

March 19, 2003

The Honorable W.J. "Billy" Tauzin, Chairman  
Committee on Energy and Commerce  
United States House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

The Nuclear Regulatory Commission appreciates this early opportunity to provide its views and comments on the draft "Energy Policy Act of 2003." The draft bill is wide-ranging and comprehensive, and we will limit our comments to the nuclear energy-related provisions in TITLE IV -- NUCLEAR MATTERS.

Much of TITLE IV is similar to the House- and the Senate-passed versions of H.R. 4 and H.R. 2983 that were considered in the 107<sup>th</sup> Congress. As I stated in my June 25, 2002 letter to the Committee on those bills, the Commission supports, and urges passage of, a number of the provisions, especially those that would reauthorize the Price-Anderson Act (sections 4001-4009 of the draft bill), clarify the 40-year term for an initial combined construction permit and operating license for a reactor (section 4021 of the draft bill), enhance the NRC's ability to attract and retain employees with specialized skills (sections 4023 and 4025 of the draft bill), and incorporate NRC's nuclear security proposals to amend sections 161k., 229a., and 236a. of the Atomic Energy Act (sections 4026-4028 of the draft bill with modifications). At the same time, we oppose, and counsel against passage of, section 4011 on transportation of nuclear materials, section 4012 on development of a revised design basis threat, section 4013 on siting new reactors, and section 4022 which would impose greater Government in the Sunshine Act restrictions on the NRC than on any other agency subject to that Act. More detailed comments and views on the provisions pertinent to NRC responsibilities are provided in the enclosure.

If you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,

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Richard A. Meserve

Enclosure: As stated

**DRAFT ENERGY POLICY ACT OF 2003 - TITLE IV -- NUCLEAR MATTERS**

Price-Anderson Act Renewal

Sections 4001-4009 would renew the Price-Anderson Act. These provisions, which mirror provisions agreed to by the conferees on energy policy legislation during the 107<sup>th</sup> Congress but which were never enacted into law, would extend the Price-Anderson Act through August 1, 2017. The Commission supports enactment of these provisions.

Provision on Foreign Nuclear Accident Liability

Section 4010 would preclude the United States from assuming any liability for any nuclear accidents occurring in connection with the design, construction, or operation of a production facility or utilization facility in any country whose government has been identified by the Secretary of State as engaged in state sponsorship of terrorist activities. This would mean that if the United States became a Party to the Convention on Supplemental Compensation (commonly referred to as the "Liability Convention") and any of the terrorist states (e.g., Iran, North Korea) had an accident at a nuclear facility operating in their country that resulted in transboundary damages to other nations and the terrorist State where the accident occurred was also a Party to the Liability Convention, the United States would be barred from paying any sums owed under the terms of the Liability Convention. The NRC believes views on this provision are more appropriately expressed by Executive Branch agencies, such as the Departments of Energy or State.

### Provision on Transportation of Nuclear Materials

Section 4011 pertains to the secure transfer of nuclear materials and is identical to section 11 of H.R. 2983, which passed the House during the 107<sup>th</sup> Congress. Section 4011 would require that all shipments of radioactive materials be accompanied by a manifest describing the type and amount of materials being transported, that drivers be subject to a Federal security background check, and that the material be transported only to facilities licensed by the NRC or an Agreement State. Our concern with this section is not with its purpose; the agency already is strengthening its transportation requirements. Our concern is with the section's breadth, schedule, and focus. As drafted, it would capture all Atomic Energy Act materials, even those that pose no real risks to the public health and safety (for example, slightly contaminated concrete that would be less radioactive than the granite in the Capitol). We believe this expansion of requirements is unnecessary and could impede transportation of radioisotopes used in medicine. Although the section permits the agency to make appropriate exceptions to the section, the exceptions can be made only through rulemaking. The schedule for actions in the provision also does not take into consideration either the agency's on-going review and active revision of its security standards and requirements, or its consultation with other agencies on those standards and requirements. Finally, the section treats nuclear transport in isolation from transportation of other potentially toxic materials. This might result in a non-optimal application of resources to the whole range of similar risks. In summary, we see aspects of this provision as needlessly burdensome and limiting and other aspects as unnecessary.

### Provision on Development of Revised Design Basis Threats

Section 4012 would direct the President, in consultation with the NRC and other appropriate Federal, State and local agencies and private entities, to conduct a study to identify the types of threats that pose an appreciable risk to the security of the facilities regulated by the NRC. The section would also direct the NRC to promulgate by rule a design basis threat based on the threats identified in the study, and to establish an operational safeguards response evaluation program that tested licensees' ability to defeat the design basis threat. This provision was found in section 12 of H.R. 2983, that passed the House in the 107<sup>th</sup> Congress.

The Commission believes this section is not necessary. The Commission last year issued Orders to licensees of operating nuclear reactors and Category I fuel cycle facilities which effectively provided for an interim change to the design basis threats for these facilities. Since last summer the NRC staff has been using enhanced adversary characteristics in table-top drills at operating reactors.

The Commission expects to revise the design basis threat shortly and has recently instituted a revised operational safeguards response evaluation program that includes on-site table-top drills and force-on-force exercises. In addition, the requirement to promulgate a new DBT entirely by a rulemaking is unnecessary and may be counterproductive to security goals. Details of a new DBT (e.g., size of a truck bomb; numbers of attackers) will involve sensitive safeguards information that cannot be included in a published rule. Finally, the provision presumes that the responsibility will be clearly allocated to either the licensee or the government. In fact, however, the response to some threats may well call for an integrated response using both licensee and governmental assets.

#### Provision Related to Siting New Nuclear Facilities

Section 4013 requires that the NRC, before signing an indemnification agreement for a new reactor, consult with the Secretary of the Department of Homeland Security on whether the proposed location and design of the facility would ensure adequate protection of public health and safety in the event of a terrorist attack on the facility. This section is identical to section 14 of H.R. 2983 that passed the House in the 107<sup>th</sup> Congress. We believe that this section is unnecessary in light of the agency's extensive interactions with the Department of Homeland Security and other governmental agencies and offices on matters of security.

#### Provision on Term of Combined Construction Permit and Operating License

Section 4021 would provide that an initial combined construction permit and operating license for a reactor could extend for up to 40 years beyond the date on which the Commission authorized operation. This is similar to one of the Commission's legislative proposals and is similar to a provision included in H.R. 4, as passed by the House in the 107<sup>th</sup> Congress. The Commission supports this provision.

#### Provision on "Non-Sunshine Act" Meetings of the Commission

Section 4022 would require the Commission to keep transcripts of Commission business discussions not covered by the Government in the Sunshine Act. The Commission would be required to advise the public of such discussions after the fact, to record the discussions, and to release discussion transcripts upon request, withholding only that information authorized by law, generally under the Freedom of Information Act. The NRC strongly opposes this provision. The NRC's Sunshine Act definition of "meeting" found in its Sunshine Act regulations is in complete accord with the Supreme Court's opinion in FCC v. ITT

World Communications, Inc., 466 U.S. 463 (1984) and was upheld by the D.C. Circuit in NRDC v. NRC, 216 F.3d 1180 (D.C. Cir. 2000). The NRC's approach also is supported by the American Bar Association. Section 4022 would unjustifiably single out the NRC for unique requirements extending Sunshine Act requirements to non-Sunshine Act discussions. To our knowledge, NRC would be the only agency subjecting its discussions to these additional requirements. The provision would discourage the kind of exchange and collegiality that can be one of the primary strengths of a multi-member agency; it would frustrate or impede the efficient conduct of Commission business; and it would hamper "good government" by isolating individual Commission members and imposing unnecessary constraints on general discussions among Commissioners.

#### Provision on a Nuclear Training and Fellowship Program

Section 4023 would allow the NRC to establish a training and fellowship program to address shortages of individuals with critical safety skills. For Fiscal Years 2004-2007, \$1 million per year would be authorized to be appropriated to carry out this program. There has been a significant decline in the number of nuclear-related academic programs and this is of great concern to the Commission because these programs produce the skilled employees that the NRC needs to carry out its mission. This is one of the Commission's legislative (in "omnibus" bills submitted in the past) proposals and was included in the version of H.R. 4, passed by the Senate in the 107<sup>th</sup> Congress. The Commission supports this provision.

#### Provision on Charging Other Federal Agencies User Fees

Section 4024 would authorize the NRC to charge fees to Federal agencies for licensing and inspections. Without this authority, the NRC must recoup the costs of these activities

through the annual fees charged to other licensees. Section 4024 would eliminate this inequity, thereby creating a more fair and just fee schedule. This provision has been included in recent NRC authorization bills submitted to the Congress, and was included in the version of H.R. 4, passed by the Senate in the 107<sup>th</sup> Congress. The Commission supports this provision.

#### Provision on Federal Pension Offset

Section 4025 would permit the Commission to hire retired NRC employees as consultants without any sums paid for these services being offset against the retired employee's Federal pension. This would greatly aid the NRC because it would make it more attractive for retired NRC employees with specialized skills to serve as consultants to the NRC while the NRC recruits and trains the next generation of nuclear regulators. By allowing retirees with critical skills to receive full pay from the NRC for their consulting services, the NRC could more readily obtain critical skills to sustain high-quality regulatory efforts. This provision, which the Commission suggested be enacted in correspondence with various Senators, was included in the version of H.R. 4 passed by the Senate in the 107<sup>th</sup> Congress. The Commission supports this provision.

#### Provisions on Nuclear Security

Section 4026 is an earlier version of the Commission's legislative proposal which would amend section 161k. of the Atomic Energy Act pertaining to the possession and use of firearms by licensee guards. Of importance, this version does not include the provision which would empower guards to carry and use those weapons that the Commission may deem appropriate. The House Energy and Commerce Committee reported this provision out as part of H.R. 3016

during the 107<sup>th</sup> Congress. The Commission supports this provision, but would urge that it be expanded to include the weapons provision. We attach the current Commission proposal.

Section 4027 is the Commission's legislative proposal making it a crime for the unauthorized introduction of dangerous weapons into designated NRC-regulated facilities. The House Energy and Commerce Committee reported this provision out as part of H.R. 3016 during the 107<sup>th</sup> Congress. The Commission supports this provision.

Section 4028 is the Commission's legislative proposal making it a crime to sabotage nuclear facilities or fuel. The House Energy and Commerce Committee reported this provision out as part of H.R. 3016 during the 107<sup>th</sup> Congress. The Commission supports this provision.

SECTION . CARRYING OF FIREARMS BY LICENSEE EMPLOYEES

Section 161 k. of the Atomic Energy Act of 1954 (42 U.S.C. 2201(k)) is amended to read as follows:

"Sec. 161. GENERAL PROVISIONS.

"In the performance of its functions the Commission is authorized to --

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"k. (1) authorize such of its members, officers, and employees as it deems necessary in the interest of the common defense and security to carry firearms while in the discharge of their official duties. The Commission may also authorize--

"(A) such of those employees of its contractors and subcontractors (at any tier) engaged in the protection of property under the jurisdiction of the United States located at facilities owned by or contracted to the United States or being transported to or from such facilities as it deems necessary in the interests of the common defense and security; and

"(B) such of those employees of persons licensed or certified by the Commission (including employees of contractors of licensees or certificate holders) engaged in the protection of (i) facilities owned or operated by a Commission licensee or certificate holder that are designated by the Commission, or (ii) property of significance to the common defense and security located at facilities owned or operated by a Commission licensee or certificate holder or being transported to or from such facilities;

to carry firearms while in the discharge of their official duties. A person authorized to carry firearms under this subsection may, while in the performance of, and in connection

with, official duties, make arrests without warrant for any offense against the United States committed in that person's presence or for any felony cognizable under the laws of the United States if that person has reasonable grounds to believe that the individual to be arrested has committed or is committing such felony. An employee of a contractor or subcontractor or of a Commission licensee or certificate holder (or a contractor of a licensee or certificate holder) authorized to carry firearms under this subsection may make such arrests only when the individual to be arrested is within, or in direct flight from, the area of such offense. A person granted authority to make arrests by this subsection may exercise that authority only in the enforcement of (A) laws regarding the property of the United States in the custody of the Department of Energy, the Nuclear Regulatory Commission, or a contractor of the Department of Energy or Nuclear Regulatory Commission or a licensee or certificate holder of the Commission, or (B) laws applicable to facilities owned or operated by a Commission licensee or certificate holder that are designated by the Commission pursuant to this subsection, and property of significance to the common defense and security that is in the custody of a licensee or certificate holder or a contractor of a licensee or certificate holder of the Commission, or (C) any provision of this chapter that may subject an offender to a fine, imprisonment, or both. The arrest authority conferred by this subsection is in addition to any arrest authority under other laws; The Secretary and the Commission, with the approval of the Attorney General, shall issue guidelines to implement this subsection;

“(2) authorize employees of persons licensed or certified by the Nuclear Regulatory Commission (including employees of contractors of licensees or certificate holders) who are trained and qualified as guards and whose duty is the protection of facilities designated under paragraph (1)(B)(i) or property described under paragraph (1)(B)(ii) to

carry and use, where necessary to the discharge of their official duties, such weapons, devices, or ammunition as the Commission may require. Such employees shall have the power to carry and use such weapons while in the discharge of their official duties, regardless whether such employees have been designated as Federal, State, or local law enforcement officers. Such employees shall have such law enforcement powers as are provided to them under this section and section 161 i of this Act. The Nuclear Regulatory Commission shall issue guidelines, with the concurrence of the Attorney General, to implement this paragraph. The authority conferred by this paragraph with respect to employees of persons licensed or certified by the Nuclear Regulatory Commission (including employees of contractors of licensees or certificate holders) who are trained and qualified as guards and whose duty is the protection of facilities designated under paragraph (1)(B)(i) or property described under paragraph (1)(B)(ii) shall not be implemented until such guidelines have become effective;”