STATE OF CALIFORNIA—THE RESOURCES AGENCY

EDMUND G. BROWN JR., Governor

CALIFORNIA ENERGY COMMISSION
1111 HOWE AVENUE
SACRAMENTO, CALIFORNIA 95825

June 20, 1980

DOCKET NUMBER
PETITION RULE PRM-140-2 (8)
(45 FR 26973)

Mr. Samuel Chilk
Secretary
Nuclear Regulatory Commission
1717 H Street, N.W., Room 1146
Washington, D.C. 20555

Attention: Mr. Chase Stephens

Dear Mr. Chilk:

Enclosed is the response of the California Energy Commission to the Nuclear Regulatory Commission's notice of rulemaking on financial protection requirements, Docket No. PRM-140-2, published in the Federal Register of April 22, 1980.

Please address all further notices and other correspondence in this proceeding to:

Daniel Meek
Office of the General Counsel
California Energy Commission
1111 Howe Avenue, MS-27
Sacramento, CA 95825

Thank you.

Sincerely,

Daniel Meek, FOR

WILLIAM M. CHAMBERLAIN
General Counsel

WMC/DM:cf
Enclosure

L-4-1, Pt.140
PRM-140-2

Acknowledged by card. 6/26/80 mdv.

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COMMENTS

of the

CALIFORNIA ENERGY COMMISSION

for

NRC RULEMAKING PROCEEDING ON
FINANCIAL PROTECTION REQUIREMENTS
[Docket No. PRM-140-2]

The California Energy Commission (CEC) favors an increase in the amount of financial protection that NRC requires the licensees of nuclear facilities and materials to maintain. Specifically, the NRC should increase this "primary layer" financial protection by: (1) requiring nuclear reactor licensees to offer to pay higher premiums in order to obtain greater amounts of private insurance coverage; (2) requiring each licensee to maintain separate financial protection for each nuclear facility; (3) requiring each licensee to provide additional financial protection by means of private contractual indemnities or by subjecting a portion of its assets to liability that might arise from a nuclear incident; (4) requiring increased financial protection for away-from-reactor spent fuel storage facilities; and (5) removing the investigative and legal expenses of licensees and insurers from the coverage afforded by the primary layer insurance policies.

I

THE NRC SHOULD INCREASE THE PRIMARY LAYER FINANCIAL PROTECTION IT REQUIRES LICENSEES TO MAINTAIN.

A. Commercial Nuclear Reactors.

The Price-Anderson Act directs the NRC to require the licensees of 100-megawatt or larger commercial nuclear reactors to maintain primary layer financial protection in the

> ". . . maximum amount available at reasonable cost and on reasonable terms from private sources. Such financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination of such measures and shall be subject to such terms and conditions as the Commission may, by rule, regulation, or order, prescribe." 42 USC §2210(b).

The $160 million primary layer financial protection presently required by the NRC does not represent the "maximum amount available at reasonable cost and on reasonable terms from private sources."

In real dollars, this $160 million is less than the $60 million originally required by the Act in 1957.[1/] In the meantime, the size of commercial reactors has increased 10-fold; many now approach or exceed 1000 megawatts of electric power capacity. Proportional to size, radioactive inventory and potential consequences of core meltdown or other catastrophic malfunction, the primary layer of financial protection has actually deteriorated by about 90% since 1957. This erosion is doubled when two reactors are located at the same

site (as are almost half of the commercial nuclear reactors already operating or under construction in the United States), because the NRC requires the licensee to maintain only one $160 million policy to cover them both, even though (1) shared safety systems and personnel increase the probability of simultaneous accidents at co-located reactors,[2] and (2) the NRC has no rule requiring a licensee to re-establish the $160 million coverage after the policy's liability ceiling has been decreased by an earlier nuclear incident.[3]

While the amount of required financial protection in real dollars has been decreasing, so have the premiums paid by licensees to obtain this coverage from the nuclear insurance pools. In real dollars, the premiums paid by reactor licensees have decreased dramatically (over 60%) since 1957.[4] If the licensees' premium payments beginning in 1957 have represented "reasonable cost" under section 2210(b), faithful implementation of the Act would require at least a doubling of the licensees' present premiums. Instead of taking the initiative and actually requiring these licensees to procure the maximum amount of private insurance available at reasonable cost, the NRC has required only the amount of insurance announced as "available" by the nuclear insurance pools, a determination based in part on the level of premiums offered by the licensees. Until the NRC requires the licensees to offer increased premiums in exchange for increased coverage, this cycle of financial protection decay will continue.

The Price-Anderson Act directs the NRC to require these licensees to maintain not just the maximum amount of private insurance available but the maximum amount of financial protection, including "private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination of such measures. . . ." Yet it appears that the NRC has not even considered requiring additional amounts of financial protection from these other sources.

Many utilities operating nuclear power plants, as well as the companies that construct these plants and the suppliers of reactors and other components, show assets in the billions of dollars.[5/] It would be quite reasonable to require these enterprises to subject some portion of their assets to liability that might arise from a nuclear incident. The Price-Anderson Act's retrospective rating plan does subject each large commercial reactor licensee to a potential liability of $5 million per nuclear incident, but this fixed premium per reactor, regardless of the source of the damage, transfers financial risk from careless operations to careful ones. A system imposing some potential liability directly upon the licensee responsible for the nuclear incident would provide a stronger, more direct incentive for safety.

We suggest that the NRC should begin requiring the licensee of each nuclear reactor, regardless of its co-location with another reactor, to maintain primary layer financial protection corresponding to: (1) the private insurance coverage that

could be purchased by premiums tied to a price index (at least double the present premiums), and (2) additional financial protection from private contractual indemnities, self-insurance or other sources equivalent to $100,000 (1980 dollars) per megawatt of electrical generation capacity ($100 million for a 1000-megawatt power plant).

B. AFR Spent Fuel Storage Facilities.

The NRC requires the licensee of the only existing away-from-reactor (AFR) spent fuel storage facility, the General Electric installation at Morris, Illinois, to maintain only $20 million in primary layer financial protection,[6] even though the NRC's own reports indicate that accidents or sabotage at a spent fuel storage pool could release enough radioactivity to result in several thousand cancer fatalities, nonfatal cancers and serious inherited disorders (genetic defects)[7] and though the NRC has stated that a much greater amount of private insurance coverage has been available--$125 million in 1976[8]--and, we assume, remains available now. The NRC should immediately increase the financial protection required of AFR spent fuel storage facility licensees to at least the amount of private liability insurance available.

C. Investigative and Legal Expenses of Licensees and Insurers.

Despite the 1975 amendments to the Price-Anderson Act, the NRC has refused to eliminate the investigative and legal expenses of licensees and insurers from either the primary

layer or the retrospective rating plan layer of required financial protection.[9/] The 1975 amendments removed from the Act's financial protection provisions any reference to "the reasonable costs of investigating and settling claims and defending suits for damage."[10/] Nevertheless, the NRC has continued to permit licensees to maintain, as primary layer financial protection, insurance policies that include these costs within their coverage, thereby decreasing the amount of coverage available to compensate nuclear incident victims. The NRC's rationale for this approach--that section 2210(b) states that the amount to be charged a licensee under the retrospective rating plan "shall not exceed the licensee's pro rata share of the aggregate public liability claims and costs arising out of the nuclear incident" (emphasis added)--is not persuasive. To begin with, the term "costs" associated with litigation is generally taken to mean merely the filing fees imposed by the court, and then only those expenses incurred by the opposing party, not by the nonprevailing litigant the court orders to pay these costs. Moreover, section 2210(b) permits but does not require any deferred premium to cover these "costs." Finally, this reference to "costs" does not apply at all to the licensee's primary layer of financial protection, which is the subject of this proceeding.

Nothing in the Act requires or even permits the NRC to allow licensees and insurers to collect all of their investigative and legal expenses from their own coverage before

the remainder is made available to satisfy the claims of nuclear incident victims. The NRC should immediately amend the standard insurance policy to prevent these expenses from being collected out of the required financial protection.

II

THE NRC GENERAL COUNSEL'S LEGAL RATIONALE FOR NOT INCREASING THE REQUIRED AMOUNT OF FINANCIAL PROTECTION IS NOT PERSUASIVE.

The NRC General Counsel's view that the Price-Anderson Act does not require any increase in the required amount of financial protection is based upon his conclusion that Congress has not indicated its dissatisfaction with NRC's approach. It would be impossible, of course, for Congress to exercise detailed oversight on every aspect of each of the hundreds, perhaps thousands, of programs administered by federal departments and agencies. Nevertheless, the United States Supreme Court has in the past used this "congressional inaction" rationale to uphold actions of the Atomic Energy Commission or the NRC that have appeared to be contrary to federal statute. In Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers (1961) 367 U.S. 396, the Court stated:

> "It may often be shaky business to attribute significance to the inaction of Congress, but under these circumstances, and considering especially the peculiar responsibility and place of the Joint Committee on Atomic Energy in the statutory scheme, we think it fair to read this history as a de facto acquiescence in and ratification of the Commission's licensing procedure by Congress." 367 U.S. at 409.

layer or the retrospective rating plan layer of required financial protection.[9/] The 1975 amendments removed from the Act's financial protection provisions any reference to "the reasonable costs of investigating and settling claims and defending suits for damage."[10/] Nevertheless, the NRC has continued to permit licensees to maintain, as primary layer financial protection, insurance policies that include these costs within their coverage, thereby decreasing the amount of coverage available to compensate nuclear incident victims. The NRC's rationale for this approach--that section 2210(b) states that the amount to be charged a licensee under the retrospective rating plan "shall not exceed the licensee's pro rata share of the aggregate public liability claims and costs arising out of the nuclear incident" (emphasis added)--is not persuasive. To begin with, the term "costs" associated with litigation is generally taken to mean merely the filing fees imposed by the court, and then only those expenses incurred by the opposing party, not by the nonprevailing litigant the court orders to pay these costs. Moreover, section 2210(b) permits but does not require any deferred premium to cover these "costs." Finally, this reference to "costs" does not apply at all to the licensee's primary layer of financial protection, which is the subject of this proceeding.

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This rationale is inapplicable to the NRC's financial protection requirements for two reasons: (1) because, while the Court may infer that Congress is aware of the NRC's primary responsibility of nuclear facility and material licenses, one can hardly presume that Congress has cognizance of a regulatory detail which itself does not prevent the construction or operation of nuclear facilities or the use of nuclear materials, and (2) because the Joint Committee on Atomic Energy was abolished in 1977 and replaced by a plethora of Senate and House subcommittees each with some responsibility over nuclear energy. Thus, it is not "fair to read" the present inaction of Congress "as acquiescence in and ratification of" the NRC's program of permitting public protection under the Price-Anderson Act to deteriorate. If Congress truly favors a system that continuously provides less and less public protection, then it can amend the Price-Anderson Act to so specify. In the meantime, the NRC should begin to halt this public protection decay by increasing the amount of primary layer financial protection licensees are required to maintain.

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NOTES

1. In 1957 terms, a 1980 dollar is worth about 35 cents. Council of Economic Advisers, Economic Indicators (April 1980).

2. Environmental Protection Agency, Reactor Safety Study (WASH-1400): A Review of the Final Report, EPA-520/3-76-009, at 3-20 (1976).

3. See Note, Nuclear Power and the Price Anderson Act: Promotion Over Public Protection, 30 Stanford Law Review 393, 398, 453-54 (1978).

4. See Id., at 460, n. 298.

5. See Forbes, May 12, 1980, at 236-46.

6. 36 Fed. Reg. 17979 (1971).

7. See, e.g., AEC, Reactor Safety Study, Draft WASH-1400, app. VI, at 93 (1974); NRC, Reactor Safety Study, WASH-1400, app. I, at 103/104 (1975).

8. 41 Fed. Reg. 40514 (1976).

9. See 44 Fed. Reg. 20710 (1979).

10. Pub. L. No. 94-197, §§4(b), 5(b), 8, 10(b), 11, 89 Stat. 1111 (1975).

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