

## **STATEMENT OF CONSIDERATIONS**

### **New York Blue Supercomputer User Facility Class Waiver for Non-Proprietary and Proprietary Research W(C)-2008-007**

This class waiver is intended to provide for the disposition of intellectual property rights for public and private organizations (hereinafter, Users) that are using the New York Blue (NYBlue) Supercomputing facility for research and commercial use. It is also intended that this class waiver will follow the considerations and terms of the user agreements spelled out in the two recently issued Proprietary and Non-proprietary Class Waivers for designated user facilities at DOE laboratories, W(C)-2008-003 and 005. For the sake of economy, the considerations and user agreements contained in the 003 and 005 waivers will not be repeated verbatim in this class waiver, but will be incorporated by reference.

NYBlue (hereinafter, Facility) is an 18 rack IBM Blue Gene/L massively parallel supercomputer located at Brookhaven National Laboratory (BNL) in Upton, Long Island, New York. Purchased by a \$26 million allocation from the State of New York, the Facility is the centerpiece of the New York Center for Computational Sciences (NYCCS), a cooperative initiative between Stony Brook University (SBU) and BNL that will foster research collaborations among research institutions, universities and companies throughout New York State. With a peak performance of 103.22 teraflops (trillion floating-point calculations per second), the Facility will allow computations critical for research in biology, medicine, material science, nanoscience, renewable energy, climate science, finance and technology.

Although the supercomputer was purchased by the State of New York, and the State continues to fund its operation through Stony Brook University, the Facility is located at BNL, a government owned and contractor operated DOE laboratory. As a result, activities arising at the Facility that do not fall into the definition of "funding agreements" under 35 U.S.C. §200 *et seq.* (commonly referred to as the Bayh-Dole legislation) fall under Section 9 of DOE's Federal Nonnuclear Energy Research and Development Act of 1974. This means that intellectual property that arises from activities at the Facility is subject to DOE's title taking patent legislation which gives title in the intellectual property to DOE unless waived.

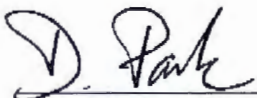
There already exists within DOE various user facility waivers which provide to a class of users of DOE facilities certain rights in intellectual property that is created. There is a class waiver for DOE designated supercomputer user facilities, W(C)-05-004. Also, as mentioned above, DOE has recently approved two comprehensive class waivers, Proprietary and Non-proprietary Class Waivers for designated user facilities at various DOE laboratories. However, the Facility Users cannot avail themselves of these existing waivers because the Facility is not funded directly by DOE and is not a designated user facility under any of these class waivers.

Nonetheless, the Facility will be used by various public and private entities for basic research and commercial development in a manner not different than at other designated DOE supercomputing centers or user facilities. It has been the policy of DOE to utilize the flexibilities

of its waiver authority to grant rights to users in intellectual property they produce to encourage wider utilization of DOE facilities and enhance commercialization and transfer of technology there from. In funding the purchase and operation of the Facility, the stated goal of the State of New York is to enhance the competitiveness of the State's academic and research institutions as well as industrial research through the deployment of a more robust cyber infrastructure and computational network. Both the policy of DOE and the State of New York would be frustrated if Users of the Facility could not protect intellectual property that is created as a result of the use of the Facility. Therefore, this class waiver is intended to give Users the exclusive rights necessary to encourage utilization of the Facility for basic research and developing their technology to enhance potential commercialization.

For the sake of economy, this class waiver incorporates by reference all of the general considerations contemplated in the Proprietary and Non-proprietary Class Waivers, W(C)-2008-003 and 005. This includes, but is not limited to, its considerations of statutory authority, scope of the waivers, allocation of patent and data rights, and DOE reviews as set out therein. The Facility will utilize the Non-proprietary and Proprietary User Agreements also set out in the 003 and 005 class waivers. As per the 003 and 005 waivers, the availability of this class waiver will be automatic upon the approval of an implementation plan for the Facility and a determination by the DOE Field Patent Counsel and the DOE Site Contracting Officer. If Users have a pre-existing agreement with the Government, this class waiver is not intended to change the terms and conditions of that agreement.

Accordingly, in view of the objectives to be attained and the factors to be considered under DOE's statutory waiver policy, all of which have been considered, it is recommended that a waiver of U.S. and foreign patent rights, to the class of Users, and in the situations described above, will best serve the interests of the United States and the general public. It is therefore recommended that the waiver be granted.




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Date: 12/08/2008


Pursuant to the authority provided in Section 152 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2182), Section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974, as amended (42 U.S.C. 5908), and the implementing regulations promulgated thereunder for waivers of patent rights, it is in the best interests of the United States and the general public to grant a waiver of patent rights to the class represented by Users of the Facility. Therefore, it is ordered that a waiver of U.S. and foreign patent rights to a class of Users described in the foregoing Statement of Considerations be granted. The waiver is limited to inventions of Users which are conceived or first actually reduced to practice in the course of or under an agreement for the use of the Facility, and is subject to all the limitations, terms, and conditions set forth in the foregoing Statement of Considerations. The Assistant General Counsel for Technology Transfer and Intellectual Property shall be responsible for issuing instructions for implementation of this waiver in accordance with DOE regulations for the waiver of patent rights.

CONCURRENCE:

  
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Office Of Laboratory Policy

Date: 12-11-08

APPROVAL:

  
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Date: 12-12-08