THE UNIVERSITY OF CHICAGO
Operator of Argonne National Laboratory

Comments on the Department of Energy
Notice of Inquiry Concerning Preparation of Report to Congress on the Price-Anderson Act
January 30, 1998

Following are responses to the questions in the Notice of Inquiry published in the Federal Register on December 31, 1997:

1. *Should the DOE Price-Anderson indemnification be continued without modification?*

The extension of Price-Anderson indemnification is critically important to the continuation of the DOE program respecting nuclear materials and facilities. We recommend several changes in the Act in answer to succeeding questions, but a continuation of the indemnity as is would be preferable to any changes that might endanger the Act's basic scheme of protection of the public.

2. *Should the DOE Price-Anderson indemnification be eliminated or made discretionary with respect to all or specific DOE activities? If discretionary, what procedures and criteria should be used to determine which activities or categories of activities should receive indemnification?*

We strongly oppose elimination of the indemnification. The indemnity is intended to protect the public and therefore it should not be discretionary wherever the public is at risk.

3. *Should there be different treatment of "privatized arrangements" ....?*

We express no opinion on this question inasmuch as the Argonne Contract is a "management and operating" contract.

4. *Should there be any change in the current system under which DOE activities conducted pursuant to an NRC license are covered by the DOE Price-Anderson*

indemnification, except in situations where the NRC extends Price-Anderson coverage under the NRC system? ...

We believe the present arrangement makes good sense and see no reason to change it.

5. *Should the DOE Price-Anderson indemnification continue to provide omnibus coverage, or should it be restricted to DOE contractors or to DOE contractors, subcontractors, and suppliers? Should there be a distinction in coverage based on whether an entity is for-profit or not-for-profit?*

The basic purpose of the indemnification is to protect the public. For this reason it would be unwise to limit the indemnification to contractors, subcontractors and suppliers; similarly it would be unwise to provide different coverage for organizations depending on their status as for-profit or not-for-profit.

6. *If the DOE indemnification were not available for all or specified DOE activities, are there acceptable alternatives? Possible alternatives might include Pub. L. No. 85-104, section 162 of the AEA, general contract indemnity, no indemnity, or private insurance. To the extent possible discussing alternatives, compare each alternative to the DOE Price-Anderson indemnification, including operation, cost, coverage, risk, and protection of potential claimants.*

The difficulty with all of the proposed alternatives is that they do not adequately protect the public. As to individual proposed alternatives, we have the following comments:

! 85-804 does not provide the equivalent coverage for contractors and their subcontractors and suppliers; there are exceptions to coverage. For certain activities outside the United States which are not covered by Price-Anderson, 85-804 has been an acceptable alternative, and the University has received such coverage. In these situations the Government interest is not specifically to protect the public outside of the United States, who would come under the laws and protection of their home countries, but rather to enable U.S. contractors to

perform work outside of the country which furthers the interests of the United States and which otherwise could not be performed by American companies because of the excessive risks of liability for a catastrophic incident. While there may be a reason for the DOE to treat requests for indemnity outside of the country on a contractor by contractor basis, requiring individual applications for indemnities on domestic activities would be administratively burdensome, arbitrary, and, above all, would not assure protection of the American public.

! Section 162 of the Atomic Energy Act authorizes the President to exempt any specific action of the DOE in a particular matter from the provisions of law relating to contracts when the President determines that such action is essential in the interest of the common defense and security. Having to apply to the President for an action assures that this would be invoked rarely, and, we understand that the section has been used only in a few instances. Further, the criteria for use would not fit many situations where Price-Anderson is used. And the section would only be useful in protecting a contractor from certain risks; it would not provide complete protection for the public.

! General contract indemnities are subject to the availability of funds. Because of the enormous potential liabilities in a catastrophic incident, these would not provide the protection needed for contractors to engage in extra-hazardous work involving nuclear energy, and would not provide protection for the public.

! Private insurance is not obtainable for the full extent of risk involved in a catastrophic incident. For the lower level of coverage that might be obtainable through insurance, DOE has been reluctant to support the very substantial cost of private insurance, a cost that would be charged to the contracts.

It is clear that Price-Anderson is the only indemnification that protects the public and enables contractors, subcontractors and vendors to undertake extra-hazardous work in the nuclear field in the national interest. Thus far Price-Anderson has provided this protection at minimum cost to the Government.

7. *To what extent, if any, would the elimination of the*

DOE Price Anderson indemnification affect the ability of DOE to perform its various missions? Explain your reason for believing that performance of all or specific activities would or would not be affected?

DOE performs its mission programs through contracts. Without Price-Anderson indemnification contractors would be unwilling to perform work that entails the risk of a catastrophic incident. No company or non-profit institution is in a position to risk its continued existence by undertaking risk of loss of its assets, which could put any organization in bankruptcy.

Further, the existence of Price-Anderson indemnification has enabled DOE to carry on its mission activities without the concern that the public is unprotected from the potential economic cost of widespread damage due to nuclear incidents. DOE mission activities that would be severely hampered without Price-Anderson are those where nuclear materials are involved in substantial quantities, reactor and other facilities with the high potential for damage due to the properties of nuclear materials, and increasingly, sites and operations where there is nuclear waste.

8. *To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the willingness of existing or potential contractors to perform activities for DOE? Explain your reasons for believing that the availability of goods and services for all or specific DOE activities would or would not be affected?*

The University of Chicago would be unwilling to continue as contractor for Argonne National Laboratory without a continuation of the Price-Anderson indemnity. We believe that all other management and operations contractors currently covered by Price-Anderson would come to a similar conclusion. Without Price-Anderson, DOE would be unable to obtain responsible contractors for its nuclear facilities. On the other hand, we believe DOE could continue to find contractors for non-nuclear facilities, where Price-Anderson coverage is not applicable.

9. *To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the ability of DOE contractors to obtain goods and services from*

subcontractors and suppliers? Explain your reason for believing that the availability of goods and services for all or specific DOE activities would or would not be affected?

Without Price-Anderson, prime contractors would be unable to obtain goods and services from companies and institutions that are aware of the risks of the nuclear business. This would include all organizations sophisticated enough to be aware that they could suffer catastrophic losses that could endanger their existence if they were held liable for any nuclear incident.

10. *To what extent, if any, would the elimination of the DOE Price-Anderson indemnification affect the ability of claimants to receive compensation for nuclear damage resulting from a DOE activity? Explain your reasons for believing the ability of claimants to be compensated for nuclear damage resulting from all or specific DOE activities would or would not be affected?*

Unlike Price-Anderson, where the public interest is to assure that all claimants are compensated, without Price-Anderson, claimants would have to prove liability on the part of companies and organizations which are able to pay claims and judgments. If they are not protected by Price-Anderson, contractors and other defendants would vigorously contest liability and damages. The defendants would not be obliged to waive defenses, and it would be in their strong economic interest to assert all defenses. With the ensuing costs of litigation and delays some worthy claimants would never be compensated for catastrophic losses. Moreover, aggregate claims for losses in a catastrophic accident could overwhelm the resources of any organization or group of organizations.

11. *What is the existing and the potential availability of private insurance to cover liability for nuclear damage resulting from DOE activities? What would be the cost and the coverage of such insurance? To what extent, if any, would the availability, cost and coverage be dependent on whether the activity was a new activity or an existing activity? If DOE Price-Anderson indemnification were not available, should DOE require contractors to obtain private insurance?*

Existing private insurance would not be adequate to protect against the extraordinary hazards of nuclear activities. The aggregate amounts would be inadequate by orders of magnitude and insurance companies would not be prepared to waive defenses and provide the other protections of the public that are accorded by Price-Anderson.

12. *Should the amount of the DOE-Price Anderson indemnification for nuclear incidents for all or specified DOE activities inside the United States (currently approximately $8.96 billion) remain the same or be increased or decreased?*

The logic for the present number is that it is the same amount applied for commercial reactors licensed by the NRC. We believe the present method of determining the aggregate number is appropriate, but, in any event, the amount should not be decreased.

13. *Should the amount of the DOE Price-Anderson indemnification for nuclear incidents outside the United States (currently $100 million) remain the same or be increased or decreased?*

The amount is grossly inadequate and should be increased. In addition, the definition of incidents covered abroad should be expanded, as we have noted below in answer to question 20.

14. *Should the limit on aggregate public liability be eliminated? If so, how should the resulting unlimited liability be funded? Does the rationale for the limit on aggregate public liability differ depending on whether the nuclear incident results from a DOE activity or from an activity of a NRC licensee?*

The limit on aggregate liability, which for contractors corresponds to the maximum amount of financial protection covered by the Act, provides a ceiling on the Government's commitment, a useful element of a responsible policy. The Act provides that Congress will review any situation where the aggregate damages exceed the limit and take action to meet the claims resulting from such a major catastrophe. We see no compelling reason to reopen this question in the deliberations over

extension of the Act. Further there would be no convincing rationale to treat DOE activities differently from NRC licensees in this regard.

15. *Should the DOE Price-Anderson indemnification continue to cover DOE contractors and other persons when a nuclear incident results from their gross negligence or willful misconduct? If not, what would be the effects, if any, on (1) The operation of the Price-Anderson system with respect to the nuclear incident, (2) other persons indemnified, (3) potential claimants and (4) the cost of the nuclear incident to DOE? To what extent is it possible to minimize any detrimental effects on persons other than the person whose gross negligence or willful misconduct results in a nuclear incident? For example, what would be the effect if the United States government were given the right to seek reimbursement for the amount of the indemnification paid from a DOE contractor or other person whose gross negligence or willful misconduct causes a nuclear incident?*

In answer to the first question, the indemnity should continue to cover DOE contractors in those situations. The protection of the public demands that there be a defendant who is liable regardless of fault. The United States should not be given the right to seek reimbursement from a management and operations contractor of the amount of indemnification paid. This would contradict the basis for such contracts, under which contractors are engaged to perform the work without the risk of liability for catastrophic accidents. Price-Anderson does create mechanisms to penalize contractors that disregard safety considerations through civil and criminal penalties.

16. *Should the DOE Price-Anderson indemnification be extended to activities undertaken pursuant to a cooperative agreement or grant?*

If DOE supports work which necessarily involves risk of a nuclear incident, we believe the Price-Anderson indemnity should apply, for the protection of the public. To the extent a cooperative agreement or grant is used as a mechanism by DOE to accomplish its missions with respect to nuclear research, the extension would clearly be warranted.

17. *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 jurisdiction through which the material is being transported?*

So long as it is necessary for contractors to transport nuclear materials to perform their work and such transportation involves risk of a nuclear incident, the indemnification should apply to such transportation.

18. *To what extent, if any, should the DOE Price-Anderson indemnification apply to DOE clean-up sites? Should coverage be affected by the applicability of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or other environmental statutes to a DOE clean-up site?*

For the protection of the public, the indemnification should apply to clean-up sites. The applicability of CERCLA and other environmental statutes should not affect the need for protection of the public afforded by Price-Anderson.

19. *To what extent, if any, should the DOE Price-Anderson indemnification be available for liability resulting from mixed waste at a DOE clean-up site?*

To the extent that nuclear hazards are involved.

20. *Should the definition of nuclear incident be expanded to include occurrences that result from DOE activity outside the United States where such activity does not involve nuclear material owned by, and use by or under contract with the United States? For example, should the DOE Price-Anderson indemnification be available for activities of DOE contractors that are undertaken outside the United States for purposes such as non-proliferation, nuclear risk reduction or improvement of nuclear safety? If so, should the DOE Price-Anderson indemnification for these additional activities be mandatory or discretionary?*

In addition to the limited situations currently in the Act, we believe the definition of nuclear incident should

be expanded to include occurrences outside the United States that result from DOE activity. DOE has important mission activities in non-proliferation, nuclear risk reduction and improvement of nuclear safety. DOE's activities in these areas, as well as domestic nuclear activities, are performed by contractors. Contractors have been unwilling to accept the risks of these outside-United States activities without indemnity against the risks of liability for catastrophic losses from nuclear disasters. DOE has acknowledged the need for such indemnification by granting P.L. 85-804 indemnities on a case by case basis for some of these risks, particularly nonproliferation and nuclear risk reduction. However, in the important area of improvement of nuclear safety, DOE has refused 85-804 protection, hence American contractors have been very limited in what they are willing to do to help other countries with their reactor safety programs. Some protection for contractors may come through other countries and treaty provisions, but such protection is not deemed adequate.

Extending Price-Anderson indemnification in these areas would serve the policies of the United States and avoid the necessity for case by case consideration of indemnities. It may be advisable to consider the criteria and terms and conditions of such indemnification since the circumstances are different. The primary concern for indemnification in these situations is to enable contractors to conduct business abroad which is in the interests of the United States and bears the risk of catastrophic damage. In general we would suggest that some form of Price-Anderson indemnification should be granted wherever DOE supports or sanctions activities abroad by its management and operating contractors that bear the risk of a nuclear incident.

21. *Is there a need to clarify what tort law applies with respect to a nuclear incident in the United States territorial sea? Should the applicable tort law be based on state tort law?*

Price-Anderson should apply with respect to a nuclear incident in the United States territorial sea. The University expresses no opinion on the tort law that should apply in this situation.

22. *Should the definition of nuclear incident be modified*

to include all occurrences in the United States exclusive economic zone....

The definition of nuclear incident shold be modified to include all occurrences in the United States exclusive economic zone.

23. *Should the reliance of the Act on state tort law continue in its current form?...*

The University finds the present rules satisfactory and has no suggestions to offer for modification.

24. *Should the Act be modified to be consistent with the legal approach in many other countries under which 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? If so, what would be the effect, if any, on the system of financial protection, indemnification and compensation established by the Act?*

Practically speaking, the present system probably works out the same as that in which the operator is the sole liable party, with strict liability. Should the Congress decide to move in that direction, the public and contractors would still be protected. Since such a proposal might be considered a radical change in concept without genuine value added, we fear its consideration would detract from the basic purpose of extending the Act.

25. *Should the procedures in the Act for administrative and judicial proceedings be modified? If so, describe the modification and explain the rationale?*

We are aware of no reasons to change the procedures in the Act.

26. *Should there be any modification in the types of claims covered by the Price-Anderson system?*

Price-Anderson indemnification is most essential for catastrophic incidents. The scheme of coverage in the Act was developed carefully over a period of years and there does not seem to be a compelling reason to change

it.

27. *What modifications in the Act or its implementation, if any, could facilitate the prompt payment and settlement of claims?*

The University has no suggestions to offer on this question.

28. *Should DOE continue to be authorized to issue civil penalties pursuant to section 234A of the AEA? Should section 234A be modified to make this authority available with respect to DOE activities that are not covered by the DOE Price-Anderson indemnification? Should DOE continued to have authority to issue civil penalties if the Act is modified to eliminate the DOE Price-Anderson indemnification with respect to nuclear incidents that result from the gross negligence or willful misconduct of a DOE contractor?*

Inasmuch as The University of Chicago is exempt from civil liabilities under the Act, the University has no comment on this set of questions.

29. *To what extent does the authority to issue civil penalties affect the ability of DOE to attain safe and efficient management of DOE activities? To what extent does this authority affect the ability of DOE and its contractors to cooperate in managing the environment, health and safety of DOE activities through mechanisms such as integrated safety management? To what extent does this authority help contain operating costs including the costs of private insurance if it were to be required?*

The University is not subject to civil penalties, so it does not have an opinion on this set of questions. However, the University points out that it has very strong incentives, reinforced by contract provisions, to carry out its resposibilities in the public interest in maintaining the safe and efficient management of the activities at Argonne National Laboratory, and to cooperate with DOE in this regard.

30. *Should there continue to be a mandatory exemption from civil penalties for certain nonprofit contractors?*

Should the exemption apply to for-profit subcontractors and suppliers of a nonprofit contractor? Should the exemption apply to a for-profit partner of a nonprofit contractor?

The mandatory exemption for civil penalties should be retained for nonprofit contractors. The logic of extending this exemption to for-profit subcontractors and suppliers is that this enables there to be one rule for the contract operation. Similar logic would apply to the for-profit partner of a nonprofit partner, but, since the University is the sole contractor for Argonne it takes no position on this question.

31. _*Should DOE continue to have a discretionary authority to provide educational nonprofit institutions with an automatic remission of civil penalties?*

We believe it would be fairer to provide for automatic remission of civil penalties for such institutions in the Act, rather than to require action by the DOE to provide each such remission on a case by case basis.

32. *Should the maximum amount of penalties be modified? If so, how?* _

We have no comment on this question.

33. *Should the provisions in section 234Ac, concerning administrative and judicial proceedings relating to civil penalties be modified? If so, how?*

We have no comment on this question.

34. Should there be any modification in the authority in section 223.c. to impose criminal penalties for knowing and willful violations of nuclear safety requirements by individual officers and employees of contractors, subcontractors and suppliers covered by the DOE Price-Anderson indemnification? Should this authority be extended to cover violations by persons not indemnified?

The University questions that part of section 223.c. which would make criminal a violation of a safety regulation which "if undetected, would have resulted in a nuclear incident". We believe this is a impermissively

vague standard for a criminal statute.