



## Memorandum

To: Southern Alliance for Clean Energy

From: Doug Koplow (Earth Track) and Max Chang (Synapse Energy Economics)

Date: January 30, 2013

Re: **Review of DOE Documents Released in October 2012**

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At the request of the Southern Alliance for Clean Energy (SACE), Earth Track and Synapse Energy Economics have preliminarily reviewed hundreds of documents (full set available here; <http://www.scribd.com/doc/122597588/Full-Vogtle-FOIA-Online-Index>). These documents are associated with the \$8.33 billion conditional loan guarantees offered by the U.S. Department of Energy (DOE) for the ongoing construction of two Toshiba-Westinghouse AP1000 nuclear reactors, Vogtle 3 and 4 (the Vogtle Project) in Georgia.<sup>1</sup>

In response to a Freedom of Information Act request filed by SACE with DOE in April 2012, DOE provided two additional documents to SACE in October 2012.<sup>2</sup> Synapse and Earth Track have reviewed this information in the context of our earlier work to assess the loan guarantees offered by DOE to the Vogtle project. Specifically, we examined:

- Georgia Power Company: Open Issues List produced by Chadbourne and Parke LLP draft of July 11, 2012 (*Open Issues List*)
- Georgia Power Company: Draft Loan Guarantee Agreement produced by Chadbourne and Parke LLP draft of January 30, 2012 (*Draft Loan Guarantee Agreement*)

Georgia Power (GPC), Oglethorpe Power (OPC) and the Municipal Electric Authority of Georgia (MEAG) each submitted an application to DOE for loan guarantees in September 2008. Recent news articles indicate that the deadline for the loan guarantees has been extended to the first half of 2013 since the December 31, 2012 extension deadline has passed.<sup>3</sup>

Our key findings from these new documents are detailed in two broad categories, 1) many elements of the loan terms are still under negotiation and 2) material information remains missing or redacted.

The most striking finding from the two documents is how protracted the loan process has been, even though plant construction has already begun and some issues with cost overruns and construction delays are already becoming evident. As summarized below, our analysis found a number of material issues remain open between Georgia Power and DOE two years since the signing of the Conditional Commitment for its loan guarantee.

## Many Elements of the Loan Terms Are Still Under Negotiation

Although DOE issued credit subsidy estimates in early 2010, and GPC and DOE signed a conditional guarantee agreement at the same time, the conditions of the GPC loan guarantee continued to be heavily negotiated during the ensuing two years. The *Draft Loan Guarantee Agreement* of January 30, 2012 contains numerous placeholders, and included the right to add still more conditions “following due diligence.”<sup>4</sup> Many un-redacted footnotes contain comments made by various drafters of the agreement suggesting unresolved items or language.

In addition, we noted a number of occurrences of the phrase “First Advance Only” placed next to sections of the *Draft Loan Guarantee Agreement*. It is an open question to determine whether limiting conditions and reporting to the First Advance made under the loan agreement merely simplifies information flows or if it exposes taxpayers to additional risk by leaving any subsequent material changes to these elements over the course of the loan period unreported.

The continued evolution of the loan agreement raises a variety of practical concerns:

- **Negative precedent.** If the GPC agreement is being modified much more heavily between the conditional and final stages than other deals done under Title XVII, will DOE’s willingness to adopt such an approach result in a weakening of the negotiation process for other existing and pending agreements?
- **Stale credit subsidy values.** Neither of the released documents mentions the credit subsidy amount. However, material changes to the loan agreement would be expected to result in changes to the risk of the loan to taxpayers. Furthermore, market conditions since the original credit subsidy estimates were provided in 2010 have eroded, driven by the Fukushima accident, credit market turmoil, growing supplies of natural gas, and growing delays in the Vogtle Project construction process. Taxpayer interests would not be protected if DOE does not update the credit subsidy amount in light of changing loan terms and market conditions.

## Missing and/or Redacted Information

Although January 30, 2012 was the latest draft of the agreement provided by DOE, it does not appear to be the most recent version. The *Open Issues List* references GPC proposed changes to the Loan Guarantee dated April 18, 2012 and a mark-up of the loan guarantee dated June 14, 2012.<sup>5, 6</sup>

As with earlier documents released by DOE to SACE, these two latest ones contain substantial redactions. In the *Draft Loan Guarantee Agreement*, many of the footnotes in document are redacted. In the *Open Issue List*, the columns and headings listing the areas under discussion have been blacked out entirely, making it difficult even to assess the categories of disagreement, let alone the specifics of the negotiations.

Although the two GPC documents have significant information gaps, we have been able to gain some information. In contrast, DOE did not release issues lists or draft loan agreements for the other borrowers, OPC and MEAG. While it is possible that the other

borrowers were satisfied with the original terms of their loans and have not continued to modify terms over the past two years, we anticipate it is more likely that such negotiations have occurred, but DOE has not released information from that process.

## **Summary**

The two released documents show that Georgia Power and DOE continued negotiating loan guarantee terms and language more than two years after announcing the conditional loan guarantee. In addition the two released documents do not provide any update on the credit subsidy fee in light of current ongoing activities at the construction site.

We currently know the following:

- Approximately \$930 million of project cost are in dispute between the owners and the contractors of the Vogtle project.
- The Vogtle Project's Construction Monitor has testified that the project will not meet the original 2016 and 2017 completion schedule.
- A final loan guarantee agreement has not been announced, and DOE has once again extended the loan guarantee negotiation window.

It is unclear how the construction conflicts have impacted the loan guarantee negotiations. In our analysis of the Vogtle Project conditional loan guarantees, we have been concerned that DOE's estimates for the credit subsidy fees may be too low. We remain concerned, as the two latest released documents provide no updated information on the credit subsidy issue, even though this payment is the main venue to protect taxpayers in the case of default. Key information such as whether the credit subsidy estimates have been updated, the basis for doing so if they have, and whether DOE is constrained by the estimate range in its original credit subsidy letters has not surfaced. Nor has DOE provided any information indicating whether DOE believes that the estimates from two years ago remain valid.

## Endnotes

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<sup>1</sup> This report has been supported by the Southern Alliance for Clean Energy and Friends of the Earth. Any errors or omissions in this report are the responsibility of the authors.

<sup>2</sup> Documents available at: <http://www.scribd.com/doc/122597588/Full-Vogtle-FOIA-Online-Index>

<sup>3</sup> Rob Pavey, "Federal loan for Vogtle expansion still on the table." Augusta Chronicle, December 4, 2012. Accessed January 9, 2013. Available at <http://chronicle.augusta.com/news/metro/2012-12-04/federal-loan-vogtle-expansion-still-table>

<sup>4</sup> See, for example, Article 5 of the *Draft Loan Guarantee Agreement*. Representations and Warranties, in which paragraph 5.41 is a catch-all "Other" placeholder that reads "[Additional representations and warranties identified by DOE following due diligence.]" Page 39.

<sup>5</sup> *Open Issue List*. "Calls to be arranged between DOE's and GPC's (redacted) to resolve any outstanding issues in mark-up provided by GPC on June 14." Page 18.

<sup>6</sup> *Open Issue List*. "DOE made a detailed proposal on 4/18 to GPC with respect to the key provisions to be included in a (redacted). DOE awaits GPC's response." Page 20.