

Price-Anderson Act Reauthorization

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The Price-Anderson Act is a vital component of contracting by the Federal Government to combat nuclear threats. Since 1957, the Act has authorized the Department of Energy (DOE) (and its predecessor agencies) to indemnify its contractors against nuclear hazards. This authority will expire on August 1st, unless again extended by Congress. What will expire is the authority to provide *new* nuclear hazards indemnity coverage, *i.e.* existing DOE contracts will continue to have coverage for the life of the contracts. Reauthorization is essential to DOE's ability to maintain a base of qualified nuclear contractors, a requirement that is all the more vital in light of September 11th's terrorist attacks.

Congressional Action Incomplete

Last November 27th, the House of Representatives passed a bill (H.R. 2983) that would extend DOE's Price-Anderson authority for another fifteen years. Unfortunately, the House bill contains a DOE contractor subrogation provision similar to that rejected by Congress when Price-Anderson last was reauthorized in 1988. On March 7th, Price-Anderson reauthorization provisions more favorable to DOE contractors were added on the Senate floor to the comprehensive energy bill (S. 517). As of this writing (mid-April), it is unclear when or if the Senate will complete action on S. 517 or some other vehicle containing Price-Anderson. In any case, it will be difficult for House and Senate Price-Anderson bills to be reconciled by August 1st. Thus, it now appears there will be some break in Price-Anderson authority after this August 1st, as there was between August 1987 and August 1988.

Since the last extension, Price-Anderson reauthorization has been a lengthy and complicated process: The Price-Anderson Amendments Act of 1988 required DOE and the Nuclear Regulatory Commission to submit Reports to Congress on whether the Act should be extended. Both the 1998 NRC Report and the 1999 DOE Report recommended reauthorization without substantial change. During the Summer of 2000, the Secretary of Energy sent a letter to Congress reiterating the recommendations of the DOE Report on behalf of the new Bush Administration. Yet, as we approach August 1st, Congress has not completed action on Price-Anderson reauthorization.

1999 DOE Report to Congress

The Department's 1999 Report to Congress made five basic recommendations:

DOE Recommendation 1 - The Department's first recommendation was that Price-Anderson indemnification should be continued without any substantial change, because it is "essential to DOE's ability to fulfill its statutory mission." The Report further made the point that DOE indemnification guarantees the availability of about \$9.5 billion to ensure prompt and equitable compensation for the public, provides for consolidating claims in one Federal court, and minimizes protracted litigation. DOE went on to say Price-Anderson is cost-effective, pointing out that DOE payments to date "have not been significant." The Report listed only two large Price-Anderson payments: the \$78 million settlement for property owners and residents near Fernald, Ohio in 1989, and the subsequent \$20 million settlement for Fernald workers and frequent visitors.

DOE Recommendation 2 - The Department argued that decreasing the current \$9.5 billion DOE coverage amount "would be perceived as a lessening of the commitment to provide prompt and equitable compensation in the event of a nuclear incident."

DOE Recommendation 3 - The Report stated DOE should continue to provide "broad" and mandatory coverage of activities conducted under contract with the Department. Basically, this argued for not returning to the situation prior to 1988 when DOE had to decide on a case-by-case basis whether to provide Price-Anderson indemnification.

DOE Recommendation 4 - The Report supported continuation of the statutory authority first included in the 1988 Amendments Act for the Department to impose civil penalties on its for-profit contractors, subcontractors and suppliers. These unusual civil penalties (in addition to various contractual remedies) were the compromise made during the last reauthorization to avoid imposition of a subrogation provision tied to so-called "gross negligence" or "willful misconduct."

DOE Recommendation 5 - DOE's last recommendation addressed the new 1997 International Atomic Energy Agency Convention on Supplementary Compensation for Nuclear Damage (CSC), indicating it should be ratified by the United States and conforming amendments to Price-Anderson should be adopted. The CSC (which the United States took the lead in promoting) would provide substantial protection for American companies doing nuclear work abroad, including DOE contractors doing safety and security upgrade work on Soviet-designed nuclear power plants.

(DOE has not provided nuclear liability coverage for such work, but has provided coverage under Public Law 85-804 for a few contractors conducting "high risk national security work" abroad involving non-U.S.-owned nuclear weapons and weapons-grade material.)

Summary of Congressional Actions

In 2001, nearly identical Price-Anderson reauthorization provisions were introduced in the Senate and House on a bipartisan basis, *i.e.* S. 389 (Murkowski), S. 472 (Domenici), S. 597 (Bingaman), S. 1766 (Daschle-Bingaman), H.R. 1679 (Graham), and H.R. 2983 (Wilson). The DOE Price-Anderson provisions of the comprehensive energy bill (S. 517) debated during March and April on the Senate floor are substantially the same as the earlier bills. Hearings were held by the Senate Energy and Natural Resources Committee on June 26, 2001 and the House Energy and Commerce Committee on June 27 and September 6, 2001. (There also was a hearing by the Senate Environment and Public Works Committee on the NRC portions of Price-Anderson on January 23, 2002.) The House Energy Committee held markup sessions on October 4 and 31, 2001, and released its report on H.R. 2983 on November 19, 2001 (H.Rept. 107-299, Part 1). H.R. 2983 was considered on the suspension calendar, and passed the House by voice vote on November 27, 2001. The Senate Energy Committee held no markup; Majority Leader Daschle included DOE Price-Anderson provisions in the comprehensive energy bill (S. 517) taken directly to the Senate floor beginning in March. On the Senate floor, Senator Voinovich offered Senate Amendment 2917, essentially combining the DOE and NRC Price-Anderson provisions of the earlier bills. S.A. 2917 passed on March 7th by a vote of 78 to 21 after only one and one-half hours of debate, signaling broad bipartisan support in the Senate for Price-Anderson reauthorization.

The 1988 reauthorization involved a five-year lobbying effort and five Congressional Committees; and, as noted earlier, there was a one-year lapse in DOE's Price-Anderson authority. This time, there have been some similarities and some differences: For example, this time in the House, only the Energy and Commerce Committee held hearings and reported a bill. There also has not been as much interest in reauthorization on the part of NRC-licensed nuclear power plant operators. Unlike DOE contractors whose contracts usually expire in five years or less, power plant operators are "grandfathered" under the Act, *i.e.* their coverage lasts for the duration of their licenses. To the extent they have participated, utilities have concentrated on two issues: (1) whether the annual power plant retrospective assessment should remain capped at \$10 million; and (2) whether pebble-bed modular reactors up to 1,300 MW at the same site should be counted as only one unit for the purpose of such assessments.

Differences in House and Senate Bills

H.R. 2983 and S.A. 2917 have some significant differences in their DOE contractor provisions: The most problematic for DOE contractors is Section 15 (the Tauzin-Dingell Amendment) of the House bill, which provides the Attorney General may bring an action in U.S. district court to recover from a DOE contractor, subcontractor or supplier amounts paid by the Federal Government "resulting from conduct which constitutes intentional misconduct of any

corporate officer, manager, or superintendent of such contractor (or subcontractor or supplier of such contractor)." The amount is capped at the amount of "profit" derived under the contract, but that number could be large (particularly near the end of the contract's term). This subrogation provision (similar to those rejected in 1987-1988) was strenuously opposed by DOE contractors.

We argued that subrogation is an unnecessary remedy in search of a nonexistent problem. Indeed, there already are a wide variety of mechanisms in place to ensure DOE contractor accountability. These are:

- _ Civil penalties up to \$110,000/day for each violation (added by the 1988 Price-Anderson Amendments).
- _ Criminal fines and imprisonment (enhanced by the 1988 Price-Anderson Amendments).
- _ Performance fee reductions.
- _ Contract termination or modification.
- _ Stop-work orders.
- _ Debarment from DOE and other Federal contracts.
- _ Damage to reputations and ability to get commercial work.
- _ Many contracts have additional penalties related to nuclear safety.
- _ Prime contractors are accountable and may be penalized for their subcontractors' work.

Our arguments were unsuccessful in the House, but the Senate bills contain no subrogation provisions.

In addition to the Tauzin-Dingell DOE contractor "financial accountability" amendment, the House bill contains certain provisions not directly related to Price-Anderson added during markup: For example, Section 13 (the Strickland Amendment) of H.R. 2983 would require DOE to promulgate and enforce industrial safety rules for DOE nuclear facilities substantially equivalent or identical to those of the Occupational Safety and Health Administration on very short timetables. The Strickland Amendment further provides, "It shall be a condition of any agreement of indemnification...that the indemnified party comply with regulations issued under this paragraph." Another provision of the H.R. 2983 (Section 10) (the Cox-Markey Amendment) would prohibit any Federal Government indemnification for nuclear accidents associated with the KEDO Project in North Korea.

Other differences between the House and Senate bills' DOE provisions include: (1) the length

of extension (fifteen years in the House bill and permanent extension in the Senate bill); and, (2) the technicalities of removing the current exemption from DOE civil penalties for certain "nonprofit" contractors (amount of fine capped at "discretionary" fee paid to "nonprofits" (as defined in the Internal Revenue Code) in H.R. 2983 and fine limited to fee paid in one year for "nonprofit" (defined as an entity for which no net earning can inure to the benefit of a natural person or for-profit artificial person) in S. 517). Both the House and Senate bills would round off the DOE indemnification and liability cap (now tied to the NRC power plant number of about \$9.5 billion) at \$10 billion (subject to inflation indexing), and increase the amount for nuclear incidents outside the United States from the \$100 million figure added in 1962 to \$500 million. (Note this coverage applies only to nuclear materials "...owned by, and used by or under contract with the United States.")

Price-Anderson Coverage for Terrorist Acts

This program is entitled, "The Contracting Challenges of Combating Nuclear, Biological and Chemical Threats." Therefore, I shall say a few words about whether Price-Anderson covers terrorist acts: "Public liability" is defined in the Act as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation...." 42 U.S.Code 2210(w). The only exceptions in that definition are for worker's compensation claims, "claims arising out of an act of war," and claims for damage to on-site property at a licensed nuclear facility. Thus, the only way an act of terrorism would be excluded under Price-Anderson would be if it were found to have been an "act of war." With respect to the act-of-war exception, the 1957 Report of the Joint Committee on Atomic Energy accompanying the original Price-Anderson legislation said:

...This exception to some extent parallels the exception in the private policies. It was thought that in the event of war the damages would be so great and the task of proving causation so difficult that further congressional study would be needed. This exception was not drawn to damage caused by a declaration of war since the first attack on the United States could be an unannounced attack before any declaration of war. Any single act of sabotage would be covered by the indemnification provisions of the bill if it could not be proven to be an act of war.

S.Rept. No. 296, 85th Cong, 1st Sess. 18 (1957), *reprinted in* 1957 U.S.Code Cong & Ad. News 1803, 1819.

At the time Congress was considering the 1975 amendments to the Price-Anderson Act, the NRC prepared a detailed study concerning financial protection against potential harm caused by sabotage or theft of nuclear materials. One of the reasons for the study cited in the NRC Staff Report was "increased terrorist activity," even then referred to as "a risk that is becoming increasingly common on the world scene." As to the act-of-war exclusion, the NRC Report said:

Generally speaking...this exclusion appears to contemplate a relatively widespread

and actual disruption of the civil order. [citation omitted] The mere fact that a group of terrorists may label themselves "revolutionaries" would not necessarily make their actions a "revolution" within the meaning of this exclusion.

The NRC study concluded that payment for damages otherwise covered by Price-Anderson is not precluded simply because the damages were caused by an illegal act of sabotage or theft. Illustrating with specific examples, NRC stated unequivocally that an act of sabotage at a reactor site would be covered by the system, as would sabotage of a materials shipment (*e.g.*, spent fuel from a reactor) "while the shipment was in a planned transportation route." At the time of the 1988 amendments, Congress considered amending the Price-Anderson Act to compensate claims resulting from a nuclear incident involving nuclear material that had been illegally diverted from its intended place of confinement or intended transportation route. The proposed amendment was not adopted.

Acts of terrorism (while not involving the massive damages of September 11th) have been happening for decades: For example, as early as 1937, the League of Nations held an intergovernmental conference that adopted the 1937 Convention on the Prevention and Punishment of Terrorism. In 1972, three hijackers threatened to crash a Southern Airways DC9 into the Y-12 nuclear weapons production facility in Oak Ridge, Tennessee. (The airline provided a US\$2 million ransom to the hijackers who then forced the pilots to fly to Havana, Cuba where the hijackers were imprisoned for eight years.) Notwithstanding these events, Congress has not modified Price-Anderson's act-of-war provision.

Alternatives to Price-Anderson Coverage

During the 1987-1988 lapse in Price-Anderson authority, DOE provided alternative indemnification under Public Law 85-804 for a few management and operating contracts expiring during that period. However, at least one major DOE contractor refused a nuclear contract with only Public Law 85-804 coverage during the lapse. In this regard, it should be noted that Public Law 85-804 does not provide the same level of protection to the public or contractors: For example, Public Law 85-804 does not provide for consolidation of all cases in a single Federal court, does not provide for waivers of key tort defenses in the event of a large accident ("extraordinary nuclear occurrence"), does not provide "omnibus" coverage (*i.e.*, does not automatically apply to subcontractors, suppliers or others who may be liable), requires the Secretary of Energy to find coverage "would facilitate the national defense," has an exception for "willful misconduct or lack of good faith," and is discretionary on a case-by-case basis.

An alternative to Price-Anderson and Public Law 85-804 is Section 162 of the Atomic Energy Act of 1954. That little-used provision authorizes the President to approve DOE contracts containing "general indemnities" not subject to the availability of appropriated funds. Section 162 has been used by seven Presidents to provide exemptions to the Anti-Deficiency Act. The most recent use of Section 162 was by President Reagan in 1988 in connection with the last five-year extension of AT&T's Sandia National Laboratories contract.

Conclusions

Failure to reauthorize Price-Anderson would result in substantially less protection for the public at the same time DOE is being called upon to provide enhanced protection against nuclear threats. Without Price-Anderson, most private contractors and suppliers could not prudently take the financial risks associated with assisting DOE to perform its vital national defense, cleanup, and other missions. Commercial insurance is not available for such activities; and, even if it were, it would increase DOE's costs and not provide more than the \$200 million now available for commercial nuclear facilities. If Price-Anderson is not reauthorized, alternatives will be using Federal employees or possibly less responsible, less competent, "judgment-proof" contractors. Use of Federal employees would mean that the Federal Tort Claims Act would apply, which would eliminate jury trials and the possibility of class actions, and require the submission of individual administrative claims. In short, Price-Anderson Act reauthorization is essential this year, but may not happen before August 1st when its current authority expires.

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