Recent Developments in the Area of Insurance and Indemnity Coverage for Transportation of Radioactive Materials in the United States

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INTRODUCTION

The availability of adequate liability coverage in the unlikely event of a serious radioactive materials transportation accident continues to be of concern to transporters and public officials. This paper will discuss recent developments in the area of insurance and indemnity for transportation of radioactive materials in the United States.

At the 6th International Symposium in Berlin (West) in 1980, the 7th International Symposium in New Orleans in 1983, and the 8th International Symposium in Davos, Switzerland in 1986, I presented descriptions of the Price-Anderson insurance-indemnity system as it existed at those times. Since then, there have been a number of developments of interest here in the United States. Foremost among these is the fact that, on August 20, 1988, President Reagan signed into law the Price-Anderson Amendments Act of 1988. These statutory amendments renewed and modified previously existing nuclear hazards liability coverage for many nuclear materials shipments within the United States.

BACKGROUND

The Price-Anderson Act when it first was enacted in 1957 established a comprehensive and unique system of private insurance and Federal Government indemnity for "public liability" that might arise from use of "source, by-product and special nuclear material" in the United States. For over 30 years, this system has provided broad coverage for public liability associated with certain fixed nuclear facilities and associated transportation to or from such

facilities. Substantive tort law is left to the States (except when a "nuclear incident" rises to the level of an "extraordinary nuclear occurrence"). Congress originally enacted the Price-Anderson Act for the dual purpose of (1) assuring that funds would be available in the unlikely event of a serious nuclear incident, and (2) encouraging private industry to participate in the nuclear field.

The Price-Anderson Act now has been re-enacted three times since 1957 and amended several other times. Before the 1988 Amendments, the last re-enactment (for ten years) was in 1975. The 1975 re-enactment expired on August 1, 1987. What expired on that date was only the authority to extend nuclear hazards liability coverage to new power plants (and other facilities) licensed by the U.S. Nuclear Regulatory Commission (NRC) and new U.S. Department of Energy (DOE) contracts. With no new nuclear power plants being ordered in the United States, the hiatus in authority from August 1, 1987 until August 20, 1988 was of more immediate concern to DOE contractors than electric utilities whose existing plants continued to be covered. During the hiatus, DOE provided less comprehensive nuclear coverage for certain contracts under Public Law 85-804.

The unique feature of the Price-Anderson system that makes coverage under it most desirable is that, when it applies, it covers "anyone liable" (except the Federal Government) for "any legal liability arising out of or resulting from a nuclear incident". This so-called "omnibus" feature is similar to the channeling of all liability to the nuclear power plant operator in Western European countries. The omnibus feature would facilitate the handling of lawsuits and reduce costs by allowing for consolidation of the defense and avoiding cross-claims among defendants (as demonstrated by the Three Mile Island litigation). There is coverage regardless of how liability of particular defendants (any one of whom might have limited assets) is allocated by U.S. tort law, a system unique to nuclear applications.

Additionally, the Price-Anderson Act has provided that the liability of all entities covered by it is limited to the amount of coverage provided by the system. This limitation-on-liability provision was upheld unanimously by the U.S. Supreme Court in 1978 in Duke Power Co. v. Carolina Environmental Study Group.

The NRC administers the portions of the Price-Anderson Act applicable to commercial nuclear facility licensees (principally section 170c). NRC indemnity agreements (under section 170c) (or DOE indemnity agreements under section 170d, as discussed below) may be the sole source of funds

for public liability associated with nuclear risks where there is not insurance from private sources. Private insurance, when applicable, can furnish either underlying or exclusive coverage. It is provided by either the two nuclear insurance pools (American Nuclear Insurers, the pool of stock insurance companies, and Mutual Atomic Energy Liability Underwriters, the pool of mutual insurance companies) or the conventional insurance market. As a general rule, the pools cover nuclear fuel cycle activities, while non-fuel cycle activities (which are not considered to involve a level of risk requiring a pooling arrangement) are covered by the conventional insurance market. The pools issue two principal types of nuclear liability policies both in amounts that until recently were up to $160 million: the Facility Form (now $200 million), and the Supplier's and Transporter's Form (which is not part of the Price-Anderson system).

In the case of liability associated with NRC-licensed power plants, if the primary level of financial protection afforded by the plant's Facility Form (now $200 million) were insufficient to pay all claims, power plant operators would be assessed a "retrospective premium" per incident. As discussed below, the amount of this retrospective premium has been raised from $5 million to $63 million per power plant by the 1988 Amendments. Effective July 1, 1989, the amount of power plant coverage (and the limitation on liability) will be $200 million under the Facility Form plus at least $7.182 billion under the Retrospective Plan (based upon 114 nuclear power plants operating as of early June 1989 times $63 million each) for a total of at least $7.382 billion.

The other principal kind of Price-Anderson coverage is that issued by DOE under the section 170d contractor provision. That subsection, as amended last August, now requires DOE to provide nuclear hazards indemnity coverage to its contractors in an amount equal to that provided for nuclear power plant licensees (but not to be reduced if the number of power plants declines). Coverage under a DOE nuclear hazards indemnity agreement has been substantially the same as that afforded under the pools' Facility Form policy.

CONGRESSIONAL CONSIDERATION

Congress began considering whether to again extend the Price-Anderson Act in 1983 shortly after the NRC and DOE submitted reports required by the 1975 extension (when only the Joint Committee on Atomic Energy had reviewed the legislation). This time, Congressional action was much more protracted (and controversial): Three House of

Representatives and two Senate Committees asserted jurisdiction over the most recent Price-Anderson extension. A number of hearings were held by each between 1984 and 1987. Each of the five Committees reported bills before the 1986 Labor Day recess, but the 99th Congress adjourned before a bill could reach the floor of either house. Following reintroduction of bills early in the 100th Congress, the House passed H.R.1414 at the end of July 1987 (just before authority to enter into new agreements expired on August 1, 1987). However, it was not until March 1988 that a Price-Anderson bill reached the Senate floor. Final passage of the 1988 amendments did not come until August 1988, when the Senate accepted a "compromise" version of H.R.1414 that had modified some of the Senate floor amendments. The President signed the bill on August 20, 1988.

Because of this protracted Congressional consideration, the legislative history of the 1988 Amendments is voluminous. What follows is a summary discussion of the significant changes contained in those statutory provisions:

1988 AMENDMENTS

This time, Congress has extended the authority of both NRC and DOE to enter into new nuclear hazards indemnity agreements for 15 years (i.e., until August 1, 2002). Most of the changes contained in the 1988 Amendments are applicable to all nuclear incidents occurring on or after the date of the bill's enactment (i.e., August 20, 1988). On December 20, 1988, NRC published proposed rule changes to implement the 1988 Amendments; these were published in final form on June 6, 1989, with an effective date of July 1, 1989. DOE has not yet published its proposed or final rules implementing the 1988 Amendments.

For nuclear power plant licensees, the principal changes brought about by the 1988 amendments relate to increased retrospective premiums (and the resulting increase in the overall limitation on liability), coverage for "precautionary evacuations", and clarification of coverage of costs for investigating, settling and defending claims. DOE contractor coverage is subject to similar changes, in addition to the fact that such coverage has become mandatory and that certain "contractor accountability" provisions (new criminal and civil penalties for nuclear safety violations) have been added. The 1988 Amendments also specifically provide that Price-Anderson coverage applies to DOE's nuclear waste activities.

For power plants, the retrospective premium has been

increased to $63 million per incident per plant (from $5 million), with no more that $10 million payable in any year. Additionally, the retrospective premium is made subject to inflation indexing not less than every five years based on the Consumer Price Index, and is subject to an additional five percent surcharge for legal costs. The effect of these changes is to increase the limitation on liability from about $700 million per incident to about $7.382 billion. Also added to the limitation-on-liability subsection is a provision whereby Congress specifically reserves the right to enact a "revenue measure" applicable to NRC licensees to reimburse the Federal Government if it provides compensation above the limitation.

The 1988 Amendments further clarify how Congress would consider "compensation plans" if the limitation on liability were exceeded. That provision requires the President to submit a comprehensive compensation plan to Congress within ninety days of a court determination that public liability for any nuclear incident may exceed the aggregate limitation. Expedited procedures for Congressional consideration are provided.

The new amendments also eliminate certain confusion about coverage for legal costs that had resulted from a 1975 Senate floor amendment (the so-called Hathaway Amendment). These costs are restored to indemnity coverage for DOE contractors and NRC nonprofit educational institution licensees. All such costs are made subject to certain DOE, NRC and/or court approval.

For the first time, the statute now clearly covers liability arising from a "precautionary evacuation", even if it later is determined no "nuclear incident" had occurred. This assumes that such costs constitute a "public liability".

Certain changes also have been made in the Act's "extraordinary nuclear occurrence" (ENO) provisions: First, the ENO waivers of shorter statutes of limitations are modified to eliminate the twenty-year outside limit, i.e. the ENO waiver now would apply to any statute shorter that a three-year-from-discovery limit. Second, the ENO provisions also are made applicable to DOE nuclear waste activities.

Federal court jurisdiction and consolidation of claims are made available for any "nuclear incident", instead of just for ENO's or where it appears the limitation on liability will be reached as had been the case. This provision was made effective retroactively specifically to allow for consolidation of certain pending Three Mile Island cases

that had been removed to state courts.

Another subsection added by the 1988 Amendments limits the liability of lessors: It provides that no person under a bona fide lease of any utilization or production facility shall be liable by reason of such interest for any legal liability for a nuclear incident, unless the nuclear facility is in "the actual possession and control of such person at the time of the nuclear incident giving rise to such legal liability".

The new statute provides no court may award punitive damages where the Federal Government is obligated to make payments under an agreement of indemnification.

Finally, in addition to technical and conforming amendments, the new statute established a Presidential Commission on Catastrophic Nuclear Accidents to conduct a two-year study on certain issues (including special standards or procedures for latent injuries). It also required NRC to conduct a negotiated rulemaking that recently recommended against Price-Anderson coverage for radiopharmaceutical licensees.

CONCLUSIONS

The 1988 Amendments retained the basic structure of the Price-Anderson insurance-indemnity system. More radical changes advocated during the lengthy Congressional review process were rejected. Thus, Price-Anderson remains an exemplary system for providing liability coverage for the risks of a potentially hazardous activity.