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Dear Mr. Chairman:

This is in reply to your request for the views of the Department of Commerce on HR 12112, a bill:

> "to provide additional assistance to the Energy Research and Development Administration for the advancement of non-nuclear energy research, development and demonstration."

As you know, this bill amends the Federal Non-Nuclear Energy Research and Development Act of 1974, PL 93-577, by adding a section establishing a program of loan guarantees for the purpose of creating an incentive in private financial institutions to commit resources to the demonstration of newly conceived industry technology for generating energy. There is no intent, as in PL 93-577, to directly fund the conception and demonstration of such new technology other than the possible reimbursement of financial institutions in the case of default. It is clear that if the technology embodied in the facility is ultimately demonstrated to be successful, it will have been achieved entirely through the use of private funds.

We are concerned that industrial participation in the loan guarantee program will be severely affected by the inclusion of section 18(r) and 18(g)(4) as presently drafted.

Our main concern is the inclusion of section 18(r) which subjects inventions, made or conceived in the course of or under a guarantee, to the title and waiver requirements and conditions of section 9 of the basic Federal Non-Nuclear Energy Research and Development Act of 1974. Quite simply, we believe that guaranteeing a loan does not sufficiently support

a Government demand to any rights in inventions made in the course of a successful loan guarantee project, since no Government funds will have been utilized in such situations. Of course, we do not object to the principle of Government rights in such inventions if the project is unsuccessful or defaulted, as appears to be the intent of section 18(g)(4). We recognize that section 9 does afford the possibility of waiver of title to such inventions to the loan recipient, but the possibility of such waiver does not cure the basic inequity of presuming a Government right in an invention it has not paid for. In fact, even if a waiver is granted to an invention made in performance of a successful project, we would still maintain the situation inequitable, since the loan recipient does not obtain unfettered ownership but is tied to Government administration of the invention in a number of different ways through conditions required by section 9.

In addition to the above reasons for deletion of 18(r), we would also like to bring to your attention the following:

1) Subsection 9(n) of PL 93-577 required the Energy Research and Development Administration to assess the applicability of existing patent policies affecting the program under the Act and to make recommendations to the President and the Congress on the statutory patent policies of ERDA. To comply with this requirement a task force composed of various ERDA officials. representatives from the Department of Commerce, the Department of Justice, and the

Office of Federal Procurement Policy of the Office of Management and Budget has been formed to study this issue. The final report of the task force is being prepared. To legislate in this area at this time would be to debilitate the Congressionally required report and to ignore the operational experience of ERDA.

2) Under its present authority (section 7(a)(1) of PL 93-577), ERDA is expressly authorized to itself make loans. Under its existing policies ERDA has taken the position that section 9 is not applicable when exercising its loan authority. To extend section 9 to the loan guarantee program established by HR 12112 where the risk investment of the Government on a project basis is less than in the ERDA's direct loan program is considered to be inconsistent with the present ERDA practice in making loans without making any demand for any invention rights.

3) The idea of an insuring organization acquiring the assets of a borrower in a situation where the borrower has met his obligations is a radical and unproven departure from accepted commercial practice, especially when the insuring organization focuses only on a particular type of asset, such as patents and inventions.

4) The Federal Government has a vast loan guarantee program both with foreign nations and with domestic enterprises. It

seems anomalous to focus on patents and other industrial property in this legislation which would be taken from U. S. businesses and not to require similar acquisition when we guarantee loans in foreign nations.

5) Passage of this bill could set dangerous precedent for legislation from the Small Business Administration, the Department of Health, Education and Welfare and other organizations which frequently guarantee loans under similar circumstances. In fact, there is evidence that other pending legislation has followed the lead of this bill in suggesting that the Government acquire title to inventions developed under loan guarantees.

In regard to section 18(g)(4), we believe that as presently drafted it will be perceived to be over-reaching into the area of a loan recipient's privately developed technology in cases of default, and will, therefore, ~~accordingly~~ create unnecessary delays in negotiating loans. Accordingly, we offer the following amendments to the existing language for the purpose of more clearly defining the rights of the parties in patents and inventions of interest at default.