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(4) The Department of the Treasury has been consulted as to the terms and conditions of the Loan Guarantee Agreement;

(5) The Loan Guarantee Agreement and related documents contain all terms and conditions DOE deems reasonable and necessary to protect the interest of the United States;

(6) Each holder of the Guaranteed Obligations is an Eligible Lender, and the servicer of the Guaranteed Obligations meets the servicing performance requirements of § 609.9(b);

(7) DOE has determined the principal amount of the Guaranteed Obligations expected to be issued in respect of the Eligible Project, as estimated at the time of issuance, will not exceed 80 percent of the Project Costs of the Eligible Project;

(8) All conditions precedent specified in the Conditional Commitment are either satisfied or waived by the Contracting Officer and all other applicable contractual, statutory, and regulatory requirements have been satisfied or waived by the Contracting Officer. If the counterparty to the Conditional Commitment has not satisfied all such terms and conditions on or prior to the closing date of the Loan Guarantee Agreement, the Secretary may, in his discretion, set a new closing date, or terminate the Conditional Commitment; and

(9) Where the total Project Costs for an Eligible Project are projected to exceed \$25 million, the Applicant must provide a credit rating from a nationally recognized rating agency reflecting the revised Conditional Commitment for the project without a Federal guarantee. Where total Project Costs are projected to be \$25 million or less, the Secretary may, on a case-by-case basis, require a credit rating. If a credit rating is required, an updated rating must be provided to the Secretary not later than 30 days prior to closing.

§ 609.8 Loan guarantee agreement.

(a) Only a Loan Guarantee Agreement executed by the Contracting Officer can obligate DOE to issue a Guarantee in respect of Guaranteed Obligations.

(b) DOE is not bound by oral representations.

(c) Each Loan Guarantee Agreement shall contain the following requirements and conditions, and shall not be executed until the Contracting Officer determines that the following requirements and conditions are satisfied:

(1) The Federal Financing Bank shall be the only Eligible Lender in transactions where DOE guarantees 100 percent (but not less than 100 percent) of the principal and interest of the Guaranteed Obligations issued under a Loan Guarantee Agreement.

(i) Where DOE guarantees more than 90 percent of the Guaranteed Obligation, the guaranteed portion cannot be separated from or “stripped” from the non-guaranteed portion of the Guaranteed Obligation if the loan is participated, syndicated or otherwise resold in the secondary market; and

(ii) Where DOE guarantees 90 percent or less of the Guaranteed Obligation, the guaranteed portion may be separated from or “stripped” from the non-guaranteed portion of the Guaranteed Obligation, if the loan is participated, syndicated or otherwise resold in the secondary debt market;

(2) The Borrower shall be obligated to make full repayment of the principal and interest on the Guaranteed Obligations and other debt of a Borrower over a period of up to the lesser of 30 years or 90 percent of the projected useful life of the Eligible Project’s major physical assets, as calculated in accordance with U.S. generally accepted accounting principles and practices. The non-guaranteed portion (if any) of any Guaranteed Obligations must be repaid *pro rata*, and on the same amortization schedule, with the guaranteed portion.

(3) If any financing or credit arrangement of the Borrower or relating to the Eligible Project, other than the Guaranteed Obligations, has an amortization period shorter than that of the Guaranteed Obligations, DOE shall have determined that the resulting financing structure allocates to DOE a reasonably proportionate share of the default risk, in light of:

(i) DOE’s share of the total debt financing of the Borrower,

(ii) Risk allocation among the credit providers to the Borrower, and

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(iii) Internal and external credit enhancements.

(4) The loan guarantee does not finance, either directly or indirectly tax-exempt debt obligations, consistent with the requirements of section 149(b) of the Internal Revenue Code;

(5) The principal amount of the Guaranteed Obligations, when combined with funds from other sources committed and available to the Borrower, shall be sufficient to pay for expected Project Costs (including adequate contingency amounts), the applicable items specified in § 609.10(b), and otherwise to carry out the Eligible Project;

(6) There shall be a reasonable prospect of repayment by the Borrower of the principal of and interest on the Guaranteed Obligations and all of its other debt obligations;

(7) The Borrower shall pledge collateral or surety determined by DOE to be necessary to secure the repayment of the Guaranteed Obligations. Such collateral or security may include Eligible Project assets and assets not related to the Eligible Project;

(8) The Loan Guarantee Agreement and related documents shall include detailed terms and conditions that DOE deems necessary and appropriate to protect the interests of the United States in the case of default, including ensuring availability of all relevant intellectual property rights, technical data including software, and technology necessary for DOE or any Person selected by DOE, to complete, operate, convey, and dispose of the defaulted Borrower or the Eligible Project;

(9) The Guaranteed Obligations shall not be subordinate to other financing. Guaranteed Obligations are not subordinate to other financing if the lien on property securing the Guaranteed Obligations, together with liens that are *pari passu* with such lien, if any, take priority or precedence over other charges or encumbrances upon the same property and must be satisfied before such other charges are entitled to participate in proceeds of the property's sale. In DOE's discretion, Guaranteed Obligations may share a lien position with other financing;

(10) There is satisfactory evidence that the Borrower will diligently pur-

sue the Eligible Project and is willing, competent, and capable of performing its obligations under the Loan Guarantee Agreement and the loan documentation relating to its other debt obligations;

(11) The Borrower shall have paid all fees and expenses due to DOE or the U.S. Government, including such amount of the Credit Subsidy Cost as may be due and payable from the Borrower pursuant to the Conditional Commitment, upon execution of the Loan Guarantee Agreement;

(12) The Borrower, any Eligible Lender, and each other relevant party shall take, and be obligated to continue to take, those actions necessary to perfect and maintain liens on collateral in respect of the Guaranteed Obligations;

(13) DOE or its representatives shall have access to the offices of the Borrower and the Eligible Project site at all reasonable times in order to monitor the—

(i) Performance by the Borrower of its obligations under the Loan Guarantee Agreement; and

(ii) Performance of the Eligible Project;

(14) DOE and Borrower have reached an agreement regarding the information that will be made available to DOE and the information that will be made publicly available;

(15) The Borrower shall have filed applications for or obtained any required regulatory approvals for the Eligible Project and is in compliance, or promptly will be in compliance, where appropriate, with all Federal, state, and local regulatory requirements;

(16) The Borrower shall have no delinquent Federal debt;

(17) The Project Sponsors have made or will make a significant Equity investment in the Borrower or the Eligible Project, and will maintain control of the Borrower or the Eligible Project as agreed in the LGA; and

(18) The Loan Guarantee Agreement and related agreements shall include such other terms and conditions as DOE deems necessary or appropriate to protect the interests of the United States.

(d) The Loan Guarantee Agreement shall provide that, in the event of a default by the Borrower:

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(1) Interest on the Guaranteed Obligations shall accrue at the rate stated in the Loan Guarantee Agreement or the Loan Agreement, until DOE makes full payment of the defaulted Guaranteed Obligations and, except when such Guaranteed Obligations are funded through the Federal Financing Bank, DOE shall not be required to pay any premium, default penalties, or prepayment penalties; and

(2) The holder of collateral pledged in respect of the Guaranteed Obligations shall be obligated to take such actions as DOE may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery.

(e)(1) An Eligible Lender or other Holder may sell, assign or transfer a Guaranteed Obligation to another Eligible Lender that meets the requirements of § 609.9. Such latter Eligible Lender shall be required to assume all servicing, monitoring and reporting requirements as provided in the Loan Guarantee Agreement. Any transfer of the servicing, monitoring, and reporting functions shall be subject to the prior written approval of DOE.

(2) The Secretary, or the Secretary's designee or contractual agent, for the purpose of identifying Holders with the right to receive payment under the Guaranteed Obligations, shall include in the Loan Guarantee Agreement or related documents a procedure for tracking and identifying Holders of Guaranteed Obligations. Any contractual agent approved by the Secretary to perform this function may transfer or assign this responsibility only with the Secretary's prior written approval.

(f) Each Loan Guarantee Agreement shall require the Borrower to make representations and warranties, agree to covenants, and satisfy conditions precedent to closing and to each disbursement that, in each case, relate to its compliance with the Davis-Bacon Act and the Cargo Preference Act.

(g) The Applicant, the Borrower or the Project Sponsor must estimate, calculate, record, and provide to DOE any time DOE requests such information and at the times provided in the Loan Guarantee Agreement all costs incurred in the design, engineering, fi-

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nancing, construction, startup, commissioning and shakedown of the Eligible Project in accordance with generally accepted accounting principles and practices.

§ 609.9 Lender servicing requirements.

(a) When reviewing and evaluating a proposed Eligible Project, all Eligible Lenders (other than the Federal Financing Bank) shall at all times exercise the level of care and diligence that a reasonable and prudent lender would exercise when reviewing, evaluating and disbursing a loan made by it without a Federal guarantee.

(b) Loan servicing duties shall be performed by an Eligible Lender, DOE, or another qualified loan servicer approved by DOE. When performing its servicing duties, the loan servicer shall at all times exercise the level of care and diligence that a reasonable and prudent lender would exercise when servicing a loan made without a Federal guarantee, including:

(1) During the construction period, monitoring the satisfaction of all of the conditions precedent to all loan disbursements, as provided in the Loan Guarantee Agreement, Loan Agreement or related documents;

(2) During the operational phase, monitoring and servicing the Guaranteed Obligations and collection of the outstanding principal and accrued interest as well as undertaking to ensure that the collateral package securing the Guaranteed Obligations remains uncompromised; and

(3) Until the Guaranteed Obligation has been repaid, providing annual or more frequent financial and other reports on the status and condition of the Guaranteed Obligations and the Eligible Project, and promptly notifying DOE if it becomes aware of any problems or irregularities concerning the Eligible Project or the ability of the Borrower to make payment on the Guaranteed Obligations or its other debt obligations.

§ 609.10 Project costs.

(a) Project Costs include:

(1) Costs of acquisition, lease, or rental of real property, including engineering fees, surveys, title insurance, recording fees, and legal fees incurred