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

CHAIRMAN

April 2, 1987

The Honorable J. Bennett Johnston, Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I am pleased to respond to your request for the Commission's written testimony on the need for extension of the Price-Anderson Act in general, and on S. 748, a bill to extend the Price-Anderson Act as it pertains to contractors of the Department of Energy. A legal opinion, prepared by our General Counsel, on the situation that would arise should the Price-Anderson Act not be extended beyond August 1, 1987, is also enclosed.

Commissioner Asselstine did not participate in this response. Commissioner Bernthal was not available to participate.

Sincerely,

Thomas M. Roberts
Acting Chairman

Enclosures:
1. Testimony
2. Opinion

cc: Senator James A. McClure

ENCLOSURE 1

STATEMENT OF

U.S. NUCLEAR REGULATORY COMMISSION

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

CONCERNING THE

PRICE-ANDERSON ACT

AND

S. 748

The Commission would like to emphasize at the outset that the NRC's primary concern is the public health and safety. Our efforts are directed to preventing accidents and ensuring the safe use of nuclear power. Our agency's mission is not primarily to evaluate the financial ability of utilities to participate in arrangements such as those established by the Price-Anderson Act. Nonetheless, while our overriding interest is that the plants be operated safely, we wish to work with you to assure that in the event of a significant release of radiation the public would be promptly and adequately compensated for losses suffered.

As you know, when the Price-Anderson Act became law in 1957, it had two basic objectives:

First, to ensure that adequate funds would be available to the public to satisfy liability claims in the event of a catastrophic nuclear accident; and

Second, to remove the deterrent to private sector participation in atomic energy presented by the threat of potentially enormous liability in the event of such an accident.

The Commission believes that even with the passage of time and the successful history of operation of over 100 nuclear power plants in the United States, these two basic objectives are still important to maintaining the nuclear power option which has been established by the Congress for our country. While we continue to believe that the possibility of a catastrophic nuclear accident in the United States is very small, if there were to be such an accident, comprehensive, prompt and equitable settlement of public liability claims must be assured. Consistent with this goal, any modification of this legislation must be undertaken cautiously lest it unwittingly upset the delicate balance of obligations between operators of nuclear facilities and the U.S. Government as representative of the people. We believe it is important to keep in mind that the purpose of this legislation is to serve the American people by achieving two goals -- preserving an energy option recognized by the Congress as important to the nation and assuring prompt payment of claims in the event of a nuclear accident. We should continually ask the question -- are these goals for the American people being served? -- as we review the various provisions of this legislation.

Background

Before expressing our requested views on the need to extend the Price-Anderson Act and on S. 748, the Commission would like to describe the Price-Anderson Act in general to set the framework for the discussion to follow.

The Price-Anderson Act was initially enacted for a 10-year period, but was extended and amended in 1965 and 1975 and will expire on August 1, 1987 without Congressional action.

Licensees of large commercial nuclear power plants must provide proof to the NRC that they have the maximum amount of private nuclear liability insurance -- generally referred to as financial protection -- that is available. That financial protection, currently $700 million, consists of a primary layer of nuclear liability insurance of $160 million and a secondary retrospective premium insurance layer. This secondary layer works in the following way. In the event of a nuclear accident causing damages exceeding $160 million, the licensees of each commercial nuclear power plant would be assessed a prorated share of damages in excess of the primary insurance layer up to $5 million per reactor per incident. With 108 large commercial reactors under this system today, the secondary insurance layer totals up to $540 million.

The Price-Anderson Act authorizes the Commission to enter into indemnity agreements with reactor licensees. These agreements specify the amount of financial protection, if any, required of licensees. The agreements also specify the obligation of the Federal Government to provide funds when a nuclear accident exhausts private liability insurance or when no private liability insurance is required, such as with small university test reactors. This government obligation to provide funds is called "government indemnity."

The Price-Anderson Act places a ceiling on the total amount of public liability in an accident. This ceiling, or "limit of liability," for large commercial nuclear power plant licensees is currently tied to the maximum

amount of insurance available through private sources. For many years, the limit of liability was $560 million. Congress provided that the limitation on liability would grow, once the total protection of the primary and secondary layers of insurance reached and passed $560 million. In November 1982, the $560 million level was reached and the government's indemnity was, as a practical matter, essentially eliminated for large reactors. The present limit of $700 million will continue to increase in increments of $5 million for each new commercial reactor licensed to operate.

Congressional Activity in 1986

The Congress recognized that the Price-Anderson Act would expire by its own terms on August 1, 1987. Thus both the House and the Senate began in 1986 actively to consider the terms by which the Act should be extended. Clearly the limitation on liability was the most difficult and controversial issue associated with extending the Act. Although agreement on the limitation on liability was never reached in 1986, out of the debate it became clear that there was a strong consensus to favor a change in the structure of the liability limit, though there was considerable support for some form of a limitation on liability. S. 1225, introduced in the last Congress by Senators Simpson and McClure, and reported by the Senate Committee on Energy and Natural Resources, contributed substantially to the consideration of the need to extend Price-Anderson in the 99th Congress.

The Commission was called upon last year to present to the Congress its views on the various Price-Anderson bills that were under consideration, and in particular on the liability limit. The Commission's position then, as now,

recognized that, as in most legislation, a balancing of equities must be made by the Congress and that various alternatives, based on different balances, might provide adequate assurance that all public liability claims could be paid. In that context, a majority of Commissioners favored Price-Anderson Act extension amendments that would provide for a substantially greater liability for reactor licensees than is provided by current law but would retain the concept that any such liability would be bounded by a predetermined cap or cutoff.

The Commission's Views

The Commission supports the extension of the Price-Anderson Act. The Commission's primary goals for financial protection of the public are to assure prompt and full payment for public losses. In particular, we favor an increase in annual retrospective premium for nuclear power reactors, but retention of some large ceiling on liability for any nuclear incident. We also favor explicit provisions calling for Congress to act in the event that an accident results in damages in excess of the liability limit.

As noted earlier, the financial side of nuclear power operation is not the Commission's primary expertise. Accordingly, we do not take a position on the precise dollar amount of retrospective premiums that should be required from reactor licensees. While past staff work has indicated that utilities will probably be able to pay an annual assessment of around $10 million, such as was suggested in the 99th Congress, and is currently suggested in H.R. 1414, introduced recently in the 100th Congress by Congressmen Udall and Sharp, such a collection would be an extraordinary undertaking. Consideration of such an

undertaking should be mindful that the contemplated collection could well take place in an atmosphere of impaired utility earnings resulting from the ramifications of the accident itself. The Commission has no special foresight as to the burden on the industry in such an atmosphere. If there is to be such a large annual assessment, it would be useful if the annual assessment is expressed on a per reactor basis, rather than on a per reactor-per incident basis. Alternatively, the Commission could be authorized to provide limited relief from the obligation to meet the full annual retrospective premium in the case of multiple incidents in any year or where a utility is licensed to operate more than one facility.

The Commission continues to support legislation that would prohibit the payment of punitive damages from federal or Price-Anderson funds. The Commission would not bar the assessment of punitive damages, where appropriate, against a liable party.

The Commission supports inclusion of precautionary evacuations under Price-Anderson coverage where such evacuations are compensable under state tort law and are ordered by authorized state or local officials.

The Commission has consistently supported a recommendation that the Congress extend the statute of limitations for filing a public liability claim arising from a nuclear accident from 20 years to 30 years. This extension is recommended in order to provide greater assurance that latent injuries caused by a nuclear accident are provided protection under the Price-Anderson system. The Commission continues to support an increase to 30 years from the current 20-year period in which those indemnified waive a right to plead any state

statute of limitations. The inherent difficulties in proving that latent injuries were caused by the nuclear accident and not by some other factor or combination of factors appear to us to argue for some final cutoff to initiation of claims once a generous allowance has been made for accommodating the discovery of those injuries.

S. 748

S. 748, introduced by Senators Johnston, McClure, and Domenici, would extend and revise the Price-Anderson Act, as it pertains to Department of Energy contractors, for twenty years. The Commission generally defers to the Department of Energy (DOE) on the need to revise and extend the Act for DOE contractors. However, the Commission believes that it is important for a system to be in place to provide for public compensation for nuclear accidents at a DOE waste repository licensed by the Commission that is at least as generous as the system that applies to nuclear power reactors. Since it has been generally understood that such a system could appropriately be provided by "contractor" Price-Anderson provisions administered by DOE, we would favor an extension and revision of the "contractor" Price-Anderson provisions so that this system could be in place.

Finally, while we understand the special concerns of DOE and its contractors that "contractor" Price-Anderson be extended, we would much prefer a comprehensive extension and revision of Price-Anderson, which includes NRC licensees, if that is at all possible before the Act is slated to expire on August 1.

ENCLOSURE 2

COVERAGE OF CURRENT LICENSEES UNDER THE PRICE-ANDERSON ACT IF THE ACT IS NOT EXTENDED

Set forth below is an analysis prepared by the NRC Office of the General Counsel of the coverage of current NRC licensees under the Price-Anderson Act ("Act") should the expiring provisions of that Act not be extended beyond August 1, 1987.

I. Significance of the August 1, 1987 Date in Section 170c

The provisions of the Act applicable to most licensees contain only one expiration date.[1] That date, August 1, 1987, is found only in section 170c, which provides as follows:

> The Commission shall, with respect to licenses issued between August 30, 1954, and August 1, 1987, for which it requires financial protection of less than $560,000,000, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee....

The other provisions of the Act, including the provisions authorizing and requiring financial protection (sections 170a and 170b), limiting liability (section 170e) and waiving defenses (section 170n), do not contain any express expiration date.

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[1] An expiration date appears also in section 170k, which will be discussed separately.

While the applicability of the section 170e liability limitation is confined to "persons indemnified," thereby suggesting a necessary correlation with indemnity agreements under section 170c, the term "person indemnified" is broadly defined in section 11t to include not only "the person with whom an indemnity agreement is executed," but also anyone "who is required to maintain financial protection, and any other person who may be liable for public liability." Accordingly, the issue arises whether some or all of the provisions of the Act other than section 170c continue in effect beyond August 1, 1987, even if section 170c is allowed to expire.

For the reasons set forth below, a careful analysis of the Act's language and legislative history shows that the provisions of the Act are not severable, and that if the date in section 170c is not extended, other provisions in the Act, including those requiring financial protection, limiting liability, and waiving defenses, expire along with section 170c.

A. Before 1975 All of the Act's Provisions Were Expressly and Inextricably Interconnected

Prior to enactment of Public Law 94-197 in 1975, section 170c provided as follows:

> The Commission shall, with respect to licenses issued between August 30, 1954, and August 1, 1977, for which it requires financial protection agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which

> is in excess of the level of financial protection required of the licensee.... [Emphasis added.]

At the same time, section 170a provided that:

> Each license issued under section 103 or 104 and each construction permit issued under section 185 shall ... have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Commission shall require in accordance with section 170 b. to cover public liability claims. Whenever such financial protection is required, it shall be a further condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection 170 c. ... [Emphasis added.]

Accordingly, before 1975 there was an inextricable connection between financial protection and an indemnity agreement -- it was not possible to have one without the other. Thus, if the authority to indemnify expired, then the authority to require financial protection must be regarded as having expired as well.[2] Also, the waivers of defenses would expire because they were, as now, tied to the existence of either financial protection or an indemnity agreement.[3] Finally, while the liability limitation was then, as now, expressed in terms of "persons indemnified,"

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[2]The only other possible reading, that the authority to issue licenses expired, cannot be sustained since there is absolutely no support in the Act's legislative history for such a drastic proposition.

[3]Section 170n provides in pertinent part that "the Commission may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive ...."

that term was then defined as "the person with whom an indemnity agreement is executed and any other person who may be liable for public liability." This definition made no sense without an indemnity agreement, for without one the definition degenerated into the strange phrase "other person who may be liable ...." The term "other" in the definition clearly implied a connection between "persons indemnified," and thus the liability limitation, and an indemnity agreement.

Thus, before 1975 when the Act was last extended and modified, sections 170a, 170b, 170c, 170e, and 170n were all expressly and inextricably intertwined -- if the authority to indemnify in section 170c expired, then the other provisions expired as well.

B. Nothing in Public Law 94-197 (1975) Changed the Concept that the Act Continued or Expired as a Whole.

In 1975, with the enactment of Public Law 94-197, the Act was extended and modified to include a new layer of financial protection and an eventual phasing-out of indemnity. The phasing-out of indemnity, which was to occur as the secondary financial protection layer exceeded $560 million, required conforming changes to section 170a, section 170c, and section 11t. Section 170a was changed so that indemnity "may," rather than "shall," be a license condition if financial protection is required. Section 170c was amended to state that indemnity agreements were required only for licenses "for which it [NRC]

requires financial protection of less than $560,000,000." And the definition of "persons indemnified" in section 11t was amended to add a person "who is required to maintain financial protection."

These conforming changes had the effect -- which the below analysis will show was unintended -- of eliminating the essential interrelation of sections 170a, 170b, 170c, 170e, and 170n which had heretofore been explicitly expressed in the language of the Price-Anderson Act and therefore giving the appearance that these various provisions could be read and could stand separate of each other. This is because once financial protection exceeded $560 million, an indemnity agreement was no longer required and, under amended 170a, financial protection could exist as a separate license condition without indemnity.[4] And, so long as financial protection was required, the new definition of "person indemnified" still made sense. Thus, it became possible to read the Act as if the financial protection provisions in section 170a and b, the liability limitation in section 170e, and the waiver of defense provision in section 170n, all had vitality separate from section 170c.

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[4]Prior to the 1975 amendment, the limit of liability was $560 million of which not more than $500 million could be covered by an indemnity agreement. The 1975 amendment had an objective of getting the government out of the indemnity business prospectively once the financial protection reached and exceeded $560 million. Thus, the need for the conforming changes in the sections of the Price-Anderson Act.

That this reading was not intended is clear from the legislative history. First, there is no indication in the 1975 Act's legislative history that the pre-1975 concept that the Act expired as a whole was intended to be changed by the 1975 law. Given the careful attention to detail in the legislative history, especially in the Joint Committee's reports, there would certainly have been some discussion of such a basic change in concept if a change was intended.

Second, the 1975 legislative history shows clearly that Congress was treating the Act as a whole, to be extended only as a whole. E.g., S.Rep. No. 94-454, 94th Cong., 1st Sess., at 2 ("the Act is scheduled to expire on August 1, 1977"), 1 ("the bill meets the need by extending the Price-Anderson Act for an additional 10 years"), 7-8 (conclusion that if the Act expired, there would be no waivers of defenses or limitation on liability.).

Finally, a proposal by Congressman McCormick during the recorded open markup session to make the Act permanent was withdrawn after it encountered opposition from those who preferred a fixed expiration date. In its place, language was added to the Joint Committee report that:

> The Joint Committee wishes to stress that there are a number of features of the Price-Anderson Act which should be viewed as permanent. These include the mandatory insurance coverage, the no-fault provisions, the provisions for consolidation of claims in a single federal court and for advance payment of claims, the

> contractor indemnity provisions, and the mandatory retrospective premium system. These elements make up a pattern of public protection which must be continued. The provision for termination in 1987 should be viewed as a device to ensure that Congress will reassess the situation prior to that time and make revisions as required, rather than as congressional intent to provide for an eventual termination of the federal regulation of nuclear liability insurance. S.Rep. No. 94-454, 94th Cong., 1 Sess., at 9.

The intent behind this Report language was clear: "[i]t's not binding if it's in the Report. It's merely an expression of a 1975 Congress talking to a 1985 Congress, only making a suggestion." "Open Markup of H.R. 8631 and S. 2568: Price Anderson Act Amendments", Meeting of the Joint Committee on Atomic Energy, 94th Cong., 1st Sess. at 47-49.

Congressman McCormick's proposal, which was in effect rejected on its merits, presumed that the Act must continue or expire as a whole. A different construction of the Act, which would allow portions of the Act relating to such things as liability limitation to continue for licenses issued beyond 1977, would be inconsistent with the Joint Committee's rejection of McCormick's proposal.

II. Effect of a Non-Extension on Power Reactor and Other Facility Licensees

As shown above, the Act must be construed as a whole. Thus, if the authority to indemnify expires, then the remainder of the Act, including the limitation on liability, authorization to

require financial protection to satisfy liability claims, and waivers of defenses, expires as well. However, the expiration date of August 1, 1987 is expressed in terms of future licenses. As to facility licenses issued before that date the language of section 170c of the Act is clear:

> With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 1987, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 1987.

Thus, without an extension of the Act, the existing provisions of the Act continue unaffected for all power reactors and other facilities which received construction permits before August 1, 1987. It would seem that renewals of operating licenses would also be covered by the Act, so long as the original construction permit was issued prior to August 1, 1987. But, for plants which receive construction permits after August 1, 1987, the Price-Anderson Act would not apply. This means, among other things, that NRC could not require liability insurance or waiver of defenses, and there would be unlimited liability.

III. Effect of a Non-Extension on Non-Profit Reactors

Section 170k of the Act provides as follows:

> With respect to any license issued pursuant to section 53, 63, 81, 104a., or 104c. for the conduct of educational activities to a person found by the Commission to be a nonprofit educational institution, the Commission shall exempt such licensee from the financial protection requirement of subsection 170a.

> With respect to licenses issued between August 30, 1954, and August 1, 1987, for which the Commission grants such exemption:
>
> > (1) the Commission shall agree to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability in excess of $250,000 arising from nuclear incidents. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000, excluding cost of investigating and settling claims and defending suits for damage:
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> > * * * * *
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> Any licensee may waive an exemption to which it is entitled under this subsection. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 1987, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 1987. [Emphasis added.]

As can be seen from the text, the ambiguity created by the text of the 1975 law does not extend to certain non-profit educational and research licenses. Similar to the case prior to 1975 for power reactors, for these licenses indemnification is mandatory. Since there is no financial protection, if there can be no indemnity there can be no waiver of defenses and the definition of "persons indemnified" becomes meaningless. Thus the law itself is quite clear that the Act as a whole does not apply to any non-profit educational and research licenses issued after August 1, 1987. As was the case for power reactors, operating licenses and renewals of operating licenses for reactors subject to 170k would be subject to the Act so long as the original construction permit was issued prior to August 1, 1987.

IV. Effect of Non-Extension on Other Licenses

The effect of a non-extension of the Act on materials licenses issued under sections 53, 63, or 81, is similar to the effect on power reactors and section 170k reactors. The Act expires as a whole. Thus no materials licenses issued after August 1, 1987 could have Price-Anderson Act protection. It is not clear whether renewals of licenses after this date, where the original licenses issued before the date, would or would not be covered.