



MAELU

Mutual Atomic Energy Liability Underwriters

DOCKET NUMBER

PETITION RULE PRM-140-2^①
(45 FR 26973)

June 13, 1980

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing & Service Branch Docket No. PRM-140-2

Gentlemen:

PETITION FOR RULEMAKING DOCKET NO. PRM-140-2
FINANCIAL PROTECTION REQUIREMENTS
AND INDEMNITY AGREEMENTS

This response is made on behalf of Mutual Atomic Energy Liability Underwriters (MAELU) and American Nuclear Insurers (ANI).

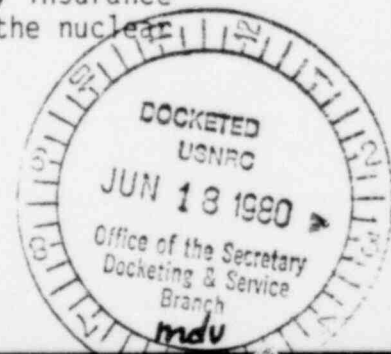
We have read the petition for rulemaking assigned Docket No. PRM-140-2 which requests that the Commission amend its regulations relating to Financial Protection Requirements and Indemnity Agreements "to increase the amount of liability insurance required of persons licensed to operate large commercial nuclear power plants".

Section 170b of the Atomic Energy Law provides that "The amount of financial protection required shall be the amount of liability insurance available from private sources...", and specifies that for large reactors, "the amount of financial protection shall be the maximum amount available at reasonable cost and on reasonable terms from private sources".

No major private enterprise can function without the benefit of protection by a variety of insurance coverages. The Congress has been aware that other insurance, in addition to liability insurance for the nuclear energy hazard is necessary for the nuclear industry and must also be obtained from private sources. Thus the Congress never intended that the amounts of workers' compensation insurance, general liability insurance, automobile, property insurance, business interruption, bonding or surety insurance and other types of insurance that may be available to the nuclear industry be considered by the NRC in determining the amount of liability insurance available from private sources as financial protection for the nuclear hazard.

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Congress directed the NRC by the amendment made to Section 170b in December 1975, that in determining the maximum amount of liability insurance available from private sources it include private liability insurance made available under the industry retrospective rating plan. Had the Congress believed that other kinds of insurance were to be included in the NRC's determination, the law would have so stated.

It would be helpful to review the background of the Price-Anderson Insurance and Indemnity program, the history of the nuclear insurance pools, their capacity and where it comes from.

The Price-Anderson Insurance and Indemnity Program

When the Atomic Energy Act of 1954 was enacted to speed the development of atomic energy for peaceful purposes, Congress recognized the potential hazards as well as the benefits. The act established a comprehensive regulatory program to protect the health and safety of employees and the public. But it soon became apparent that the problem of potential liability and inability to obtain adequate insurance from private sources had become a road-block to further progress. This was true even though there was general agreement among the experts that the probability of a major nuclear accident was exceedingly low.

Representatives of Government and private industry held a series of meetings and hearings over a period of two years. In March of 1955, the Atomic Energy Commission appointed a group from the insurance industry to undertake a study of liability and property insurance problems associated with the peaceful use of atomic energy. The group included senior underwriters and actuaries from several major companies.

The study group advised the Commission in June, 1955 that the primary difficulties would be in connection with third party liability. No difficulty was foreseen in providing reasonable amounts of property insurance for nuclear facilities. Workers' compensation coverage could be handled in a normal way.

Following the study group's report, the insurance industry formed national property and liability insurance pools for nuclear risks. Although they raised \$60 million of liability coverage, an unprecedented amount at that time, this was not regarded as sufficient to cover the potential liability claims which might result from a catastrophic nuclear accident.

A number of possible approaches were considered by Government and industry representatives, including Government liability coverage without a maximum limit; limited liability for the nuclear industry; a voluntary system of Government insurance in excess of available private insurance; and Government indemnity in excess of financial protection from private sources.

Opinion generally crystallized in favor of the last approach mentioned. In September of 1957 Congress enacted an amendment to the Atomic Energy Act of 1954. The law became known as the Price-Anderson Act in recognition of its sponsorship by Congressman Melvin Price and Senator Clinton P. Anderson.

The new law stated its purpose and scope in simple terms:

In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

The Price-Anderson Act requires the operators of nuclear power plants and other facilities to have financial protection covering liability claims for bodily injury or property damage caused by the nuclear energy hazard.

Financial protection may be in the form of private insurance or private securities or a combination. In practice operators of nuclear power plants have purchased nuclear liability policies from the nuclear pools. The financial protection covers not only claims against the operator of the power plant, but also against any other person who may be liable. This includes, but is not limited to, architects, engineers, contractors and other suppliers of services or components. The pilot of an aircraft who has the misfortune to crash into the reactor would be covered as well as a saboteur if an act of war were not involved.

This feature of Price-Anderson effectively channels the financial responsibility and insurance obligation for injury to the public directly to the operators of nuclear power plants even when others would be primarily liable under ordinary tort law principles. Channelling has two principal benefits. It makes virtually certain that the public will be able to establish liability for a nuclear incident which will be backed by solid financial resources to pay for damages sustained. Channelling also provides the insurance industry with the concentration of risk and the stable premium base necessary for spreading the risk of a nuclear catastrophe over an extended period of time.

Ease of recovery by the public has been enhanced by amendments to the original Price-Anderson program. These changes provide for emergency assistance payments in the event of a nuclear incident which can be made without admitting fault or obtaining releases. If the nuclear incident is serious enough to qualify as an "extraordinary nuclear occurrence" under the Nuclear Regulatory Commission's regulations, all persons covered by the financial protection must "waive" traditional third party liability defenses. The time for bringing suits is extended to 20 years. All suits may be consolidated in a single Federal court. If the total damages are likely to exceed the limitation on liability, the court can require submission of a plan for the distribution of funds. The court may also set aside a portion of the funds for the compensation of persons whose injuries may emerge in the future.

The financial protection requirements apply to all privately owned nuclear reactors, except those operated by non-profit educational institutions, and to a few other types of nuclear facilities. The amount required ranges from \$1 million to \$160 million, which is the present maximum capacity of the nuclear pools. We will confine our discussion to the large scale nuclear power reactors designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more. Operators of these power plants must maintain financial protection against the nuclear liability hazard equal to the maximum amount of private insurance available at reasonable cost.

In addition to a primary layer of \$160 million, operators of large reactors are now required to maintain a secondary layer of financial protection. If a nuclear incident causes damages exceeding \$160 million, each large commercial nuclear power plant would be assessed for a prorated share of the damages in excess of the primary layer. The maximum assessment is \$5 million for each power plant for each incident, but not more than \$10 million for each reactor in any one calendar year. The 70 power plants now operating under this system provide \$350 million of secondary financial protection. The total financial protection presently available from private sources is \$510 million.

Originally Price-Anderson provided for \$500 million of government indemnity above the amount of financial protection required. The Nuclear Regulatory Commission's indemnity agreements also follow the channelling approach. When the pools first started operations the highest limit they could offer the large power plants was \$60 million. Accordingly there was a total of \$560 million available for the protection of the public.

The Price-Anderson program encourages private development of nuclear power by limiting the liability of all persons responsible for a nuclear incident to an amount equal to the sum of the financial protection required and the amount of government indemnity available.

The limitation on liability, originally fixed at \$560 million, has remained constant since 1957. Every dollar of increased financial protection from private sources results in a corresponding reduction in government indemnity. But when the amount of financial protection goes beyond \$560 million, the limitation on liability will float upward to match.

At present the Government's indemnity obligation has been reduced to \$50 million. Ten new power plants will reduce it to zero. If in the 1980's we should reach a total of 100 large power plants, the limitation on liability and the financial protection (assuming no change in the nuclear pools' capacity) would then become \$660 million.

Congress, however, has never regarded the limitation on liability as an absolute cut-off on compensation for injuries, but rather as a reasonable stopping point for reviewing any actual case where damages exceed the limitation on liability and then determining what further action is called for. In 1975 Congress

formalized its commitment by inserting the following provision in Section 170(e) of the Atomic Energy Act.

PROVIDED, That in the event of a nuclear incident involving damages in excess of that amount of aggregate liability, the Congress will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude.

In the mid 1970's environmentalists and others critical of nuclear power challenged the Price-Anderson limitation of liability. A lower court held that the limitation was unconstitutional.

The suit, DUKE POWER COMPANY v. CAROLINA ENVIRONMENTAL STUDY GROUP, INC., ET AL, reached the United States Supreme Court. In June, 1978 the Supreme Court reversed the lower court, finding that the manifold arguments of unconstitutionality were without merit.

There is ordinarily a strong presumption in favor of the validity of Acts of Congress. But, far from viewing the Price-Anderson program as one which could barely pass constitutional muster, the Supreme Court gave Congress a high mark, as is apparent from the Court's general appraisal of the Price-Anderson Insurance and Indemnity Program:

The Price-Anderson Act not only provides a reasonable, prompt and equitable mechanism for compensating victims of a catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation. Moreover, the Act contains an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the \$560 million ceiling on liability is exceeded. This panoply of remedies and guarantees is at least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act.

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The Price-Anderson program is unique. We know of no other insurance program in the United States comparable in size or degree of protection. It has been frequently characterized as to a "no fault" compensation plan. This is an accurate description in a sense because injured persons do not have to prove fault in order to recover under the "waiver of defenses" provisions. But the compensation goes beyond ordinary automobile or workers' compensation no-fault plans because it includes coverage for general damages as well as economic losses. And most natural disaster programs are limited to property insurance.

What is perhaps most remarkable about the Price-Anderson program is that it has been able to achieve such scope without any substantial replacement of state law, either as to the fundamental rights of the public to compensation or the regulation of insurance. No special Federal tort law for the nuclear industry has been needed. This has contributed greatly to its acceptance in industry and regulatory circles.

THE NUCLEAR POOLS

Traditionally, insurance companies in the United States have been organized along two major lines: the investor owned stock companies and the policyholder owned mutuals. The nuclear pools were organized in early 1956 on a similar basis to meet the challenge of the new hazard.

The stock and mutual pools cross-reinsure each other on a "quota share" basis on every risk. "Quota share" is a term of art in the insurance business. It means a percentage sharing of each dollar of loss and premiums. Domestic reinsurers participate as members of the pools. The stock and mutual pools are also reinsured by foreign insurers representing virtually the entire world-wide private insurance market. This reinsurance is also on a quota share basis.

The pooling of both the direct insurance and foreign reinsurance has some important advantages in meeting the objective of the pools to provide maximum capacity at reasonable cost. First, it avoids adverse selection against various segments of the insurance market. Some nuclear risks are more desirable than others. Lack of coverage, less capacity or extremely high rates might develop for some risks if the quota share, cross-reinsurance principles were not applied. Pooling and cross-reinsurance also lower administrative costs in placing insurance and reinsurance because all segments have ready access to basic underwriting information and operating experience. And finally, the organized pooling arrangements contribute to a stable capacity from well established, financially sound sources.

The property insurance written by the nuclear pools provides "all risk" protection with specific exclusions for a few perils (such as flood) and with a mandatory deductible depending upon the size and type of the facility. Radioactive contamination coverage on the property insured, resulting from an incident occurring on the described premises, is included within the "all risk" coverage. Policies are written for an annual period.

The nuclear pools write two basic forms of nuclear energy liability policies -- the Facility Form and the Supplier's and Transporter's Form. They afford coverage for the nuclear energy hazard only.

The Facility Form is for the owners and operators of nuclear facilities -- particularly those who must maintain financial protection under the Price-Anderson Program. It has been approved by the Atomic Energy Commission and the Nuclear Regulatory Commission. Because the scope of financial protection against public liability is so broad, the facility policy has several features not found under standard liability insurance contracts.

The most striking feature of the policy is the extremely broad "omnibus clause" under which any person or organization becomes an insured with respect to legal responsibility for damages because of bodily injury or property damage caused by the nuclear energy hazard. The only exceptions are the United States and its agencies. No business relationship, direct or indirect, with the nuclear facility is needed for the omnibus protection to come into play. This feature matches the Price-Anderson Act's financial protection requirements.

Although the Facility Form of policy covers suppliers of goods and services, the two pools also write a Supplier's and Transporter's Form for those who may supply goods or services to facilities which have not purchased a Facility Form or wish additional amounts of coverage (if available) above those provided in such a policy.

Because the nuclear pools provide such broad coverage for such high amounts, most nuclear risks must be excluded from our conventional policies. Otherwise insurers and reinsurers around the world would face unquantifiable accumulations of their exposures to nuclear losses. This uncertainty would result in a sharp reduction in the supply of insurance protection for the public and an increase in its cost.

The nuclear exclusions in the insurance industry's regular policies prevent this accumulation of exposure and help us to make both nuclear insurance and our regular insurance widely available, in greater amounts and at lower cost. We are able to do this without any over-all reduction in protection to the public because of the unique features of the Price-Anderson program.

The general thrust of the nuclear exclusions is to concentrate coverage for nuclear power plants and other relatively high risk operations in the nuclear pools. Nuclear risks with low loss potential, such as the use of radioactive isotopes for agricultural, medical, industrial and other general commercial purposes, are normally insured under our regular policies.

THE NUCLEAR POOLS: THEIR CAPACITY AND WHERE IT COMES FROM

The nuclear pools are voluntary associations of insurance companies. The pools are separately managed. Each pool sets its own eligibility requirements. In general, membership is open to all companies that meet certain minimum requirements as to financial soundness in relation to size of desired participation.

Each member of the pools determines for itself the maximum dollar participation for a single nuclear loss which it will commit. The stock companies make separate commitments for property insurance and liability insurance. The mutual companies make a single commitment of their participation in nuclear risks, and the members of MAELU decide how their total capacity should be allocated.

The mutual and the stock pools each solicit through separate reinsurance brokers the maximum foreign reinsurance capacity in the world markets. Foreign reinsurance is pooled and then allocated to the pools in relation to their domestic capacity, but foreign reinsurers determine for themselves the gross amounts they wish to make available separately for property and liability insurance.

The pools make a drive for new capacity whenever they think there is a reasonable chance of interesting some new participants or getting their current participants to increase their subscriptions. Capacity has grown from the original \$120 million (split equally between property and liability coverage) to \$460 million (\$160 million for liability and \$300 million for property coverage). The pools also back up defaults in meeting the retrospective premium obligations of nuclear power plant operators with an additional \$30 million of contingent coverage. The following table shows the pools' maximum limits of coverage for nuclear liability and property insurance since 1957.

HISTORY OF MAXIMUM COVERAGE AVAILABLE
FROM THE NUCLEAR POOLS

| <u>Year</u> | <u>Liability Coverag</u> | <u>Property Coverage</u> |
|-------------|--------------------------|--------------------------|
| 1957 - 65 | \$ 60 Million | \$ 60 Million |
| 1966 - 68 | 74 Million | 74 Million |
| 1969 | 82 Million | 82 Million |
| 1970 - 71 | 82 Million | 84 Million |
| 1972 - 73 | 95 Million | 100 Million |
| 1974 | 110 Million | 130 Million |
| 1975 - 76 | 125 Million | 175 Million |
| 1977 - 78 | 140 Million | 220 Million |
| 1979 | 160 Million | 300 Million |

The limits of both the liability and the property damage coverage apply separately to each location, but the liability limits are shared in the case of a common occurrence involving two or more locations. Two separate accidents at different locations in the course of a year, for example, could expose the pools to two full-limit losses, or \$920 million.

Congress has urged the pools to do their best to provide property coverage as well as liability coverage. In recent years the property damage coverage capacity has grown faster. This is due to historical, economic and structural factors. Insurers in the United States have tended to specialize in liability or property insurance. Specialization is becoming blurred, but even today the stock pool has separate subscriptions for liability and property insurance. Some underwriters feel more comfortable insuring property damage risks, others prefer liability.

About 50% of the pools' total capacity comes from foreign sources, where insurers tend to specialize even more heavily in property coverages. Most countries place less emphasis on third party liability coverage than we do in the United States. And finally it may be noted that the plant values involved in nuclear generating stations have increased substantially with greater size and inflation.

Suggestions have been made in the past and are renewed by the petitioners that the public would be better served if the pools were to allocate all of their present capacity to third party liability coverage. These suggestions are unsound. The value of property coverage to the consumers of electric power is well illustrated by the TMI incident as their rates and service are directly affected by uncompensated damage to utility property. To force additional "self-insurance" on the public utilities for damage to their own plants by reducing the amount of property insurance available would only serve to over-tax their financial resources.

But in any case, we believe the above discussion of how the pools obtain their capacity shows clearly that the pools cannot arbitrarily allocate capacity as they please. The pools can merely marshal what underwriters in the private market are willing to supply on the basis of their own individual assessments of the risks in relation to the financial returns expected.

NRC's regulation 140.11(a)(4) properly implements the Atomic Energy Law.

Very truly yours,



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President, ANI



Ambrose Kelly
Manager, MAELU