January 8, 2001

Office of General Counsel
GC-52
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585

Re: AAR Comments

Dear Madam or Sir:

Enclosed are five copies of the comments of the Association of American Railroads in response to DOE's invitation to comment on Price-Anderson indemnification (62 Fed. Reg. 68272 (Dec. 31, 1997). Please return the extra copy of this cover letter, date-stamped, in the enclosed stamped, self-addressed envelope to indicate receipt.

Thank you.

Sincerely,

BEFORE THE
U.S. DEPARTMENT OF ENERGY

PREPARATION OF REPORT TO CONGRESS
ON PRICE-ANDERSON ACT

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

On behalf of its member railroads, the Association of American Railroads (AAR)[1] submits the following comments in response to DOE's invitation to comment on Price-Anderson indemnification issues.[2] AAR's member railroads are the principal transporters of nuclear material by rail and thus have a significant interest in Price-Anderson indemnification issues.

Question 17 in the *Federal Register* notice broadly addresses Price-Anderson indemnification of transportation incidents. From a transportation perspective, question 17 encompasses the issues raised in many of the other questions in the *Federal Register* notice. Thus, AAR's comments will mainly focus on question 17, which asks:

> Should the DOE Price-Anderson indemnification continue to cover transportation activities under a DOE contract? Should coverage vary depending on factors such as the type of nuclear material being transported, method of transportation, and jurisdictions through which the material is being transported?

It is essential that Price-Anderson indemnification encompass transportation. Railroads face potential catastrophic liability from a railroad accident involving nuclear material. Even if there were no release of radiation,

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[1]A trade association whose membership includes freight railroads that operate 77 percent of the line-haul mileage, employ 91 percent of the workers, and account for 93 percent of the freight revenue of all railroads in the United States.

[2]*See* 62 Fed. Reg. 68272 (Dec. 31, 1997).

the potential liability is enormous. Evacuation of a large number of people is one obvious risk. In addition, a principal rail line could be shut down for a long period of time, resulting in a loss of business to companies served by the line. There also could be businesses near the accident forced to shut down for long periods.

Transportation rates fully reflecting the railroads' potential liability would be astronomically high. Consequently, the railroads expect that if the government were to withdraw indemnification, railroads and DOE would be at loggerheads over rates. Years of litigation likely would ensue. More controversy over the shipment and disposal of nuclear material would hardly be in the public interest.

Yet, it is unlikely that indemnification would ever actually take place. The railroads are widely recognized as a safe mode of transportation. The probability of a rail accident involving nuclear materials is small.

Indemnification is also a matter of fairness. The railroads' transportation of nuclear material is in many ways a public service rather than a business proposition. The Interstate Commerce Commission, the predecessor agency to the U.S. Department of Transportation's Surface Transportation Board, has ruled that railroads have a common carrier obligation to transport nuclear material. In other words, the railroads do not have the freedom to decide whether the transportation of nuclear material makes good business sense; the federal government has said the railroads have no choice. Yet, railroads do not stand to gain significantly from this business. Shipments of nuclear material transported by rail in any one year are expected to number in the hundreds, at most. In contrast, in 1996 the railroads originated over 24 million carloads of freight. Furthermore, some railroads have taken extra precautions when transporting nuclear material, such as using dedicated trains, without additional compensation.

In one respect, the scope of Price-Anderson indemnification needs clarification. Price-Anderson indemnification encompasses "public liability," which is defined as liability "resulting from a nuclear incident or

precautionary evacuation."[3] A "nuclear incident" is an occurrence "arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material."[4] The railroads believe this statutory language means indemnification encompasses damages, in addition to precautionary evacuation costs, from accidents which do not involve actual releases. However, the statutory language is not explicit. DOE should seek an amendment clearly stating that indemnification applies whether or not there is a release. This could easily be accomplished by modifying the definition of "nuclear incident" to state clearly that "nuclear incident" encompasses all accidents involving nuclear material, whether or not there is an actual release of radiation.

There is no reason to condition the applicability of Price-Anderson on whether a release has occurred. For example, an accident involving nuclear material on a principal rail line could shut the rail line down for days or even weeks. Even if there were no release, it could take substantial time to ascertain the potential for a release and decide on the appropriate course of action. Companies dependent on the rail line for shipments could incur tremendous losses and seek compensation. There is no logical basis for conditioning Price-Anderson indemnification of these losses on whether there has been a release.

Turning to the remaining issues raised by question 17, the railroads are mystified regarding DOE's question as to whether indemnification should depend on the type of nuclear material being transported, the method of transportation, and the jurisdictions through which the material is being transported. The railroads do not see the relevance of any of these factors to the question of indemnification.[5]

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[3]42 U.S.C. §§ 2014(w), 2210(d).

[4]42 U.S.C. § 2014(q).

[5]If there is a mode of transportation that does not have a common carrier obligation to transport nuclear material, the case for indemnifying that mode would not be as strong as it is for rail transportation.

AAR also will take this opportunity to address briefly several other issues raised in the *Federal Register* notice. Question 11 asks about the ability of private insurance to cover liability for damages from nuclear incidents. The railroads do not believe there is any insurer or insurance pool that has the capacity to substitute for the indemnification provided by Price-Anderson. Question 15 asks whether Price-Anderson indemnification should cover gross negligence or willful misconduct. The answer is yes. The public policy reasons identified above for indemnifying the railroads have nothing to

do with the cause of an accident.[6] Furthermore, it is the railroads' experience that where large business entities such as railroads are concerned, juries often find a degree of culpability that simply is not justified by the facts of a particular case.

Question 24 asks whether Price-Anderson indemnification should be modified so that "all legal liability for nuclear damage from a nuclear incident is channeled exclusively to the operator of a facility on the basis of strict liability." The railroads assume that "facility" as used in this question does not include transportation facilities. Otherwise, the question would be posing a situation where there is no indemnification, i.e., the railroads would bear all the liability risk for transporting nuclear material by rail.

Question 24 seemingly asks whether the facilities where the nuclear material is produced should be the indemnifying party. Such a question would seem to be inconsistent with the federal government's policy that the federal government take title to spent nuclear fuel before it is shipped off site. As the shipper of spent fuel, the federal government should be the indemnifying party.

Finally, DOE asks a series of questions (28 through 34) concerning the relationship between the penalty scheme for activities covered by Price-Anderson and Price-Anderson indemnification. The only point the railroads wish to raise in connection with the penalty scheme is to reiterate that the federal government should address violations of safety regulations through penalties, not through withdrawal of

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[6]If a railroad violated a safety law, the violation should be addressed by the relevant civil penalty process, not through indemnification.

indemnification. Indemnification is critical to a viable transportation policy for nuclear material.

Respectfully submitted,

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