PDR-016

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

JUN 11 1985

Mr. Rob Hager
Christic Institute
1324 N. Capitol Street
Washington, DC 20002

IN RESPONSE REFER
TO FOIA-85-329

Dear Mr. Hager:

This is in response to your letter dated April 22, 1985, in which you requested, pursuant to the Freedom of Information Act (FOIA), a copy of SECY-84-146A and the Staff Requirements memo from Samuel Chilk for SECY-84-146A.

The two documents you requested are identified on the enclosed Appendix and are being placed in the NRC Public Document Room (PDR), located at 1717 H Street, NW, Washington, DC 20555, in file folder FOIA-85-329 in your name. There is no charge for inspecting records maintained in the PDR. We are enclosing a notice that provides information on charges and procedures for obtaining copies of records from the PDR.

Sincerely,

J. M. Felton, Director
Division of Rules and Records
Office of Administration

Enclosure: As stated

Re: FOIA-85-329

APPENDIX

1. 09/14/84 SECY-84-146A, "Price-Anderson and the Supreme Court Silkwood Decision." (12 pages)

2. 01/31/85 Memo from Samuel Chilk to William Dircks and Herzel Plaine, subject: Staff Requirements-SECY-84-146A-Price Anderson and the Supreme Court Silkwood Decision. (1 page)

September 14, 1984

SECY-84-146A

POLICY ISSUE
(Notation Vote)

For: The Commissioners

From: William J. Dircks
Executive Director for Operations

Subject: Price-Anderson and the Supreme Court Silkwood Decision

Purpose: To provide the Commission with an analysis of the impact of the Supreme Court's Silkwood decision on the Price-Anderson Act and to request Commission guidance on recommendations that can be made to Congress on this issue.

Discussion: SECY-84-146 provided the Commission with an analysis of the Supreme Court's decision in Silkwood v. Kerr-McGee Corp. In that decision the Court held that the Atomic Energy Act does not generally preempt a State from providing punitive damage remedies for radiation injuries. In a June 20, 1984 memorandum from S. Chilk to W. Dircks, the staff was directed to prepare proposals to submit to Congress reclassifying how punitive damages would be paid under the Commission's proposed amendments to the Price-Anderson Act. In the present analysis, Attachment "A", the staff examines a number of questions including the applicability of the Price-Anderson Act to pay punitive damage claims, and also discusses the considerations respecting two recommendations that the Commission could propose to Congress to amend the Price-Anderson Act in light of the Silkwood decision.

Contact:
Ira Dinitz, OSP
492-9884

Recommendation: That the Commission provide guidance for formulating specific recommendations, if any, to the Congress on directing how punitive damages should be treated under the Price-Anderson Act.

Scheduling: No specific circumstance is known to staff which would require Commission action by any particular date in the near term.

William J. Dircks
Executive Director for Operations

Enclosure:
Attachment "A"

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Friday, October 5, 1984.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, September 28, 1984, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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Price-Anderson and the Silkwood Decision

As discussed in SECY-84-146, the Supreme Court in a 5-4 opinion handed down on January 11, 1984, held that the Atomic Energy Act did not preempt a $10,000,000 punitive damage award levied by an Oklahoma jury, under Oklahoma law, against Kerr-McGee Corporation for radiological damages to one of its workers caused during the operation of its Cimarron plutonium fabrication facility. The Court based its conclusion that the Atomic Energy Act does not generally preempt a State from providing tort damage remedies for radiation injuries on the legislative history of the Price-Anderson Act, which, it stated, showed ample evidence of Congressional intent to preserve State tort law remedies for victims of nuclear incidents. [1/] Since punitive damages traditionally are part of State tort remedies, and since Congress nowhere had indicated an intent to preempt punitive damages, the Court concluded that the general preservation of State tort remedies under the Act left a State the power to award punitive as well as compensatory damages for injuries caused by radiation exposure.

Punitive damages, also called "exemplary " or "vindictive" damages, are awards made to plaintiffs to punish and to make examples of defendants for the purpose of deterrence to others. Forty-six States allow the imposition of punitive damage awards. About twenty States allow punitive damage awards to be covered by insurance. Sixteen States and the District of Columbia prohibit insurance coverage for punitive damages, while others are silent on coverage.

The Silkwood decision that punitive damages are available to persons injured in nuclear incidents raises questions as to whether the payment of punitive damages under the present Price-Anderson system and proposed changes to the system recommended by the Commission to the Congress in NUREG-0957 is equitable and in the public interest. As directed by the Commission in the June 20, 1984 Chilk memorandum, the staff has considered the question of whether the Commission should make any recommendations to the Congress proposing changes in the existing or proposed modifications to Price-Anderson in light of the Silkwood decision. If the Commission decides to recommend that Congress modify Price-Anderson, two possible methods for accomplishing this are provided. The first would be through a change in the statutory definition of "public liability" to preclude the use of government indemnity to pay punitive damages and the second would be by eliminating the recovery of all punitive damage awards in conjunction with claims for damages resulting from a "nuclear incident" filed under the Atomic Energy Act.

1/ The Silkwood situation did not, however, involve a facility covered by the Price-Anderson system.

Applicability of Price-Anderson To Pay Punitive Damages

There are no exclusions for punitive damages under the terms in both the primary and secondary insurance policies provided by the nuclear liability insurance pools and furnished by large power reactor licensees as evidence of financial protection under the Price-Anderson Act. Punitive damages could be considered to be covered under the insurance policies to the extent that they are allowed under State tort law. Therefore, in those jurisdictions where payment of punitive damage claims is allowed, these claims could theoretically be paid in addition to claims for bodily injury and property damage, the two classes of claims specifically provided for in the primary and secondary insurance policies.

Under the Commission's indemnity agreements with licensees pursuant to the Price-Anderson Act, specific classes of claims are not enumerated. 2/ Instead, certain licensees are required to maintain financial protection to cover "public liability" claims arising out of a nuclear incident. Public liability is defined in Section 11w. of the Atomic Energy Act of 1954, as amended, as "any legal liability arising out of or resulting from a nuclear incident . . ." Because the definition of public liability does not enumerate classes of claims, it remains for a court to determine what legal liabilities have resulted from a nuclear incident under the State tort law of the State where the incident occurs. Because Price-Anderson neither enumerates nor excludes any type or class of claim, the term "public liability" could be interpreted by a court under prevailing State law to encompass punitive damage claims. Such a ruling would be consistent with the Supreme Court's decision in Silkwood.

Prioritization of Claims Under Price-Anderson

The Commission's responsibilities for protecting the public health and safety include assuring that adequate compensation will be available to those injured by nuclear incidents. In this regard, Subsection 170.o. of the Act requires that if the U.S. District Court in the district where the nuclear incident occurs determines that public liability claims from that incident may exceed the limit of liability, the Court must adopt a plan for the disposition of funds to pay claims arising out of that nuclear incident which includes an allocation of appropriate amounts for personal injury claims, property damage claims, and possible latent

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2/ Since 1968 when the indemnity agreements and the primary insurance policies were modified to implement the waiver of defenses provisions enacted in the 1966 amendments to the Price-Anderson Act, the form of indemnity agreements and insurance policies have contained a provision that the waivers do not apply to any claims for punitive or exemplary damages. This provision appears only in the form of insurance policies and indemnity agreements and not in the 1966 amendments to the Price-Anderson Act. The staff can find nothing in either the proposed or final rules implementing the 1966 amendments that offers any explanation as to why this provision was included.

injury claims. Such a plan would include establishment of priorities between claimants and classes of claims, as necessary to insure the most equitable allocation of available funds. The Joint Committee on Atomic Energy also addressed the issue of prioritization of claims in the following statement contained in its 1975 report accompanying H.R. 8631, the bill which, when enacted as Pub. L. 94-197 in 1975, extended the Price-Anderson Act:

> "The Joint Committee has included in the legislation a direction and authorization for the courts which develops the plan for distribution of funds in the event of a nuclear incident which appears to have resulted in damages exceeding the limit on liability to establish priorities between classes of claims and claimants. The Joint Committee wishes to assure that in such a case, where the immediate recovery by claimants may be less than the full amount of their losses, the distribution of funds will be made in such a manner as to compensate first for the most severe and the most readily computable losses. Thus claims for actual losses to property, for actual and reasonable medical expenses, for loss of wages, and other such losses may merit higher priority than such claims as those for alleged pain and suffering, emotional harm, and loss of consortium. Likewise, losses otherwise compensated for, while not precluded from recovery (under the collateral source rule) in most jurisdictions should be accorded lower priority than uncompensated losses. The Joint Committee also believes that as a matter of equity, in cases where less than full compensation will be made through the amounts immediately available from insurance and government indemnity, losses to offsite property of the licensee of the responsible facility should be accorded lower priority than losses to third parties. The court is authorized to establish such additional priorities as are deemed desirable and equitable to further the principles described above. The above provisions are in no way intended to create any causes of action not in accordance with existing law or to derogate any existing causes of action. Nor should these provisions be construed as a retreat from the belief expressed on many occasions by this Joint Committee and included in this bill that Congress would thoroughly review the situation in the remote event of a nuclear incident involving damages in excess of the limit on liability. The priorities are not intended to preclude ultimate relief for claims of secondary priority, but rather to assure that early relief is applied where most needed." 3/

It would remain for a court to finally determine the equitable distribution of Price-Anderson funds. Under the present Price-Anderson system, if claims arising out of a nuclear incident approached or exceeded the present absolute liability limit, compensatory damage claims could very well be in competition with funds reserved for latent

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3/ Report by the Joint Committee on Atomic Energy, Report No. 94-648, November 10, 1975, pp. 14-15.

injury claims as well as punitive damage claims. Such possible diminution of funds to pay conpensatory losses because of displacement by punitive damages could raise questions as to whether "protection of the public" envisioned in Price-Anderson was being fulfilled. Whatever a court determines, however, subsection 170 e. of the Act provides a statutory commitment by Congress to "thoroughly review" the situation if the damage claims from a nuclear incident exceed the present fixed liability limit. This provision would provide Congress with the opportunity to appropriate additional funds for claims above the present limit of liability. Thus, under the present system a court may decide to give higher priority to paying bodily injury or property damage claims and perhaps even exclude consideration of punitive damage claims with the knowledge that Congress would review the situation to provide additional relief.

In NUREG-0957, the Commission recommended that the Congress amend the Price-Anderson Act to substitute an annual limit on liability for accidents at large commercial nuclear power plants for the present absolute liability limitation. As SECY-84-146 points out, if this recommendation is adopted, questions involving prioritization of claims and payment of punitive damages will continue to be left entirely to the courts as they are now.

Since the proposed new system would require utilities to pay retrospective premiums year after year until all of the claims resulting from an incident are eventually paid, the requirement for Congressional review of any claims would be unnecessary. Such a proposed change in the present system coupled with the nonuniformity in State tort law regarding allowance of punitive damage claims or insurance for punitive damage awards, argue for the need for further Congressional direction with respect to the payment of punitive damages under Price-Anderson in light of Silkwood. Further, even under the present system which requires all utilities to pay retrospective premiums for claims exceeding the primary insurance layer, it may be inequitable to collect retrospective premiums from all utilities to pay punitive damages against one utility and particularly to collect retrospective premiums from utilities in States that do not allow insurance to be used to pay punitive damage claims for utilities in States that do.

At the present time with the limit of liability at $595 million and government indemnity phased out for large power reactors, any claims, including punitive damage claims, arising out of a nuclear incident at a large power reactor would be paid under the primary and secondary insurance layers. The question then arises as to whether government indemnity could "drop down" to pay punitive damage claims not covered by the underlying financial protection if the insurance policies were interpreted by the courts not to cover punitive damages or if State law forbids insurance coverage for punitive damages.

The Price-Anderson legislative history addresses the general question of "drop-down" in the following statement:

> "The protection of indemnification afforded by the Government under the agreement of indemnification is intended only to start when the damages exceed the full sum or the level of the financial protection required by the Commission. This means that if there are any exceptions in the scope of coverage of the underlying financial protection which may be applicable to a particular incident the indemnification does not pick up from the ground up but still picks up only after the amount of damage reaches the level of the financial protection required of the licensee." 4/

Therefore, if the underlying primary and secondary insurance could not pay punitive damage claims, government indemnity also would not be available to pay these claims.

On the other hand, government indemnity would be available to pay claims: from the first dollar up to $500 million, for nuclear incidents occurring at six reactors owned by non-DOE Federal agencies; above $250,000 up to $500 million for claims arising from nuclear incidents at 59 non-profit educational institution reactors; or above the financial protection amount set in the regulations up to $500 million for 12 other research, teaching, and small power reactors. As previously discussed, government indemnity could then be used to pay punitive damage claims because the term "public liability" as defined in the Atomic Energy Act could allow for the payment of these claims in accordance with applicable State tort law.

In discussing use of government indemnity to pay punitive damage claims in the Silkwood decision, Justice Blackmun, in a dissent joined by Justice Marshall, states:

> "The purpose of the indemnification is to provide compensation for victims and to minimize the exposure of licensees. But the Court's inconsonant holding leads to the anomalous result that in the event of a nuclear accident . . . the Federal government might well have to pay punitive damages to the victims of the accident." Slip op. at 13 (Blackmun, J. dissenting).

Justice Blackmun continues:

> "The Court's holding produces similar incongruities in the application of Price-Anderson to an accident in which liability exceeds the $560 million dollar limit. In that situation, Price-Anderson provides for the prorationing of claims. If punitive damages are allowed, victims with large punitive awards would receive awards greatly in excess of compensation, while other victims would receive less than full

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4/ Report No. 435, House of Representatives, 85th Congress, 1st Session, May 9, 1957. p. 21.

compensation. Such a result would be grossly inequitable and in clear conflict with Price-Anderson's goal of "compensating victims of a nuclear accident." Slip op. at 14 (Blackmun, J. dissenting).

As discussed in the "Brief For the United States as Amicus Curiae" filed by the Department of Justice in the Silkwood case, the only specific reference to punitive damages that could be found in the legislative history of the Price-Anderson Act was made by Professor David Cavers of Harvard University in a law review article. 5/ In that article, which was primarily a discussion of strict liability, Professor Cavers noted that punitive damages might be imposed under State law and that to avoid this situation, punitive damages should not be protected by an operator's insurance or indemnity. Apart from this article, nowhere in the legislative history is there an indication that Congress was even aware of the credible scenario whereby government indemnity would be used to pay punitive damage awards levied against a licensee.

Logically, if punitive damages are to inflict financial punishment upon a party liable for grossly negligent behavior, they should be paid by that party alone and not through the use of government indemnity as is presently the case. The staff is not aware of any proposals by the nuclear industry, insurance industry or others to modify the Price-Anderson Act to remedy the punitive damage concern.

Modifications to the Price-Anderson System

If the Commission decides, because of the Silkwood decision, to propose recommendations to the Congress to amend the Price-Anderson Act with respect to punitive damages, the staff has evaluated two possible approaches. The first would be for Congress to amend the definition of "public liability" in Section 11w. of the Atomic Energy Act to exclude the payment of claims for punitive damages. The second method would be for Congress to exclude the payment of all punitive damages arising out of any nuclear incident.

Amending the "Public Liability" Definition

One method for remedying the present situation would be for the Commission to propose legislation to the Congress amending the definition of "public liability" which would have the effect of excluding the use of government indemnity to pay claims for punitive damages. If the term "public liability" is amended, then the definition of "financial protection" in section 11k. of the Price-Anderson Act of 1954, as amended, is also affected. The term "financial protection" is defined, in part, as "the ability to respond in damages for public liability . . ." If punitive damage claims are excluded from "public

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5/ Appendix 39, "Proposed Extension of AEC Indemnity Legislation: Hearing Before the Subcommittee on Legislation of the Joint Committee on Atomic Energy," 89th Congress, 1st Session, 1965, pp.415-416.

liability," they would also be excluded from "financial protection." While such a change would eliminate the anomalous result identified by Justice Blackmun, it would also have obvious negative impacts, especially for a licensee who would be liable. A significant impact could be on non-profit educational institution reactor licensees. As mentioned, these licensees are indemnified from public liability above $250,000 and up to $500 million by the government. If neither government indemnity nor financial protection covered punitive damage claims, these licensees would be faced with either self-insuring against these claims or trying to buy insurance coverage in the conventional liability insurance market. However, even if such insurance were available, some States would not allow insurance to be used to meet these claims.

There is a different concern for both Federal-agency licensees and members of the public if the definition of public liability is modified to exclude punitive damage claims. Under the indemnity agreement that the Commission enters into with Federal agencies operating nuclear reactors, the government promises to indemnify for damages from the first dollar up to $500 million. If the definition of public liability were amended, claims for punitive damages filed against a Federal-agency licensee would no longer be paid by government indemnity under the Price-Anderson Act. Punitive damage claims cannot be paid under the Federal Tort Claims Act (28 U.S.C. §2674). Therefore, it would appear that a person could not recover for punitive damages against a Federal-agency licensee if the definition of public liability were modified.

Because the secondary insurance policy requires large power reactor licensees to pay retrospective premiums assessed by the insurance pools, questions will arise as to whether retrospective premiums collected from all utilities at the present time can or should be used to pay punitive damages against one utility and whether retrospective premiums can or should be collected to pay punitive damages against a utility from other utilities in States that do not allow insurance to be used to pay punitive damage claims. If the purpose of assessing punitive damages is to punish a utility, then this purpose is not served if retrospective premiums collected from other utilities are then used to satisfy punitive damage awards. If punitive damage claims were excluded from the definition of public liability and, as a direct consequence thereof, also excluded from the definition of "financial protection", questions such as those posed above could be removed from the Price-Anderson context although they might continue to be a matter of contention among insurers, utilities and claimants. Even if the definition of public liability were modified to exclude punitive damage claims, the insurance pools would not be prohibited from covering punitive damages in the primary and secondary insurance policies. If the nuclear liability insurance policies did not exclude these claims, the policies therefore would have to provide coverage over and above what a licensee would be required to maintain to satisfy the financial protection requirements of the Price-Anderson Act. The result would be that while the insurance pools could continue to cover punitive damages in both the primary and secondary insurance policies, utility licensees could not be assessed retrospective premiums by the pools for punitive damage claims because such claims would not be included within the definition of public liability.

Exclusion of Punitive Damages Arising Out of Any Nuclear Incident

The staff has also considered a more radical approach to the issue of punitive damages whereby Congress would amend the Atomic Energy Act to prohibit entirely the payment of punitive damage claims under the Act for any nuclear incident and expressly preempt this class of claim under State tort law.

One of the objectives of the original Price-Anderson Act was to "remove the deterrent to private sector participation in atomic energy presented by the threat of potentially enormous liability claims in the event of a catastrophic nuclear accident." If excessive punitive damages were awarded that were covered neither by insurance nor indemnity, a utility could face losses that would threaten its viability. Punitive damage awards could greatly exceed compensable bodily injury and property damage, as was the case in Silkwood.

As discussed in NUREG-0957, utility rates are generally approved by independent State commissions. Rates are generally set to allow recovery of all reasonable and prudent operating and capital costs incurred in providing electricity. It is questionable whether a utility could or should recover from ratepayers awards paid out for punitive damages. Even if these awards were recoverable from ratepayers, the equity of having ratepayers pay for punitive damage awards is in itself also questionable. If, on the other hand, punitive damage awards are not recoverable, then stockholders would be forced to absorb these losses and the viability of the company could become impaired.

Another argument that can be made for the elimination of punitive damages for nuclear incidents is that the operation of nuclear reactors is regulated by Federal law and to impose punitive damages undermines that system. This argument was made in part in the Department of Justice Brief filed in the Silkwood case:

> "Violations of the Atomic Energy Act and the regulations enforcing it are subject to strict criminal and civil penalties. 42 U.S.C. (& Supo. V) 2271-2284. Criminal conviction for willful violations of various provisions of the Act may result in substantial fines and imprisonment. The NRC itself can impose civil penalties for violations of specific licensing provisions of the Act. 42 U.S.C. (& Supp. V) 2282 . . . Finally the NRC can initiate proceedings to modify, suspend, or revoke any license issued under the Act, and in an emergency, can make such actions effective immediately." (Citation omitted) 6/

The brief continues:

> "It is obvious that allowing State courts to duplicate the NRC's system of penalties could have the very effects the Commission tries to avoid. If sufficiently severe, a State

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6/ Department of Justice Brief for the United State As Amicus Curiae Supporting Appellees, p. 18.

> punitive award may exceed in amount what the Commission finds appropriate or even - as in this case - what Federal law permits. Such a judgment could 'put a licensee out of business,' and thereby upset the balance set by Federal law between deterrence of unlawful conduct and encouragement of the activities promoted by the Atomic Energy Act. A less drastic award could still adversely affect a licensee's ability to safely conduct licensed activities. Whether either consequence will ensue can only be determined by a careful assessment of both the licensee's financial situation and the costs of safe operation - matters entrusted by Federal law not to the vagaries of a jury verdict but rather to the NRC's uniform and expert judgements." 7/

In his dissent in the Silkwood case, Justice Powell discusses the regulatory program as the means to ensure public safety for nuclear activities in the following statement:

> "Public safety always has been an overriding concern both in government regulation and the industry. Striking the balance between the need to promote nuclear development and the responsibility to insure public safety is a task that requires a unique level of professional expertise. Congress has enacted detailed legislation and created a highly qualified administrative agency to promulgate and enforce regulations . . . It is reasonable for a nuclear facility to be held liable, even without fault on its part, to compensate for injury or loss occasioned by the operation of the facility. It is not reasonable to infer that Congress intended to allow juries of lay persons, selected essentially at random, to impose unfocused penalties solely for the purpose of punishment and some undefined deterrence. These purposes wisely have been left within the regulatory authority and discretion of the NRC." Slip. op. at 9-10 (Justice Powell, dissenting)

Balanced against these arguments are significant problems inherent in modifying the Act to exclude punitive damages. Since the enactment of the Price-Anderson Act in 1957, Congress has stated its intent of not substituting Federal law for State tort law. This was evident when Congress adopted the contractual waiver of defenses provisions rather than imposing a Federal tort standard for strict liability. The most direct statement in the legislative history of Price-Anderson concerning Congressional intent of noninterference with State tort law is found in a 1966 report:

> "Since its enactment in 1957 one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law. Under the Price-Anderson system, the claimant's right to recover from the fund established by the Act is left to the tort law of various States; the only interference with

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7/ Id., at p. 22.

> State law is a potential one, in that the limitation of liability feature of the Act would come into play in the exceedingly remote contingency of a nuclear incident giving rise to damages in excess of the amount of financial responsibility required together with the amount of government indemnity. 8/

Exclusion of punitive damages, coupled with retention of the limit of liability, could also raise a serious constitutional issue. Such an amendment would alter the constitutional balance accepted by the Supreme Court in Duke Power v. CESG, 438 U.S. 591 (1978). Finally, any recommendation to substitute Federal for State tort law in excluding punitive damages for nuclear incidents must consider that even though the doctrine of punitive damages is administered diversely among different jurisdictions, it is still popular in most States. As stated in a journal article on punitive damages:

> "Despite the lack of apparent logic to support punitive damages, such awards will probably persist . . . The vigor of the plaintiffs' bar, the prevailing sympathetic temperaments of many state and federal judges, the disproportionately heavy representation of plaintiff attorneys in state legislatures and the United States Congress, and the tradition of two hundred years or so will not soon be overcome. Like it or not, punitive damages are virtually certain to remain a long-term fact of life in civil action litigation." 9/

8/ Senate Report No. 1605, 89th Congress, 2nd sess., p. 6.

9/ J. Long, "Punitive Damage: An Unsettled Doctrine," Drake Law Review, Insurance Annual, Vol. 25, No. 4, 1976, p. 889.