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March 9, 2011

MEMORANDUM

To: Sophia Angelini, Attorney-Advisor
Office of the General Counsel for Civilian Nuclear Programs, GC-52
U.S. Department of Energy (DOE)

From: Omer F. Brown

Counsel for Contractors International Group on Nuclear Liability (CIGNL)

Re: DOE Notice of Inquiry on the Convention on Supplementary Compensation for Nuclear Damage (CSC) Contingent Cost Allocation – March 2, 2011 Meeting with CIGNL

On March 2, 2011, representatives of CIGNL met at the Forrestal Building with DOE officials at their invitation to discuss CIGNL's November 2010 written comments on the DOE Notice of Inquiry on the Convention on Supplementary Compensation for Nuclear Damage (CSC) Contingent Cost Allocation. 75 Fed. Reg. 43945 (Jul. 27, 2010). This summary of the meeting is being provided to memorialize the discussions in accordance with DOE's Guidance on Ex Parte Communications. 74 Fed.Reg. 52795 (Oct. 14, 2009).

The CIGNL representatives who attended were:

Omer Brown, Counsel for CIGNL
Robert Temple, Babcock & Wilcox
Patricia Campbell, GE Hitachi
Stephen Marlo, Shaw Group
Donald Hatcher, USEC
Ramsey Coates and Monica Deoras, Westinghouse

The DOE officials who attended were:

Ben McRae, Anita Capoferri and Sophia Angelini, Office of the General Counsel
Richard Reister and Sean Tyson, Office of Nuclear Energy

It was noted CIGNL, since its formation in 1993, has been a strong supporter of the CSC, and the broad participation in this meeting illustrated the importance CIGNL members place on DOE promulgating an appropriate and equitable CSC cost allocation rule.

The CIGNL representatives made the following key points, based on CIGNL's November 2010 written submission:

1. The single most important feature of any DOE rule must be the establishment of a maximum contribution of no more than $5 million that any company would be required to pay.

2. DOE's definition of "nuclear supplier" will be key to an equitable allocation of CSC shares. As many as 300 to 1,800 types of goods and services go into constructing and operating a nuclear power plant. DOE's rule should capture all companies that may have supplied goods and services to foreign installations, with an appropriate "look back" period (*e.g.,* five years).

3. Given the critical difficulties presented by the lack of data on the extent of and risk associated with the export of nuclear goods and services from the United States, CIGNL is unable to offer a specific CSC cost allocation formula. However, CIGNL does believe such a formula could be developed, after further data-collection, analysis and consultation with industry, based on certain key principles:

First, the formula should seek to group exporters into categories of goods and services based on the types of facilities that utilize these goods and services.

Second, each category of facilities should be compared to the other categories to determine which category is most likely to experience a nuclear incident that would result in a call for funds.

Third, the calculation of what percentage each category would bear is beyond the scope of CIGNL's comments, but potentially also could be calculated by experts who are knowledgeable of the facilities in CSC countries falling in each category and the risks of nuclear incidents at such facilities. Consistent with Congressional direction to risk-inform the allocation of potential liability, DOE should look at the NRC's processes for developing risk-informed regulation as a potential guidepost for measuring risk, rather than simply allocating risk by percentage of supply to a nuclear facility. In any case, CIGNL believes that all categories should be assigned at least some risk; and, therefore, some share of the assessment, so that all covered suppliers would have to contribute. All nuclear suppliers face the potential risk, however unlikely, of a foreign nuclear accident occurring that could result in litigation in U.S. courts and thus all suppliers are benefiting from the CSC. Accordingly, any resulting formula should include all suppliers benefiting from exporting into the global nuclear energy marketplace, including front or back end of the nuclear fuel cycle and/or transportation. All activities throughout the nuclear fuel cycle, including operating nuclear plants, have had an exemplary safety record. It would be too simplistic to exclude activities in the front or back end of the nuclear fuel cycle and/or to transportation, without recognizing economic benefit and potential risk and liability that can be be associated with such activity.

Fourth, companies that supply goods or services to facilities of the type in each category would share liability for the portion of the contingent cost allocated to that category. The allocation of liability could be based on the relative risk associated with the goods or services supplied by each company as compared to the goods or services supplied by others, or, given the complexity of such an assessment, could simply be based on the applicable revenues of such company as a nuclear supplier to facilities in that category over a period of time prior to the call for funds. Further, in the event of a call for funds, all suppliers to facilities in a category would contribute to the share assigned to their category, even if the covered incident did not occur at a facility in their category.

4. Simply using the value of goods and services would not take into account risk.

5. Other countries should be discouraged from following the U.S. example of assessing suppliers. For example, the Japanese and others have been monitoring the DOE rulemaking.

6. The process of creating and implementing a rational risk-based formula requires, at a minimum, the collection of additional data and the careful analysis of this data, which CIGNL urged DOE to undertake before publishing a proposed cost allocation formula. For example, in the comments provided to DOE from the Nuclear Energy Institute (NEI), NEI attaches a table purporting to show the relative risk of the different goods and services in relation also to the type of facility. The table draws conclusions which are not supported by any specific data or criteria for measuring the comparative risk bases. Therefore, the table is not useful as a guide to DOE.

7. DOE should consider submitting a report to Congress before the December 31, 2012 due date in the 2007 Act detailing the impractical nature of determining an equitable "risk-informed assessment formula" having a rational classification based on risk and its impact on the competitiveness of the U.S. nuclear industry. Certain approaches could serve as disincentives for a U.S. company to be a nuclear supplier, which would have a negative impact on U.S. jobs, exports, ability to obtain parts, and competitiveness.

8. Consistent with the legislative history of the 2007 Act, in developing the cost allocation formula, DOE need not limit the examination to “covered installations” in countries that have ratified the Convention, but should consider covered installations in countries that have signed the CSC and in other countries that DOE concludes are likely to join the CSC within a reasonable period of time. DOE should also consider that for purposes of the cost allocation formula it would be appropriate to include in the population all of the nuclear suppliers whose goods and services have been exported from the United States without regard to whether or not the goods or services were exported to a CSC country. CSC membership will be very limited in the initial years before CSC becomes a global treaty. Initially commerce with a limited number of CSC countries could result in a disproportionate cost allocation to a few suppliers. Actually all nuclear suppliers will benefit from the CSC coming into effect and eventually gaining more members.

9. DOE should not limit its examination of "covered installations" in other countries only to nuclear power plants, but should include facilities such as fuel fabrication plants, transportation, etc.

10. Discussions with nuclear insurance pools in the United States and abroad have indicated there now is little interest in providing coverage for CSC shares, largely because the CSC covers environmental impairment damages and claims after ten years. In addition, nuclear insurance carriers do not have data on the operating histories and performance of individual facilities in all CSC Members or potential Members needed to quantify the probability of losses. In any case, the threshold issue for any insurance option is knowing what the total U.S. share of the CSC international fund would be and what each individual supplier would be assessed. Without this information, it is not possible to determine how individual insurance premiums would be allocated. Thus, even if an insurance product were made available to the community of suppliers, there currently is no way to allocate individual premiums.

11. It was noted DOE may reopen the public comment period to seek additional views on matters such as the list of goods and services and other factors that might be taken into account before publishing a proposed rule.

CIGNL appreciated the opportunity to meet with DOE.