UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

May 29, 1997

OFFICE OF THE
SECRETARY

John A. Reding, Esquire
Crosby, Heafey, Roach & May
1999 Harrison Street
Oakland, California 94604-2084

Re: CLI-97-6

Dear Mr. Reding:

Enclosed is a copy of CLI-97-6, addressing the request of the Regents of the University of California for reimbursement of legal expenses incurred by the University in connection with its defense of two suits. The decision is also being faxed to you and to Mr. Edward H. Boehner, Vice President-Liability Claims of the American Nuclear Insurers on this date.

With respect to the fax copy, please call the Office of the Secretary on 301-415-1966, to confirm satisfactory receipt of the Order.

Sincerely,

Emile L. Julian

Emile L. Julian
Assistant for Rulemakings
and Adjudications

cc: Edward H. Boehner

UNITED STATES
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Kenneth C. Rogers
Greta J. Dicus
Nils J. Diaz
Edward McGaffigan, Jr.

In the matter of	)
	)
Indemnity Claim	)
	)
The Regents of the University of California	)

CLI-97-6

DECISION

I. Introduction

In a series of letters beginning on January 17, 1996, the Regents of the University of California have demanded that the Commission pay $91,375.22 in indemnification for attorneys' fees and expenses incurred in defending two private tort suits against the Regents.[1] The Regents seek indemnification under Section 170 of the Atomic Energy Act, 42 U.S.C. § 2210 (known as the Price-Anderson Act), and under their indemnity agreement with the Commission executed pursuant to that Act.

[1]The Regents' initial letter, dated January 17, 1996, demanded NRC payment of $76,102.26. More recently, in a letter dated January 31, 1997, the Regents amended their claim to include an additional $15,272.96 in legal costs, an amount which apparently reflects attorneys' fees and costs the Regents have incurred in pursuing their indemnity claim with the NRC. The Regents' submissions do not make clear who bears the risk of loss in the event that the NRC rejects the indemnity claim. That presumably is a matter of contract among the Regents, their private insurer and the law firm that has handled this matter.

The two underlying tort suits, known as the Miller and Redisch cases, sought damages for harm to plaintiffs' persons allegedly caused by releases of radioactivity during normal operations of the NRC-licensed Argonaut nuclear test reactor at the University of California at Los Angeles (UCLA) between 1979 and 1984. By late October, 1996, the Regents had settled both cases, which therefore were never tried or decided on the merits. The settlements resulted in the payment of no damages to plaintiffs. Under their terms, plaintiffs voluntarily dismissed their lawsuits, and the Regents relinquished all rights to seek legal costs from plaintiffs.

Under the Price-Anderson Act and under the Commission's indemnity agreement with the Regents, the Commission agreed to indemnify the Regents for "public liability" exceeding $250,000 when such liability arises from a "nuclear incident." See Section 170k, 42 U.S.C. § 2210(k). The Regents' January 17, 1996, claim for indemnity asserted that expenses incurred in defending the Miller and Redisch cases exceeded the $250,000 threshold by roughly $76,000. The Regents' private insurer apparently paid the first $250,000 in legal costs.

In a letter dated August 6, 1996, the Commission's Office of the General Counsel advised lawyers for the Regents that it was disinclined to recommend payment of the indemnity claim. More than six months later, on January 31, 1997, the Regents replied and asked that their claim be presented directly to the Commission.

After reviewing the factual background of the Regents' indemnity claim, the relevant provisions of the Price-Anderson Act, and the Regents' letters and submissions to the NRC detailing their claim, we have decided to deny it -- for two independent reasons. First, the Price-Anderson Act is best understood as barring Commission payment of licensee legal expenses incurred in connection with settlements. See Section 170h, 42 U.S.C. § 2210(h). Second, even if we were able to construe the Act to permit Commission payment of such expenses as a general matter, we would not approve an indemnity payment in this case because the Regents failed to give the Commission reasonable notice of the extent of their expenses in time for the Commission to take protective measures. See id. Some of the expenses also appear unreasonably excessive or insufficiently related to defense of the underlying tort suits.

We detail the reasons for our decision below. We issue our decision as a formal opinion because the Regents specifically requested Commission consideration of their indemnity claim, and because our views may shed some light on seldom invoked provisions of the Price-Anderson Act.

II. DISCUSSION

The Commission plainly cannot authorize expenditures of government money without express statutory authority or in the face of a statutory prohibition against such payments. Both the Constitution (the Appropriations Clause, Art. 1, § 9, cl.7) and federal statute (31 U.S.C. §§ 1341, 1350) impose this restriction

on Commission expenditures. See Office of Personnel Management v. Richmond, 496 U.S. 414, 424-30 (1990). Under the related "sovereign immunity" doctrine (id., at 432), a claimant may not pursue monetary relief against the government absent authority "unequivocally expressed in statutory text." Lane v. Pena, 116 S.Ct. 2092, 2096 (1996).

This background law requires the Commission to scrutinize the Regents' claim against the public treasury in this case with great care. We cannot discern the clear authority necessary to pay the claim. Nor would we find the claim otherwise payable even if we were able to answer the authority question differently.

1. Authority to Pay.

Contrary to the Regents' view, we believe that Section 170h of the Atomic Energy Act provides the governing law. That section appeared in the original 1957 Price-Anderson Act and to this day provides the authority for the Commission to collaborate with an indemnified person, approve payments of claims, appear through the Attorney General on behalf of the person indemnified, take charge of such action, and settle or defend any such action. Section 170h further provided, in its original form, that a settlement "may include reasonable expenses in connection with the claim incurred by the person indemnified."[2]

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[2] See H.R. Report No. 296, 85th Cong. 1st session 23 (1957) (noting that the expenses "could include reasonable attorney's fees incurred by the person indemnified in examining any claims").

Section 170h has had only one substantive alteration. That came in 1975 as part of a series of changes presented as an amendment by Senator Hathaway. Senator Hathaway's aim was (at least in part) to ensure that government indemnity money ended up in the hands of victims of nuclear incidents, and was not diverted to attorney's fees and other costs. See generally Damage Claims under the Atomic Energy Act, 1 U.S. Opp. OLC 157 (1977).

The Hathaway Amendment altered a number of the Act's provisions, including Section 170h, which as revised provided that a Commission-approved settlement "shall not include expenses in connection with the claim incurred by the person indemnified" (emphasis added). "Therefore," concluded the Comptroller General in a 1980 opinion, "the Act must be interpreted as follows: the government will not indemnify a person for his legal expenses." See "Interpretation of Price-Anderson Act," File B-197742, 1980 WL 16980, *4 (C.G.).

In 1988 amendments to the Price-Anderson Act, after revisiting the legal costs issue in cognizant committees, Congress loosened the across-the-board restrictions on government payment of legal costs and modified several of the Hathaway Amendment provisions, but did not alter Section 170h in any respect. This leaves in place the Section 170h bar against indemnifying a licensee's expenses in settlements and prevents the Commission from paying the legal expenses incurred by the Regents in settling the Miller and Redisch cases. Congress may

have assumed that licensees' own insurance would be adequate to cover legal costs in such cases. See Damage Claims Under the Atomic Energy Act, 1 U.S. Op. OLC at 158 & n.3 (discussing legislative history of Hathaway Amendment).

The Regents argue that Section 170h does not apply here because the Miller and Redisch lawsuits in actuality were dismissed, not settled. We find this argument wholly unpersuasive. The documents the Regents themselves have provided us show plainly that the two cases were dismissed voluntarily and only after the parties reached a negotiated arrangement in which the Regents, among other things, forfeited any right to seek costs from plaintiffs. By any standard, this qualifies as a "settlement."

The Regents' only other argument is that the Section 170h bar must give way because it is less "specific" than another provision, Section 170k, which applies to educational institutions and appears to contemplate government payment of licensee legal costs in some situations.[3] As noted above, the

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[3]Section 170k's applicability here is far from crystal-clear by its own terms. That provision establishes that the Commission shall indemnify educational licensees "from public liability in excess of $250,000 for nuclear incidents," and says that the "aggregate indemnity" in connection with each nuclear incident may not exceed $500,000,000, "including such legal costs as are approved by the Commission." But in this case the aggregate indemnity limit was never approached. And no public liability payment was made, much less one in excess of $250,000. By definition, "public liability" does not include legal costs; by contrast, licensees' own "financial protection" is defined as including damages and legal costs. See §§ 11k, 11w, 42 U.S.C. §2014(k), (w). For educational institutions the financial protection requirement was waived and instead the requirement for exceeding $250,000 in public liability was established as the

"legal costs" language currently found in Section 170k (and in other Price-Anderson Act provisions) dates from the 1988 Amendments that modified some aspects of the 1975 Hathaway Amendment but made no changes in Section 170h. Standard principles of statutory construction prevent us from assuming that Congress repealed Section 170h by implication. Watt v. Alaska, 451 U.S. 259, 266-67 (1981). On the contrary, we are obliged to give effect to all statutory provisions. Id. See Bennett v. Spear, 117 S.Ct. 1154, 1166 (1997).[4] We cannot, therefore, accept the Regents' invitation simply to ignore the Section 170h prohibition.

We see no basis, in sum, for disregarding Section 170h's apparent prohibition against paying licensee legal expenses incurred in settling cases. The Regents themselves have offered us none. We therefore decline to approve their indemnity claim.

2. Prior Notice and Reasonableness of Indemnity Claim.

Even if Section 170h did not bar Commission reimbursement of licensee legal costs in settled cases, as we think it does, we would not approve payment of the Regents' indemnity claim in this

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trigger for governmental indemnity. See § 170k, 42 U.S.C. 2210(k).

[4]Our reading of Section 170h does not nullify the "legal costs" authorization found in Section 170k or in other provisions of the Price-Anderson Act. Those provisions remain applicable in the absence of a settlement. Moreover, even in connection with a settlement, the Commission could approve payment of plaintiffs' legal costs. See § 11jj, 42 U.S.C. § 2014(jj). Section 170h simply prevents Commission payment of licensees' legal costs in settling a case.

case. The Price-Anderson Act, and the NRC's indemnity agreement with the Regents, indisputably contemplate Commission "approval" of claims for legal costs. Such a right of approval implies Commission review for reasonableness. Here, we cannot find the Regents' claim reasonable.

a. As a matter of procedure, the Price-Anderson Act contemplates that at the point where governmental indemnity arises, here at the $250,000 threshold, the licensee will offer the government the opportunity to take over defense of the claims and manage the lawsuit. See § 170h, 42 U.S.C. § 2210(h). One purpose of this provision, presumably, is to allow the government to take over representation or active management of the case with a view toward minimizing public expenses.

Here, a series of letters from counsel for the Regents did alert the NRC staff to the existence of the Miller and Redisch cases, and to the possibility of exceeding the $250,000 limit. But the Regents' letters also indicated that plaintiffs' merits claims were insubstantial and that the case would be "tendered" to the NRC if expenses reached the $250,000 limit. See, e.g., Letter dated August 10, 1995. No "tender" ever occurred until the two cases ended, after the Regents had exceeded the $250,000 limit by nearly $80,000. The lack of timely tender prejudiced the NRC.

Eight days before the parties agreed on the settlement in Redisch, with the Miller suit having already been dismissed, the Regents' insurer sent the NRC a letter reporting $28,534.08 in

remaining "available financial protection" from the private insurer and indicating that tender to NRC was expected "in the very near future since [the Redisch case] is still unresolved." See Letter from Boehner, dated October 18, 1995. But it now appears that in actuality the Regents' law firm at that time already had incurred additional billable hours amounting to more than $30,000 and already had paid out additional expenses in excess of $20,000 (many apparently incurred much earlier). In other words, the Regents already had entirely consumed and substantially exceeded the $28,534 that supposedly remained as "available financial protection."

Thus, if the Regents were correct that their legal expenses were payable by the NRC after $250,000 (but see footnote 3, supra), they had reached an appropriate tender time and passed it before they negotiated the Redisch settlement. By statute, they not only ought to have notified the NRC but they also should have sought NRC approval of the settlement. See § 170h, 42 U.S.C. § 2210(h). As part of the settlement, however, and without NRC approval, they relinquished any right to claim legal costs against plaintiffs or monetary sanctions under Rule 11 of the Federal Rules for Civil Procedure. Had the NRC been given pre-settlement notice that the $250,000 limit had been reached, it might have insisted on some recompense from plaintiffs or their lawyers for the substantial expenses their insubstantial lawsuit had caused. The government almost surely would have limited any further expenditures by the private lawyers.

Even the Regents' letter reporting termination of the case indicated that there still remained $3,654.94 of the insurance money. That letter suggested only that "some expense in excess" of $250,000 might be expected. See Letter dated December 6, 1995. By then, of course, there was no case for the government to take over and no opportunity to minimize government costs. In addition, when read in conjunction with the prior letter's reference to $28,000 in remaining financial protection, the close-out letter's language raised no expectation of more than a de minimis exceeding of the $250,000 limit. The NRC therefore was quite surprised a few weeks later, when counsel for the Regents demanded $76,000 from the Commission. The substantial excess, one-third again over the insurance amount, apparently occurred in some measure because of late-arriving bills for earlier-performed services.

In these circumstances, the government was not given a timely opportunity to take over these cases and minimize public costs. The Regents have since suggested that the NRC staff ought to have been aware that experts' fees would be high and that pre-trial preparation would be expensive; however, the people in the best position to make that assessment were the defendants' counsel themselves. The Regents' correspondence did not call attention to the apparently lengthy lag time between incurring obligations for expenses and notification of them as expenditures. And, as we stressed above, the Regents did not make its tender in time for the NRC to monitor and approve the

ultimate settlement or otherwise to take action in an attempt to minimize the potential costs to the U.S. Government.

In short, given the Regents' failure to timely tender the case to the NRC, we do not find it reasonable for the government to pick up the bill for the Regents' expenses.

b. In addition, some of the expenses incurred by the Regents in reaching and exceeding the $250,000 limit appear questionable substantively. To begin with, we see no basis in the Price-Anderson Act to approve the Regents' claim for approximately $15,000 in attorney's fees and costs incurred after termination of the underlying tort suits, apparently as part of the Regents' effort to persuade the NRC to make indemnity payments. See note 1, supra. The Act provides for indemnification of expenses incurred defending claims against licensees, not reimbursement for expenses incurred in presenting claims to the government.

The Regents' fee claim raises a number of additional questions. For example, the billing records' descriptions of law firm hours are often vague and insufficiently segregated as to tasks as well as being chronologically out of order -- with significant expenses for billed hours appearing considerably later than previous invoices represented as being "for services rendered through" a specified date. Moreover, the billing records indicate that counsel incurred substantial expenses on matters not directly related to defense of the tort cases, such as correspondence with the insurer-client and organizing what

were apparently disorganized UCLA files. Finally, the records show that high-priced law firm partners, rather than associates or paralegals, conducted such fairly mundane tasks as document and privilege reviews and also that they traveled extensively to meet with experts rather than conduct conferences by telephone, at significantly less expense.

The Regents might be able to provide adequate answers to some or all of our substantive questions. But we need not resolve these questions definitively in view of our decision on other grounds not to pay Price-Anderson Act indemnity in this case.

CONCLUSION

For the foregoing reasons, the Commission declines to approve the Regents' indemnity claim.

For the Commission

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of May, 1997.