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The Honorable Ronald Kirk
United States Trade Representative
Office of the U.S. Trade Representative
600 17th Street N.W.
Washington, D.C. 20508
VIA FACSIMILE: 202-395-4549

May 4, 2009

Dear Ambassador Kirk,

As state government officials working on the public safety, environmental and national security concerns relating to the siting of Liquefied Natural Gas (LNG) facilities, we are writing to you to express our concerns with the proposed U.S.-European Union (EU) settlement in the World Trade Organization's (WTO's) Internet gambling case brought by Antigua against the United States.

It is our understanding that the agreement has not gone into effect because the United States is still negotiating with Antigua over compensation and no aspect of a WTO General Agreement on Trade in Services (GATS) compensation package becomes adopted until compensation deals are reached with all involved countries. Thus, thankfully, the opportunity remains for the Obama administration to become aware of a serious problem that could be created were the Bush compensation package adopted and to revisit the U.S.-EU compensation deal.

Specifically, the proposed U.S. WTO commitment in "*Storage and warehouse services*" is of serious concern to us. This category includes the subcategory "Bulk storage services of liquids or gases" (CPCprov code 7422) which covers facilities storing oil, gas and chemicals.¹ We understand that at a meeting with a Public Citizen lawyer, USTR staff said that it was USTR's intention to exclude LNG facilities from its offer to the EU. We support and appreciate that intention.

¹ In this offer document, USTR utilizes the numbering system of the provisional UN Central Products Classification database. Under 7422 "bulk storage of liquids and gas" an explanatory note states: "This class includes the operation of storage facilities for all kinds of goods in grain elevators, general merchandise warehouses, refrigerated warehouses, etc. Warehousing of furniture, automobiles, lumber, **gas and oil, chemicals**, textiles, food and agricultural products, etc. Also included is storage of goods in foreign trade zones."

However, we are deeply concerned that the way in which the proposed commitment has been written does not in fact exclude LNG facilities from what would be new GATS coverage of U.S. “Storage and warehouse services”. LNG facilities involve a chain of services that occur *after* the service of maritime transport of a bulk liquid, including the unloading of a volatile frozen liquid, processing to transform that liquid into a gaseous state, various forms of pipeline transport before and after regasification, and then storage of the fuel in its gaseous state. These are integrated facilities, and the storage aspect of the facility accounts for up to 50 percent of the total capital expenditure.²

The proposed settlement would cover “Storage and warehouse services (except maritime transport services or services to which the Annex on Air Transport Services applies).” USTR did not give any CPC codes for its Maritime Transport Services carve out. However, assuming the carve out includes *every* subcategory of Maritime Transport Services listed under the WTO scheduling guide W-120, the on-land storage facilities related to LNG facilities *still* fall under “Storage and warehouse services” CPC 742 – the sector you propose to newly commit to GATS. Nothing makes this problem clearer than a close look at one of the subcategories of the W-120’s Maritime Transport Services listing, which is “Supporting services for maritime transport” CPC 745. This subcategory includes “Port and waterway operation services (excl. cargo handling)” CPC 74510 which covers numerous services related to marine terminal facilities. Perhaps USTR staff thought that by excluding this category, it had excluded LNG storage? To the contrary, this subcategory contains an important clarification that reveals that LNG stored on land, even if taken off ships, would not be safeguarded by a “Maritime Transport Services” carve out: “Port storage and warehousing services (related to marine terminals) are clearly excluded and fall under 742” says the CPC 74510 note.

The other sectors covered by the “Maritime Transport Services” exclusion also do not exclude the services that occur at an LNG facility. For instance, “Freight Transport” (which connects to CPCprov Code 7212) refers to what happens before the LNG arrives at the port. “Supporting services for maritime transport” (which connects to CPC Code 745) includes the port services excluding cargo handling noted above plus other “Supporting services for water transport” unrelated to LNG such as ship cleaning. Thus, to actually exclude LNG facilities from being newly subjected to GATS through the proposed coverage of “Bulk storage services of liquids or gases,” USTR must amend the current proposed settlement document to explicitly exclude LNG facilities and do so in a manner that avoids any ambiguity.

And it is critical that the United States not commit LNG facilities to the constraints imposed by GATS. The siting of LNG facilities has generated a great deal of government concern, public protest and press in our states because of serious concerns regarding potential damage to air and water quality, seismic safety issues, the catastrophic explosive hazards posed by aspects of the regasification and spills, as well as the risk of LNG facilities or tankers located near population centers presenting a target for terrorism. Moreover, we share the Obama administration’s goal of energy independence. Given our domestic supplies, natural gas is one of the sectors in which this goal is most achievable. Currently our state legislatures are working on legislation that would apply needs testing to applications for LNG facilities.³

Yet, if LNG facilities come under WTO jurisdiction, then the GATS market access obligations listed in the “Storage and warehouse services” settlement proposal would grant new rights for foreign firms to establish or purchase LNG facilities in the United States and forbid “limits on the number of service suppliers” and economic needs testing (*i.e.*, an evaluation of whether additional suppliers are needed.)⁴ Thus, if LNG

² See GATS and LNG Facility Siting in California: A Case Study of Proposed Trade Rules on Domestic Regulation, 2006, p. 12: available at: <http://www.ncsl.org/standcomm/scecon/gatsltr61606.htm>.

³ In 2007, S.B. 412 the “Liquefied Natural Gas Market Assessment,” a state bill requiring an LNG needs assessment was introduced into the California legislature which did not pass. In Oregon, a current bill H.B. 2015, “The LNG Public Protection Act,” would mandate a needs assessment in that state prior to LNG terminal approval.

⁴ GATS Article XVI. “In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless

facilities were submitted to WTO jurisdiction, new constraints would be imposed on U.S. federal and state governments' abilities to make the decisions regarding the approval of new LNG terminals and/or the closing of an existing one if foreign firms were involved.

Foreign firms are very active in the LNG sector. The oldest LNG terminal in the United States, the Everett Marine Terminal in Massachusetts, is owned by a subsidiary of French energy giant GDF Suez. Other foreign firms from Australia, Europe, Qatar and Canada have expressed interest or sought market access, and Iran, Russian and Qatar produce the majority of LNG in the world.⁵

As you know, domestic policies that do not comply with WTO rules are subject to challenge in WTO dispute resolution tribunals. Policies ruled to violate WTO commitments must be eliminated or altered with the United States subject to indefinite trade sanctions for the failure to do so. Currently, the United States has the right to reject LNG applications or remove operating permits without external constraints. Were this sector committed to the WTO, policies such as the needs tests being contemplated in our legislatures would violate the WTO rules and be subject to WTO challenges in foreign tribunals where WTO rules, not U.S. law, apply. Given the uncertainty inherent in WTO tribunals, it is critical that sensitive U.S. service sectors are not submitted to GATS *in the first instance*.

There are many compelling reasons why the Obama administration or U.S. states may also want to institute some reasonable needs testing regarding LNG terminals. According to the U.S. Federal Energy Regulatory Commission (FERC), the United States now has only eight LNG terminals. A few years ago, FERC Chairman Pat Wood said only a handful more were needed to meet domestic demand.⁶ Yet under the Bush administration, FERC moved rapidly to approve 21 more LNG terminals and at least 19 more are in early planning stages. This veritable "gold rush" of imported LNG and its related inherently hazardous facilities is made yet more worrisome because the need for such imported gas supplies has not been demonstrated given robust domestic natural gas supplies. Yet, if this sector were committed to GATS market access rules, our states and the federal government could not use needs testing and reject unneeded LNG facilities, even if this policy applied equally to domestic facilities.

The GATS Market Access rules also prohibit non-discriminatory "regulatory" bans on services in committed sectors. This could pose additional threats to the states' ability to regulate LNG facilities. The Bush-era Energy Policy Act of 2005 provides a role for states in reviewing applications for LNG facilities under the Clean Air Act, the Clean Water Act, the Coastal Zone Management Act or the Federal Water Pollution Control Act, all of which a project must comply with in order to gain FERC approval. Under these laws, states must assess various aspects of the proposed LNG terminal and issue permits for planned activities. If LNG facilities were bound to WTO rules, consistent denial of permits by states could be interpreted as a GATS-prohibited "zero quota" market access "ban."

We request that at a minimum, the text of the proposed U.S. commitments be clarified to ensure that the USTR goal of excluding LNG facilities is actually accomplished in the commitment text. The clearest way to do so would be to add into the text an explicit exclusion for LNG facilities. However, a much better approach would be to remove the sub-category of "Bulk storage of liquids or gases" from the U.S. settlement offers in the Antigua gambling case – and to ensure that the sub-sector is not included in any offers at WTO. An array

otherwise specified in its Schedule, are defined as: (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;..."

⁵ The FERC website lists existing and approved applications from numerous foreign firms including: Suez (France), Westpac Terminals (Canada), Keltic Petrochemicals (Canada), and British Petroleum (United Kingdom). Many other nations, including Qatar, have expressed an interest in setting up LNG terminals in the United States. See, *Gulf Times*, "Investment Firm Eyes LNG Terminals," March 12, 2009.

⁶ Chairman Wood's speech at the Stanford Washington Research Group's Institutional Policy Conference 2005. At the time, he said only eight more were needed and two were subsequently approved, leaving an expressed need for only six. Since then much more domestic natural gas has come on line, putting even that contention in doubt.

of environmental, safety and siting regulations apply to chemical, oil and gas storage facilities. Thus, submitting these services to WTO jurisdiction could also give rise to WTO challenges. Given their environmental, public safety and national security implications, we do not think that "Bulk storage of liquids or gases" is an appropriate sector for trade-agreement regulatory constraints in general.

If the United States takes on new WTO obligations for LNG, chemical and fossil fuel facilities, it will in all likelihood find itself once again facing WTO challenges and trade sanctions over federal and state regulatory policies.

Finally, we appreciated the comments you made at your confirmation hearing regarding a more open and inclusive approach to U.S. trade policymaking. We understand that the "Storage and warehouse services" sector was also listed in 2005 U.S. offers in connection with WTO Doha Round negotiations along with other sectors of major import to states, such as higher education. As the National Conference of State Legislatures (NCSL) and USTR's Intergovernmental Political Advisory Committee (IGPAC) have pointed out time and again, the process for consulting states on issues related to state regulatory authority needs a major overhaul.⁷ Even though NCSL raised concerns about LNG and GATS in the past, it appears that these concerns were not taken fully into consideration by the Bush administration in making the proposed commitments to the EU.

Thank you for your consideration of this important matter. We look forward to a new relationship with you and the Office of USTR under your leadership – one in which citizen concerns are heard, especially regarding any future service-sector negotiations which implicate the regulatory authority of states and localities and undermine citizens' rights to be heard and to ensure that their safety, security and the environment are safeguarded.

Sincerely,



Chuck Riley
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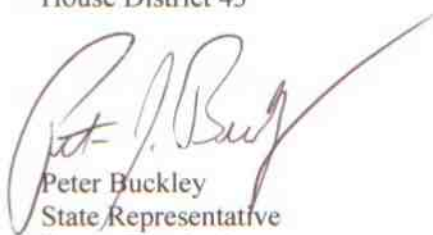
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Cc: Rahm Emanuel, White House Chief of Staff
Cc: Patrick Gaspard, Director, White House Office of Political Affairs
Cc: David Axelrod, Senior Advisor to President Obama
Cc: Jon Wellinghoff, Chairman, Federal Energy Regulatory Commission
Cc: Lisa P. Jackson, Administrator, Environmental Protection Agency

⁷ See for instance, NCSL's Free Trade and Federalism Resolution or IGPAC's Recommendations for Improving Federal-State Trade Policy Coordination, http://www.ncsl.org/standcomm/sclaborecon/sclaborecon_Policies.htm#FreeTrade and http://www.citizen.org/documents/IGPAC_Recommendations_Federal_State_Coordination.pdf.