Energy Contractors Price-Anderson Group

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BWX Technologies, Inc.
Duke Engineering & Services, Inc.
Fluor Corporation
Johnson Controls World Services Corporation
Newport News Shipbuilding and Dry Dock Company
Nuclear Fuel Services, Inc.
Raytheon Engineers & Constructors, Inc.
Stone & Webster Engineering Corporation]

Reply Comments on U.S. Department of Energy Notice of Inquiry Concerning Preparation of Report to Congress on The Price-Anderson Act

62 Fed.Reg. 68272 (December 31, 1997)

February 13, 1998

I. Introduction

The *ad hoc* Energy Contractors Price-Anderson Group (the Group) is submitting the reply comments herein in response to various comments submitted to the U.S. Department of Energy (DOE or the Department) on its Federal Register "Notice of Inquiry concerning preparation of report to Congress on the Price-Anderson Act" (Notice) of December 31, 1997. 62 Fed.Reg. 68272. Such Notice indicated additional comments could be filed to reply to original comments concerning the continuation or modification of the provisions of the Price-Anderson Act (the Act). The Group's original comments were filed on January 30, 1998; and, along with 28 others, have been made available on the Internet by the Department. The Notice indicated the dialogue is to assist the Department in preparation of a report on the Act to be submitted to Congress by August 1, 1998, as required by Section 170p of the Atomic Energy Act (AEA).

The *ad hoc* Energy Contractors Price-Anderson Group is composed of:

Bechtel National, Inc.
BNFL, Inc.
BWX Technologies, Inc.
Duke Engineering & Services, Inc.
Fluor Corporation
Johnson Controls World Services Corporation
Newport News Nuclear division
of Newport News Shipbuilding and Dry Dock Company
Nuclear Fuel Services, Inc.
Raytheon Engineers & Constructors, Inc.
Stone & Webster Engineering Corporation

As indicated in the Group's original comments, each member of the Group has a vital interest in continuation of the nuclear hazards liability coverage provided by the Price-Anderson Act, either as a DOE prime contractor, subcontractor or supplier covered by one or more nuclear hazards indemnity agreements entered into under the Act.

The overwhelming majority of comments posted on the Internet to date support the Group's position that Price-Anderson indemnity system should be continued in substantially its present form beyond August 1, 2002 to ensure protection of the public and furtherance of DOE's statutory missions in research and development, production, environmental restoration and waste management, defense and other nuclear fields. Significantly, Price-Anderson extension was supported not only by other DOE contractors, but by every State and local government that submitted comments, as well as by the Western Interstate Energy Board, the Association of American Railroads, and the United States Enrichment Corporation. Two environmental groups and one individual opposed extension, but did not explain how the public would be better protected in its absence.

As stated in the Group's original comments and several others, Price-Anderson's statutory scheme of indemnification and/or insurance has been intended to ensure the availability to the public of adequate funds in the event of a catastrophic, yet unlikely, nuclear accident. Other benefits to the public include such features as emergency assistance payments, consolidation and prioritization of claims in one court, channeling of liability through the "omnibus" feature (permitting a more unified and efficient approach to processing and settlement of claims), and waivers of certain defenses in the event of a large accident ("extraordinary nuclear occurrence") (providing a type of "no-fault" coverage).

The comments submitted to the Department confirm that, without the Price-Anderson system's indemnification and limitation on liability, private industry would be very reluctant to do even vital nuclear business with DOE. Private insurance, even if available for some risks, would not protect against all nuclear hazards (especially when they involve work at older government facilities), currently is limited to $200 million, and would not be cost-effective.

Comments of other contractors, four county governments and the railroads support the Group's position that there should not be any coverage exception tied to such legally imprecise terms as "gross negligence" or "willful misconduct." The Group reiterates that, if the Price-Anderson Act were amended to add such exclusions, contractors would have to assume they essentially would have no nuclear hazards liability coverage.

In short, the Group has not found anything in the comments of others submitted to the Department that would cause it to change its positions, as stated in its original comments of January 30, 1998.

II. Reply To Responses To DOE List of Questions

The DOE Notice contained a list of questions representing the Department's "... preliminary attempt to identify potential issues that might arise in responding to the section 170p. mandate that DOE report `concerning the need for continuation or modification of the provisions of [the Act] taking into account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety at that time, among other relevant factors.'" 62 Fed.Reg. at 68276-68278. The Group's reply comments on the responses submitted by others to DOE's specific questions (or the issues they raised) are as follows:

1. Should the DOE Price-Anderson indemnification be continued without modification?

As stated, *supra,* the overwhelming majority of comments filed to date support the Group's position that Price-Anderson indemnity system should be continued in substantially its present form beyond August 1, 2002. *See, e.g.*, comments of Battelle Memorial Institute (Jan. 27, 1998); Clark County, Nevada (Jan. 29, 1998); State of Nevada (Jan. 30, 1998); and Lincoln County and City of Caliente, Nevada (Jan. 30,

1998). The very few comments that opposed extension did not explain how the public would be better protected in the absence of the Price-Anderson Act. *See* comments of Abby Johnson (Jan. 28, 1998); North American Water Office (Jan. 30, 1998); and Environmental Coalition on Nuclear Power (Jan. 29, 1998).

As addressed in more detail in reply comments on Questions 13, 16, 18, 19, 20, 21 and 22, there was general support by other commenters on the Group's recommendations that the DOE Report to Congress urge a few modifications or clarifications to improve the Act further. For example, this included increasing the $100 million limit set in 1962 for nuclear incidents outside the United States (Question 13), and making it apply in more circumstances (Question 20). Additionally, other commenters echoed the Group's positions that the Act's applicability to DOE "cooperative agreements" and "grants" (Question 16), waste sites (Question 18), "mixed waste" (Question 19), the United States "territorial sea" (Question 21), and the United States "exclusive economic zone" (Question 22) should be clarified.

2. Should the DOE Price-Anderson indemnification be eliminated or made discretionary with respect to all or specific DOE activities? If discretionary, what procedures and criteria should be used to determine which activities or categories of activities should receive indemnification?

Other commenters supported the Group's position that DOE Price-Anderson indemnification for nuclear hazards should not return to being discretionary. *See, e.g.*, comments of Universities Research Association, Inc. (Jan. 30, 1998); Southeastern Universities Research Association, Inc. (Jan. 1998); Inyo County, Nevada (Jan. 30, 1998); Lincoln County and City of Caliente, Nevada (Jan. 30, 1998); TRW Environmental Safety Systems, Inc. (Jan. 30, 1998); Lockheed Martin Corporation (Jan. 30, 1998); University of Chicago (Jan. 30, 1998); and Princeton University (Jan. 29, 1998). No arguments were presented for making Price-Anderson indemnification discretionary.

One commenter (OHM Remediation Services Corp. (Jan. 30, 1998)) stated that, if indemnification is made discretionary, activities pursuant to contracts entered into prior to modifications to the Act should continue to receive indemnification. The Group's position is that all DOE existing contracts containing the mandatory nuclear hazards indemnification agreement are clear that the provision not only applies during the entire term of the contract, but explicitly survives the completion, termination or expiration of the contract. *See* DEAR §952.250-70(g) (providing for the continuity of DOE obligations).

3. Should there be different treatment for "privatized arrangements" (that is, contractual arrangements that are closer to contracts in the private sector than the traditional "management and operating" contract utilized by DOE and its predecessors since the Manhattan Project in the 1940's)? Privatized arrangements can include but are not limited to fixed-priced contracts, contracts where activity is conducted off a DOE site, contracts where activity is conducted at the contractor's facility located on a DOE site, or contracts where a contractor performs the same

activity for DOE as it does for commercial entities and on the same terms.

Other comments supported the Group's position that there should not be different Price-Anderson treatment for "privatized arrangements" being contemplated by DOE. *See, e.g.*, comments of Allied-Signal, Inc. (Jan. 30, 1998); United States Enrichment Corporation (Jan. 30, 1998); Western Interstate Energy Board (Jan. 30, 1998); Lincoln County and City of Caliente, Nevada (Jan. 30, 1998); Lockheed Martin Corporation (Jan. 30, 1998); and Churchill County, Nevada (Jan. 30, 1998). The Lincoln County and City of Caliente comments cited in particular activities occurring "off-site," such as transportation and intermodal operations. The comments of the Environmental Coalition on Nuclear Power (Jan. 29, 1998) predictably stated that all on- and off-site contractual arrangements should have no Price-Anderson coverage (again without explaining how the public would be better protected).

As the Group stated in its original comments, the work under privatized arrangements still will be done for the benefit of the Government, and presumably would cost more if contractors had to self-insure or purchase private insurance (if even available). Public protection would be decreased without Price-Anderson coverage.

4. Should there be any change in the current system under which DOE activities conducted pursuant to an NRC license are covered by the DOE Price-Anderson indemnification, except in situations where NRC extends Price-Anderson coverage under the NRC system? For example, (1) should the DOE Price-Anderson indemnification always apply to DOE activities conducted pursuant to an NRC license or (2) should the DOE Price-Anderson indemnification never apply to such activities, even if NRC decides not to extend Price-Anderson coverage under the NRC system?

Other comments supported the Group's position that there should not be any change in the current system under which DOE activities conducted pursuant to an NRC license are covered by the DOE Price-Anderson indemnification. *See, e.g.,* comments of Kaiser-Hill (Jan. 28, 1998); Clark County, Nevada (Jan. 29, 1998); Universities Research Association, Inc. (Jan. 30, 1998); Lincoln County and City of Caliente, Nevada (Jan. 30, 1998); TRW Environmental Safety Systems (Jan. 30, 1998); Lockheed Martin Corporation (Jan. 30, 1998); University of Chicago (Jan. 1998); and Princeton University (Jan. 29, 1998). No comments were presented for eliminating Price-Anderson coverage where the DOE activity is regulated by NRC.

The Kaiser-Hill comments suggested that the Price-Anderson reauthorization legislation "should clarify the scope of NRC regulation of activities on DOE sites and also make it clear that the NRC is authorized to regulate activities on DOE sites." The Group strongly disagrees with this statement. Price-Anderson is not the appropriate legislative vehicle for Congress to address the extent, if any, to which NRC should be authorized to regulate nuclear activities at DOE sites. This matter is better addressed in on-going consideration of outside safety regulation of DOE.

5. Should the DOE Price-Anderson indemnification continue to provide omnibus coverage, or should it be restricted to DOE contractors or to DOE contractors, subcontractors, and suppliers? Should there be a distinction in coverage based on whether an entity is for-profit or not-for-profit?

Other comments supported the Group's position that DOE Price-Anderson indemnification should continue to provide "omnibus" coverage, and there should not be a distinction in coverage based on whether an entity is for-profit or not-for-profit. *See, e.g.,* comments of Clark County, Nevada (Jan. 29, 1998); Western Interstate Energy Board (Jan. 30, 1998); Universities Research Association, Inc. (Jan. 30, 1998); Southeastern Universities Research Association, Inc. (Jan. 1998); Lincoln County and City of Caliente, Nevada (Jan. 30, 1998); Lockheed Martin Corporation (Jan. 30, 1998); University of Chicago (Jan. 1998); Esmeralda County, Nevada (Jan. 20, 1998); Princeton University (Jan. 29, 1998); and Mineral County, Nevada (Feb. 1998). The Lincoln County and City of Caliente comments, for example, observed that "omnibus" coverage also protects state and local governments against any nuclear liability they may have. No comments were presented for modifying Price-Anderson's "omnibus" coverage.

6. If the DOE indemnification were not available for all or specified DOE activities, are there acceptable alternatives? Possible alternatives might include Pub. L. No. 85-804, section 162 of the AEA, general contract indemnity, no indemnity, or private insurance. To the extent possible in discussing alternatives, compare each alternative to the DOE Price-Anderson indemnification, including operation, cost, coverage, risk, and protection of potential claimants.

Other comments supported the Group's position that, if the DOE Price-Anderson indemnification were not available for all or specified DOE activities, there are no equivalent alternatives for protecting the public or covering contractors, subcontractors and suppliers. *See, e.g.,* comments of Allied-Signal, Inc. (Jan. 30, 1998); Universities Research Association, Inc. (Jan. 30, 1998); Lockheed Martin Corporation (Jan. 30, 1998); University of Chicago (Jan. 1998); and Princeton University (Jan. 29, 1998). No comments suggested a better alternative than DOE Price-Anderson indemnification.

The Lockheed Martin comments suggested that "...DOE should be more flexible in permitting contractors to purchase insurance and should consider contractor proposals tailored to specific activities performed under their contracts which might lend themselves to a combination of Price-Anderson indemnification, Public Law 85-804, and insurance coverage. For example, enhanced coverage may be required for foreign nuclear facility activities." The Group agrees that enhanced coverage is needed for DOE's foreign nuclear facility activities, and that DOE should show flexibility, where appropriate (particularly in use of Public Law 85-804 for activities outside the United States). However, the Group strongly doubts that private insurance would be available or adequate to cover nuclear risks associated with DOE contracts inside or outside the United States or would be cost-effective for the Government. (The reasons for these conclusions are described in detail in the Group's January 30, 1998 response to DOE Question 11.)

7. To what extent, if any, would elimination of the Price-Anderson indemnification affect the ability of DOE to perform its various missions? Explain your reasons for believing that performance of all or specific activities would or would not be affected?

Other comments support the Group's position that elimination of the Price-Anderson indemnification would adversely affect the ability of DOE to perform its various missions. *See, e.g.*, comments of Universities Research Association, Inc. (Jan. 30, 1998); Southeastern Universities Research Association, Inc. (SURA) (Jan. 1998); Lockheed Martin Corporation (Jan. 30, 1998); and University of Chicago (Jan. 1998). For example, the SURA comments observe it is very doubtful that any responsible organizations would want to participate in DOE's mission without the protection afforded by Price-Anderson. Similarly, the University of Chicago comments state no company or non-profit institution is in a position to risk its continued existence by undertaking risk of loss of its assets, which could put any organization in bankruptcy. (Indeed, the public would have less protection in a bankruptcy.)

8. To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the willingness of existing or potential contractors to perform activities for DOE? Explain your reasons for believing that willingness to undertake all or specific activities would or would not be affected?

Other comments support the Group's position (also stated in DOE's 1983 Report to Congress) that there would be strong reluctance on the part of existing and potential contractors to do any nuclear business with the Department if DOE's authority to enter into Price-Anderson indemnity agreements were discontinued. *See, e.g.*, comments of Battelle Memorial Institute (Jan. 27, 1998); Kaiser-Hill (Jan. 28, 1998); Allied-Signal, Inc. (Jan. 30, 1998); OHM Remediation Services Corp. (Jan. 30, 1998); United States Enrichment Corporation (Jan. 30, 1998); Universities Research Association, Inc. (Jan. 30, 1998); TRW Environmental Safety Systems, Inc. (Jan. 30, 1998); Lockheed Martin Corporation (Jan. 30, 1998); and University of Chicago (Jan. 1998). The University of Chicago, for example, explicitly states it would be unwilling to continue as contractor for Argonne National Laboratory without a continuation of the Price-Anderson indemnity.

9. To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the ability of DOE contractors to obtain goods and services from subcontractors and suppliers? Explain your reasons for believing that the availability of goods and services for all or specific DOE activities would or would not be affected?

Other comments support the Group's position (again, also stated in DOE's 1983 Report to Congress) that, if DOE's authority to enter into Price-Anderson indemnity agreements were discontinued, the strong reluctance on the part of existing and potential contractors to do any nuclear business with the

Department would extend down tier lines to subcontractors and equipment suppliers. *See, e.g.*, comments of Kaiser-Hill (Jan. 28, 1998); Allied-Signal, Inc. (Jan. 30, 1998); United States Enrichment Corporation (Jan. 30, 1998); Universities Research Association, Inc. (Jan. 30, 1998); Southeastern Universities Research Association, Inc. (Jan. 1998); TRW Environmental Safety Systems, Inc. (Jan. 30, 1998); Lockheed Martin Corporation (Jan. 30, 1998); University of Chicago (Jan. 1998); and Princeton University (Jan. 29, 1998). No comments to date suggest otherwise.

10. To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the ability of claimants to receive compensation for nuclear damage resulting from a DOE activity? Explain your reasons for believing the ability of claimants to be compensated for nuclear damage resulting from all or specific DOE activities would or would not be affected?

Other comments support the Group's position that the elimination of the DOE Price-Anderson indemnification would adversely affect the ability of claimants to receive compensation for nuclear damage resulting from any DOE activity. *See, e.g.*, comments of Allied-Signal, Inc. (Jan. 30, 1998); United States Enrichment Corporation (Jan. 30, 1998); Universities Research Association, Inc. (Jan. 30, 1998); Lincoln County and City of Caliente (Jan. 30, 1998); Lockheed Martin Corporation (Jan. 30, 1998); University of Chicago (Jan. 1998); Esmeralda County, Nevada (Jan. 20, 1998); and Mineral County, Nevada (Feb. 1998). Esmeralda County and Mineral County, for example, cited the fact that jurisdiction over claims would be consolidated in the local U.S. District Court, as well the experience of a reasonable process for settling claims and an evacuation, such as occurred at Three Mile Island. No comments to date suggest otherwise.

11. What is the existing and the potential availability of private insurance to cover liability for nuclear damage resulting from DOE activities? What would be the cost and the coverage of such insurance? To what extent, if any, would the availability, cost and coverage be dependent on the type of activity involved? To what extent, if any, would the availability, cost and coverage be dependent on whether the activity was a new activity or an existing activity? If DOE Price-Anderson indemnification were not available, should DOE require contractors to obtain private insurance?

Private nuclear liability insurance would be an impractical, more expensive and insufficient substitute for Price-Anderson indemnification of DOE contractors, as confirmed by information provided by American Nuclear Insurers (ANI) (Attachment B to the Group's January 30, 1998 comments). These conclusions also were supported by the comments of the Association of American Railroads (Jan. 1998); United States Enrichment Corporation (Jan. 30, 1998); Lockheed Martin Corporation (Jan. 30, 1998); and University of Chicago (Jan. 1998).

The comments of the Environmental Coalition on Nuclear Power (ECNP) (Jan. 29, 1998) state,

"...absolutely DOE should require all its contractors and their underlings to obtain insurance." At the same time, the ECNP admits that it does not have a "reliable answer to the first set of questions until the real world market is put to the test...." The Group submits that the letter from ANI (the only available private insurer of nuclear risks in the United States) answers these questions about the availability and cost of private insurance, and demonstrates that private insurance is not a viable alternative to DOE Price-Anderson indemnification.

The comments of Marilyn Gayle Hoff (Jan. 27, 1998) state DOE contractors "can also afford to buy their own nuclear insurance," and should be required to "finance their own insurance." Even if nuclear liability insurance were available, DOE contractors would have to take any premiums they might pay into account in the prices they charged the Government for their goods and services. As stated in more detail in the Group's original comments of January 30, 1998 (and DOE's 1983 Report to Congress), this would be more expensive for the Government than continuing to self-insure.

12. Should the amount of the DOE Price-Anderson indemnification for all or specified DOE activities inside the United States (currently approximately $8.96 billion) remain the same or be increased or decreased?

The Group reiterates that current Price-Anderson amount of almost $9 billion is adequate for the reasons stated in the Group's January 30, 1998 comments. The Group disagrees with the comment of Kaiser-Hill (Jan. 28, 1998) that the amount should be increased, "consistent with the results of a risk analysis and a current liability protection analysis." The Group also disagrees with the comment of TRW Environmental Safety Systems Inc. (Jan. 30, 1998) that there is no existing liability to date that "one can cite or use as a gauge for the potential liability that could result from, for example, a nuclear incident." The current limit of about $8.96 billion already is more than an order of magnitude higher that the highest amount DOE ever has paid under Price-Anderson since the statute was enacted in 1957 (*i.e.*, the 1989 Fernald settlement of about $73 million). Furthermore, it is impractical and unnecessary to perform a risk analysis for every DOE contract involving nuclear activities. *See* the Group's original response of January 30, 1998 to DOE Question 2 (describing the pitfalls of DOE having to make determinations about whether a particular activity presented a "substantial" nuclear risk prior to the 1988 Amendment Act).

The Clark County, Nevada comments (Jan. 29, 1998) suggest that, since the figure was set in 1988, it may need to be adjusted for inflation. Similar comments were made by Universities Research Association, Inc. (Jan. 30, 1998) and the State of Nevada (Jan. 30, 1998). Under Section 15 of the 1988 Price-Anderson Amendments Act, Pub.L. No. 100-408, §15; 102 Stat. 1078 (codified at 42 U.S.C. §2210(t)), the limit of liability already is subject to inflation indexing not less than every five years based on the Consumer Price Index (CPI). The current figure originally set by Congress in 1988 reflects an inflation adjustment of 19.9 percent made in 1993 to reflect the change in the CPI from August 1988 through March 1993. *See* 58 Fed.Reg. 42851 (Aug. 12, 1993). Another inflation adjustment is due in August 1998.

Additionally, the Group reiterates that, if an accident were so large as to exceed the statutory indemnity ceiling, Congress first recognized in 1957 it would be capable of legislating additional funds. Indeed, the Act specifically has provided since 1975 that, in the event of a nuclear incident involving damages in excess of the statutory limitation on liability, Congress will thoroughly review the particular incident and take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude. 42 U.S.C. §2210(e)(2). This provision, along with periodic inflation indexing, makes it unnecessary to increase the current amount.

13. Should the amount of the DOE Price-Anderson indemnification for nuclear incidents outside the United States (currently $100 million) remain the same or be increased or decreased?

The Group's original comments of January 30, 1998 stated the amount of the DOE Price-Anderson indemnification for nuclear incidents outside the United States (currently $100 million) should be increased to at least $500 million. The University of Chicago (Jan. 1998) called the current amount "grossly inadequate," and said it should be increased without suggesting a specific figure. Lockheed Martin Corporation (Jan. 30, 1998) suggested the figure should be increased to the same or higher levels as that of guidelines set forth under the various international conventions for addressing civil liability for nuclear damage. The latter would be consistent with the Group's suggestion of $500 million. As indicated in the Group's original comments, under both the 1997 Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage and the Convention on Supplementary Compensation for Nuclear Damage, the minimum national compensation amounts are 300 million Special Drawing Rights (SDRs). (1 SDR = about $1.4.)

14. Should the limit on aggregate public liability be eliminated? If so, how should the resulting unlimited liability be funded? Does the rationale for the limit on aggregate public liability differ depending on whether the nuclear incident results from a DOE activity or from an activity of a NRC licensee?

No compelling reasons were given in any comments filed for eliminating the limit on aggregate public liability. *See also* comments of Lockheed Martin Corporation (Jan. 30, 1998) and University of Chicago (Jan. 1998).

15. Should the DOE Price-Anderson indemnification continue to cover DOE contractors and other persons when a nuclear incident results from their gross negligence or willful misconduct? If not, what would be the effects, if any, on: (1) The operation of the Price-Anderson system with respect to the nuclear incident, (2) other persons indemnified, (3) potential claimants, and (4) the cost of the nuclear incident to DOE? To what extent is it possible to minimize any detrimental effects on persons other than the person whose gross negligence or willful misconduct resulted

in a nuclear incident? For example, what would be the effect if the United States government were given the right to seek reimbursement for the amount of the indemnification paid from a DOE contractor or other person whose gross negligence or willful misconduct causes a nuclear incident?

Other comments support the Group's position that the Act should not be amended to provide for an exclusion or subrogation in cases of so-called "gross negligence" or "willful misconduct." *See, e.g.*, comments of Battelle Memorial Institute (Jan. 27, 1998); Kaiser-Hill (Jan. 28, 1998); Allied-Signal, Inc. (Jan. 30, 1998); Association of American Railroads (Jan. 1998); United States Enrichment Corporation (Jan. 30, 1998); Universities Research Association, Inc. (Jan. 30, 1998); Southeastern Universities Research Association, Inc. (Jan. 1998); Lincoln County and City of Caliente, Nevada (Jan. 30, 1998); Lockheed Martin Corporation (Jan. 30, 1998); the University of Chicago (Jan. 1998); University of California (Jan. 30, 1998); Churchill County, Nevada (Jan. 30, 1998); Esmeralda County, Nevada (Jan. 20, 1998); and Mineral County, Nevada (Feb. 1998). The comments of Lincoln County and City of Caliente, for example, correctly observe that payments to victims could be delayed "while the DOE and its contractors argue over who was responsible." No compelling reasons were given in any comments filed for creating an exclusion or subrogation in cases of so-called "gross negligence" or "willful misconduct."

In sum, the Group reiterates that, if the Price-Anderson Act were amended to add some such exclusion, contractors would have to assume they essentially would have no nuclear hazards liability coverage.

16. Should the DOE Price-Anderson indemnification be extended to activities undertaken pursuant to a cooperative agreement or grant?

Other comments supported the Group's position that the DOE Price-Anderson indemnification should be extended to activities undertaken pursuant to a "cooperative agreement" or "grant," if not already covered. *See, e.g.*, comments of Clark County, Nevada (Jan. 29, 1998); Universities Research Association, Inc. (Jan. 30, 1998); Southeastern Universities Research Association, Inc. (Jan. 1998); Lincoln County and City of Caliente, Nevada (Jan. 30, 1998); Lockheed Martin Corporation (Jan. 30, 1998); and University of Chicago (Jan. 1998). No contrary comments were submitted.

17. Should the DOE Price-Anderson indemnification continue to cover transportation activities under a DOE contract? Should coverage vary depending on factors such as the type of nuclear material being transported, method of transportation, and jurisdictions through which the material is being transported?

The Group's original comments of January 30, 1998 stated DOE Price-Anderson indemnification

should continue to cover transportation activities under a DOE contract, indicating such is essential for public acceptance of DOE transportation activities. Indeed, this conclusion is supported by the comments filed by the State of Nevada (Jan. 30, 1998), several local governments in Nevada (*i.e.*, Eureka County (Jan. 29, 1998), Clark County (Jan. 29, 1998), Inyo County (Jan. 30, 1998), Lincoln County and City of Caliente (Jan. 30, 1998), Churchill County (Jan. 30, 1998), Esmeralda County (Jan. 20, 1998), and Mineral County (Feb. 1998)), and the Western Interstate Energy Board (Jan. 30, 1998). It also was emphasized by the Association of American Railroads (Jan. 1998). No contrary comments were submitted.

18. To what extent, if any, should the DOE Price-Anderson indemnification apply to DOE clean-up sites? Should coverage be affected by the applicability of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or other environmental statutes to a DOE clean-up site?

Other comments supported the Group's position that the DOE Price-Anderson indemnification should fully apply to DOE clean-up sites, including those being remediated under the Comprehensive Environmental Response, Compensation and Liability Act or other environmental statutes applicable to a DOE clean-up site. *See, e.g.*, comments of Clark County, Nevada (Jan. 29, 1998); OHM Remediation Services Corp. (Jan. 30, 1998); United States Enrichment Corporation (Jan. 30, 1998); Lockheed Martin Corporation (Jan. 30, 1998); and University of Chicago (Jan. 1998). No contrary comments were submitted.

19. To what extent, if any, should the DOE Price-Anderson indemnification be available for liability resulting from mixed waste at a DOE clean-up site?

Other comments supported the Group's position that the DOE Price-Anderson indemnification should be available for liability resulting from "mixed waste" at a DOE clean-up site. *See, e.g.*, comments of Clark County, Nevada (Jan. 29, 1998); United States Enrichment Corporation (Jan. 30, 1998); TRW Environmental Safety Systems, Inc. (Jan. 30, 1998); Lockheed Martin Corporation (Jan. 30, 1998); and University of Chicago (Jan. 1998). No contrary comments were submitted.

20. Should the definition of nuclear incident be expanded to include occurrences that result from DOE activity outside the United States where such activity does not involve nuclear material owned by, and used by or under contract with the United States? For example, should DOE Price-Anderson indemnification be available for activities of DOE contractors that are undertaken outside the United States for purposes such as non-proliferation, nuclear risk reduction or improvement of nuclear safety? If so, should the DOE Price-Anderson indemnification for these activities be mandatory or discretionary?

Other comments supported the Group's position that DOE Price-Anderson indemnification should apply to activities of DOE contractors that are undertaken outside the United States for important purposes such as non-proliferation, nuclear risk reduction or improvement of nuclear safety. *See, e.g.*, comments of Battelle Memorial Institute (Jan. 27, 1998); United States Enrichment Corporation (Jan. 30, 1998); Universities Research Association, Inc. (Jan. 30, 1998); Southeastern Universities Research Association, Inc. (Jan. 1998); Lockheed Martin Corporation (Jan. 30, 1998); University of Chicago (Jan. 1998); and University of California (Jan. 30, 1998). No contrary comments were filed.

The Group wishes to comment on one point made by the University of California, *i.e.* that DOE contract work abroad is "limited to a small pool of contractors having the financial wherewithal to self-insure against large losses." Indeed, precisely the opposite appears to have been the case for the last few years: Most of the contractors DOE has been using to do nuclear safety work abroad presumably are less concerned about liability because they have *few assets*. Most well-capitalized companies have refused to do such work without adequate liability protection. The Group agrees with the University's statement that revising the Price-Anderson Act to fully indemnify overseas activities of government contractors would expand competition for such work. It also would provide greater protection to victims in the event of an accident than they now would receive from essentially judgment-proof contractors.

21. Is there a need to clarify what tort law applies with respect to a nuclear incident in the United States territorial sea? Should the applicable tort law be based on state tort law?

The Group's comments indicated there should be some clarification as to whether or not State tort law would apply in the United States "territorial sea." Essentially the same point was made by the comments of Lockheed Martin Corporation (Jan. 30, 1998) and the University of Chicago (Jan. 1998). No contrary comments were filed.

22. Should the definition of nuclear incident be modified to include all occurrences in the United States exclusive economic zone? What would be the effects, if any, on the shipment of nuclear material in the United States exclusive economic zone if such a modification were or were not made? What would be the effects, if any, on the response to an incident involving nuclear material in the United States exclusive economic zone if such a modification were or were not made?

The Group's comments indicated it would be beneficial for nuclear incidents in the United States exclusive economic zone (EEZ) to be covered by Price-Anderson. Essentially the same point was made by the comments of the University of Chicago (Jan. 1998). No contrary comments were filed.

The comments of the United States Enrichment Corporation (Jan. 30, 1998) suggested that any revision of the Price-Anderson Act to address nuclear incidents occurring in the EEZ should consider the

manner in which the EEZ is treated in the Convention on Supplementary Compensation for Nuclear Damage. The Group agrees with this suggestion.

23. Should the reliance of the Act on state tort law continue in its current form? Should uniform rules already established by the Act be modified, or should there be additional uniform rules on specific topics such as causation and damage? Describe any modification or additional uniform rule that would be desirable and explain the rationale.

The Group's original comments of January 30, 1998 state reliance of the Act on State tort law should continue in its current form. The comments of Lockheed Martin Corporation (Jan. 30, 1998) made the same point. This conclusion also appears to be supported by the comments of the Environmental Coalition on Nuclear Power (Jan. 29, 1998), which argue that Federal preemption over States and municipalities is inappropriate.

The comments of Eureka County, Nevada (Jan. 29, 1998), on the other hand, suggest that, in the case of nuclear waste transportation, the burden of proof should be on the government or utility to disprove the claim. The comments of the Western Interstate Energy Board (Jan. 30, 1998) and the State of Nevada (Jan. 30, 1998) further suggest Congress should consider whether the Act should be amended to provide a uniform legal approach for establishing the causation of injuries related to transportation of nuclear waste. Similarly, the comments of OHM Remediation Services Corp. (Jan. 30, 1998) suggest that Congress should consider adopting an express statute of limitations for nuclear incidents. The Group submits that any burden of proof, approach to causation, or statute of limitations should continue to be governed by applicable State tort law (except where certain waivers apply in the case of an "extraordinary nuclear occurrence" (ENO)). The proposed changes would require preemption of State tort laws, a constitutionally permissible, but politically impractical, alternative rejected by Congress in 1957 and again in 1966 when the ENO provision was added to the Act. The ENO provision was adopted with use of waivers to avoid Federal preemption. This remains the preferable approach.

24. Should the Act be modified to be consistent with the legal approach in many other countries underwhich all legal liability for nuclear damage from a nuclear incident is channeled exclusively to the operator of a facility on the basis of strict liability? If so, what would be the effect, if any, on the system of financial protection, indemnification and compensation established by the Act?

The Group's original comments of January 30, 1998 said the Act should not be modified to be consistent with the legal approach in many other countries under which all legal liability for nuclear damage from a nuclear incident is channeled exclusively to the operator of a facility (*i.e.,* legal channeling) on the basis of strict liability. The Group endorses the following comment made by the University of Chicago (Jan. 30, 1998) in response to this question: "Since such a proposal might be considered a radical change in concept without genuine value added, we fear its consideration would detract from the basic purpose of

extending the Act." It thus would be impractical to accept the suggestion of Esmeralda and Mineral Counties, Nevada (Jan. 20, 1998) that all legal liability be channeled to facility operators.

25. Should the procedures in the Act for administrative and judicial proceedings be modified? If so, describe the modification and explain the rationale?

The Environmental Coalition on Nuclear Power (Jan. 29, 1998) suggested the procedures must be reformed "to require the highest standards of impartiality and respect for the citizens...." The comments of Marilyn Gayle Hoff (Jan. 27, 1998) indicated that "friendlier state and local courts," rather than Federal courts should have jurisdiction over Price-Anderson claims. Without more specifics, the Group stands by its original comments of January 30, 1998 that stated the procedures in the Act for administrative and judicial proceedings should not be modified. Consolidation of cases in one Federal court is preferable from the perspective of the efficient administration of justice; and, particularly in the case of DOE indemnification, is consistent with long-standing Federal Government policies of restricting access to the Federal Treasury to Federal courts.

26. Should there be any modification in the types of claims covered by the Price-Anderson system?

There still are no apparent reasons for any modification in the types of claims covered by the Price-Anderson system (other than the clarifications as to coverage for waste sites and "mixed waste" discussed in response to Questions 18 and 19 in the Group's original comments of January 30, 1998). The types of claims mentioned in the comments of the Environmental Coalition on Nuclear Power (Jan. 29, 1998) (*e.g.*, delayed effects, such as latent cancers, and genetic defects and non-fatal illnesses in addition to cancers and leukemia) already would be covered under the current provisions of the Act.

27. What modifications in the Act or its implementation, if any, could facilitate the prompt payment and settlement of claims?

No comments have addressed any apparent reason for modifications in the Act or its implementation to facilitate the prompt payment and settlement of claims. As stated in the Group's original comments of January 30, 1998, Section 170m of the Act already contains sufficient provisions for payment of immediate assistance following a nuclear incident (without even requiring the securing of releases from claimants).

28. Should DOE continue to be authorized to issue civil penalties pursuant to section 234A of the AEA? Should section 234A be modified to make this authority available with respect to DOE

activities that are not covered by the DOE Price-Anderson indemnification? Should DOE continue to have authority to issue civil penalties if the Act is modified to eliminate the DOE Price-Anderson indemnification with respect to nuclear incidents that results from the gross negligence or willful misconduct of a DOE contractor?

This issue was addressed directly only by the Group's comments of January 30, 1998 and those of Lockheed Martin Corporation (Jan. 30. 1998). Both conclude DOE should continue to have authority to issue civil penalties pursuant to Section 234A, *unless* the Act is modified to eliminate the DOE Price-Anderson indemnification with respect to nuclear incidents that results from the "gross negligence" or "willful misconduct" of a DOE contractor.

29. To what extent does the authority to issue civil penalties affect the ability of DOE to attain safe and efficient management of DOE activities? To what extent does this authority affect the ability of DOE and its contractors to cooperate in managing the environment, health, and safety of DOE activities through mechanisms such as integrated safety management? To what extent does this authority help contain operating costs including the costs of private insurance if it were to be required?

This issue was addressed directly only by the Group's comments of January 30, 1998 and those of Lockheed Martin Corporation (Jan. 30. 1998). Both essentially say the extent to which the authority to issue civil penalties affects the ability of DOE to attain safe and efficient management of DOE activities and to cooperate in managing the environment, health, and safety of DOE activities through mechanisms such as integrated safety management remains to be demonstrated.

30. Should there continue to be a mandatory exemption from civil penalties for certain nonprofit contractors? Should the exemption apply to for-profit subcontractors and suppliers of a nonprofit contractor? Should the exemption apply to a for-profit partner of a nonprofit contractor?

The Group still takes no position at this time on whether or not there should be a mandatory exemption from civil penalties for certain nonprofit contractors.

31. Should DOE continue to have discretionary authority to provide educational nonprofit institutions with an automatic remission of civil penalties? If so, should the remission be available where the nonprofit entity has a for-profit partner, subcontractor, or supplier?

The Group still takes no position at this time on whether or not DOE should continue to have discretionary authority to provide educational nonprofit institutions with an automatic remission of civil penalties.

32. Should the maximum amount of civil penalties be modified? If so, how?

The Group reiterates there is no apparent reason for modifying the maximum amount of civil penalties. No commenter has shown otherwise.

33. Should the provisions in section 234A.c. concerning administrative and judicial proceedings relating to civil penalties be modified? If so, how?

The Group reiterates there is no apparent reason for modifying the provisions in Section 234A.c concerning administrative and judicial proceedings relating to civil penalties. No commenter has shown otherwise.

34. Should there be any modification in the authority in section 223.c. to impose criminal penalties for knowing and willful violations of nuclear safety requirements by individual officers and employees of contractors, subcontractors and suppliers covered by the DOE Price-Anderson indemnification? Should this authority be extended to cover violations by persons not indemnified?

The Group reiterates there is no apparent reason for any modification in the authority in section 223.c to impose criminal penalties for knowing and willful violations of nuclear safety requirements by individual officers and employees of contractors, subcontractors and suppliers covered by the DOE Price-Anderson indemnification. No commenter has shown otherwise.

III. Reply to Miscellaneous Comments

1. Comments of North American Water Office

The comments of North American Water Office (Jan. 30, 1998) all appear to be addressed to whether the Price-Anderson Act should continue to apply to the "commercial nuclear industry." These comments have no relevance to the issues associated with whether Price-Anderson indemnification should continue to apply to DOE contractors.

2. Consideration of 1997 Conference on Vienna Convention

The comments of OHM Remediation Services Corp. (Jan. 30, 1998) state that the DOE Report to Congress should address how the "[t]wo nuclear liability agreements adopted at the 1997 Vienna Conference" will affect the Price-Anderson Act. This apparently is a reference to 1997 Protocol to Amend

the 1963 Vienna Convention on Civil Liability for Nuclear Damage and the Convention on Supplementary Compensation for Nuclear Damage. These international instruments relate principally to commercial nuclear facilities, particularly nuclear power plants. They therefore have no relevance to the issues associated with DOE indemnification of its contractors. There is no reason for them to be addressed in DOE's forthcoming Report to Congress.

3. Formerly Utilized Sites Remedial Action Program

The comments of OHM Remediation Services Corp. (Jan. 30, 1998) state that the DOE Report to Congress should address the transfer of DOE's Formerly Utilized Sites Remedial Action Program (FUSRAP) to the U.S. Army Corps of Engineers (Corps). The apparent concern is that the Corps does not have statutory authority to enter into nuclear hazard indemnity agreements under the Price-Anderson Act. The issue of the jurisdiction of the Corps is not an appropriate topic for DOE's Report to Congress on extension of the Price-Anderson Act.

4. Private Independent Spent Fuel Storage Installation Coverage

The comments of the Western Interstate Energy Board (Jan. 30, 1998) take the position that the Price-Anderson Act should be amended to make it clear that the Act's coverage will apply to nuclear incidents related to transportation or storage of radioactive waste to or from a private independent spent fuel storage installation. While such a facility probably would come within the jurisdiction of the Nuclear Regulatory Commission, the Group agrees that independent spent fuel storage installations should be covered by the Price-Anderson Act.

5. "Solvency" of the Price-Anderson System

The comments of the Western Interstate Energy Board (Jan. 30, 1998) state that DOE's Report to Congress should address the future "solvency" of the Price-Anderson system in light of the current onset of electric industry restructuring across the nation and how the shutdown of nuclear power plants could affect the Price-Anderson system. Price-Anderson coverage for nuclear power plants is a matter within the jurisdiction of the Nuclear Regulatory Commission, and therefore should not be addressed in the DOE Report to Congress.

6. Use of the Term "Nuclear Incident"

The comments of the Environmental Coalition on Nuclear Power (ECNP) (Jan. 29, 1998) suggest that "[a]ll DOE staff (and NRC and EPA and rest of the government's bureaucracy, not to mention the

industry they supposedly regulate) should be required to spend an hour a day learning the dictionary meaning of the words they use." This colorful suggestion was prompted by ECNP's objection to the word "incident," as opposed to "accident," to describe when nuclear damage claims are covered by Price-Anderson. Had the ECNP followed its own lexicographic advice, it would have discerned that the Atomic Energy Act's use of the word "incident" actually provides greater protection to victims of nuclear exposures than use of the word "accident" would have. The word "incident" is more broadly defined to include an occurrence of relatively minor significance, while the word "accident" suggests an unforeseen happening or an unexpected, unintentional, chance event. *See, e.g.,* Webster's New World Dictionary of the American Language (2d College Ed. 1970). Thus, the word "incident" in the context of Price-Anderson affords more protection for victims than would the word "accident."

7. Criteria for Extraordinary Nuclear Occurrence

The comments of Marilyn Gayle Hoff (Jan. 27, 1998) suggests that authority to declare an "extraordinary nuclear occurrence" (ENO) should be transferred to "a body of representative experts and private citizens with no conflict of interest." Determination as to whether an event was a ENO now would be made by DOE under criteria established in writing and by rulemaking and published in the Code of Federal Regulations. *See* 10 C.F.R. Part 840 and 42 U.S.C. §2014(j) (requiring DOE establish criteria in writing setting forth the basis upon which an ENO determination shall be made).

The DOE ENO criteria set relatively low thresholds, which if found require a finding that a particular event was an ENO. When Congress adopted the ENO provision in 1966, it determined that the waivers of defenses should not apply to all "nuclear incidents" for fear of encouraging nuisance suits. *See* Joint Committee on Atomic Energy Report September 16, 1966, Accompanying Bills to Amend Price-Anderson Act, *reprinted in* Selected Materials on Atomic Energy Indemnity and Insurance Legislation, 93d Cong., 2d Sess. (Mar. 1974) at 308-311. Congress accepted the view that contractors should be able to assert defenses permitted by State law in circumstances where the plaintiff's claim may be spurious. *Id.* at 309. Congress also determined "[a]fter considerable study" that it was advisable to vest the then Atomic Energy Commission (now DOE) with authority to determine whether an ENO had taken place. The Congressional Committee report said this decision rested in large measure on the difficulty of fixing a definition which could be suitable for a wide variety of circumstances, and the need for application of informed judgment to the facts of a particular case. *Id.* at 310.

The Congressional Committee further observed that, absent an ENO determination, "...a claimant would have exactly the same rights that he has today under existing law - including, perhaps, benefit of a rule of strict liability, if applicable State law so provides. Thus, this bill in no way provides for deprivation of a claimant's existing rights." *Id.* The Group submits that the ENO provision strikes an appropriate balance, and should not be altered.

IV. Conclusions

For the reasons stated herein and in its comments of January 30, 1998, the *ad hoc* Energy Contractors Price-Anderson Group again submits DOE should present to Congress a report that strongly recommends continuation (with the modifications and clarifications stated earlier) of the nuclear hazards liability protection provided by the Price-Anderson Act.

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Respectfully submitted,

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