announces the effective date and displays the OMB control number for these sections of the rule.

G. Review Under the National Environmental Policy Act

The Department has concluded that promulgation of these regulations fall into the class of actions that does not individually or cumulatively have a significant impact on the human environment as set forth in the Department regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, the rule is covered under the categorical exclusion in paragraph A6 of Appendix A to subpart D, 10 CFR part 1021, which applies to the establishment of procedural rulemakings. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

H. Review Under the Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency regulation that may result in the expenditure by states, tribal, or local governments, on the aggregate, or by the private sector, of $100 million in any one year. The Act also requires a Federal agency to develop an effective process to permit timely input by elected officials of state, tribal, or local governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity to provide timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. The Department has determined that the rule published today does not contain any Federal mandates affecting states, tribal, or local governments, so these requirements do not apply.

I. Review Under Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy, Supply, Distribution, or Use), 66 FR 28355 (May 22, 2001) requires preparation and submission to OMB of a Statement of Energy Effects for significant regulatory actions under Executive Order 12866 that are likely to have a significant adverse effect on the supply, distribution, or use of energy. The Department has determined that the rule published today does not have a significant adverse effect on the supply, distribution, or use of energy and thus the requirement to prepare a Statement of Energy Effects does not apply.

J. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a ''Family

Policymaking Assessment'' for any rule that may affect family well-being. This rule has no impact on the autonomy or integrity of the family as an institution. Accordingly, The Department has concluded that it is not necessary to prepare a Family Policymaking Assessment.

K. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most dissemination of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). The Department has reviewed today's final rule under the OMB and Department of Energy guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

L. Congressional Notification

As required by 5 U.S.C. 801, the Department will submit to Congress a report regarding the issuance of today's interim final rule prior to the effective date set forth at the outset of this rulemaking. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this interim final rule.

List of Subjects in 10 CFR Part 950

Government contracts, Nuclear safety.

Issued in Washington, DC, on May 6, 2006.

Dennis R. Spurgeon,

Assistant Secretary, Office of Nuclear Energy.

■ For the reasons set forth in the preamble, the Department of Energy is amending Chapter III of title 10 of the Code of Federal Regulations by adding a new part 950 to read as follows:

PART 950—STANDBY SUPPORT FOR CERTAIN NUCLEAR PLANT DELAYS

Subpart A—General Provisions

Subpart B—Standby Support Contract Process

Subpart C—Claims Administration Process

Subpart D—Dispute Resolution Process

Subpart E—Audit and Investigations and Other Provisions

Authority: 42 U.S.C. 2201, 42 U.S.C. 7101 *et seq.*, and 42 U.S.C. 16014.

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.

§ 950.2 Scope and applicability.

This part sets forth the policies and procedures for the award and administration of Standby Support Contracts between the Department and sponsors of new advanced nuclear facilities.

§ 950.3 Definitions.

For the purposes of this part:

Act means the Energy Policy Act of 2005.

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).

Available indemnification means $500 million with respect to the initial two reactors and $250 million with respect to the subsequent four reactors.

Claims Administrator means the official in the Department of Energy responsible for the administration of the Standby Support Contracts, including the responsibility to approve or disapprove claims submitted by a sponsor for payment of covered costs under the Standby Support Contract.

Combined license means a combined construction and operating license (COL) for an advanced nuclear facility issued by the Commission.

Commencement of construction means the point in time when a sponsor initiates the pouring of safety-related concrete for the reactor building.

Commission means the Nuclear Regulatory Commission (NRC).

Conditional Agreement means a contractual agreement between the Department and a sponsor under which the Department will execute a Standby Support Contract with the sponsor if and only if the sponsor is one of the first six sponsors to satisfy the conditions precedent to execution of a Standby Support Contract, and if funding and other applicable contractual, statutory and regulatory requirements are satisfied.

Construction means the construction activities related to the advanced nuclear facility encompassed in the time period after commencement of construction and before the initiation of fuel load for the advanced nuclear facility.

Covered cost means:

(1) Principal or interest on any debt obligation financing an advanced nuclear facility (but excluding charges due to a borrower's failure to meet a debt obligation unrelated to the delay); and

(2) Incremental costs that are incurred as a result of covered delay.

Covered delay means a delay in the attainment of full power operation of an advanced nuclear facility caused by a covered event, as defined by this section.

Covered event means an event that may result in a covered delay due to:

(1) The failure of the Commission to comply with schedules for review and approval of inspections, tests, analyses and acceptance criteria established under the combined license;

(2) The conduct of pre-operational hearings by the Commission for the advanced nuclear facility; or

(3) Litigation that delays the commencement of full power operations of the advanced nuclear facility.

Department means the United States Department of Energy.

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

Grant account means the account established by the Secretary that receives appropriations or non-Federal funds in an amount sufficient to cover the amount of incremental costs for which indemnification is available under a Standby Support Contract.

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.

Initial two reactors means the first two reactors covered by Standby Support Contracts that receive a combined license and commence construction.

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.

Loan cost means the net present value of the estimated cash flows of:

(1) Payments by the government to cover defaults and delinquencies, interest subsidies, or other payments; and

(2) Payments to the government including origination and other fees, penalties and recoveries, as outlined under the Federal Credit Reform Act of 1990.

Pre-operational hearing means a hearing held pursuant to the Commission's regulation in 10 CFR 52.103.

Program account means the account established by the Secretary that receives appropriations or loan guarantee fees in an amount sufficient to cover the loan costs.

Program Administrator means the Department official authorized by the Secretary to represent the Department in the administration and management of the Standby Support Program, including negotiating with and entering into a Conditional Agreement or a Standby Support Contract with a sponsor.

Related party means the sponsor's parent company, a subsidiary of the sponsor, or a subsidiary of the parent company of the sponsor.

Secretary means the Secretary of Energy or a designee.

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

Standby Support Contract means the contract that, when entered into by a sponsor and the Program Administrator pursuant to section 638 of the Energy Policy Act of 2005 after satisfaction of the conditions in § 950.12 and any other applicable contractual, statutory and regulatory requirements, establishes the obligation of the Department to compensate covered costs in the event of a covered delay subject to the terms and conditions specified in the Standby Support Contract.

Standby Support Program means the program established by section 638 of the Act as administered by the Department of Energy.

Subsequent four reactors means the next four reactors covered by Standby Support Contracts, after the initial two reactors, which receive a combined license and commence construction.

System-level construction schedule means an electronic critical path method schedule identifying the dates and durations of plant systems installation (but excluding details of components or parts installation), sequences and interrelationships, and milestone dates from commencement of construction through full power operation, using software acceptable to the Department.

Subpart B—Standby Support Contract Process

§ 950.10 Conditional agreement.

(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.

(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.

(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.

§ 950.11 Terms and conditions of the Conditional Agreement.

(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.

(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.

(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.

(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.

(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.

(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.

(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:

(1) Notify the Department that it shall not execute a Standby Support Contract; or

(2) 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.

(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.

§ 950.12 Standby Support Contract conditions.

(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 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;

(4) Documentation that it has commenced construction of the advanced nuclear facility;

(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) 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.

(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.

(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.

§ 950.13 Standby Support Contract: General provisions.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

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

(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;

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

(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.

(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 re-demonstration 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.

(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.

(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:

(1) The principal or interest on which the loan costs for the Program Account was calculated; and

(2) The incremental costs on which funding for the Grant Account was calculated.

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.

§ 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.

(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.

§ 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. 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.

(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.

(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.

§ 950.23 Claims process for payment of covered costs.

(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.

(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.

(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.

(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.

(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.

§ 950.24 Claims determination for covered costs.

(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.

(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.

(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.

(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.

§ 950.25 Calculation of covered costs.

(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

(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: the actual cost of the short-term supply contract for replacement power, purchased by the sponsor, during the period of delay, or 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.

§ 950.26 Adjustments to claim for payment of covered costs.

(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.

(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.

§ 950.27 Conditions for payment of covered costs.

(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.

(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.

(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.

(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.

§ 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.

(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.

(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.

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.

(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.

(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.

(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).

(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.

(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.

(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.

(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.

(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 agree that the decision of the Board constitutes a Final Decision on the matter in dispute.

§ 950.37 Final agreement or final decision.

(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.

(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.

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:

(a) 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.

(b) 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.

[FR Doc. 06–4398 Filed 5–12–06; 8:45 am]

BILLING CODE 6450–01–P