REMARKS BY

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TO

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I am delighted to join the Atomic Industrial Forum once again for this conference on "New Directions in Nuclear Licensing".

As all of you know too well, the nuclear enterprise has been caught up in a swirl of controversy for years now. I am here today to address some of those controversies and to tell you what we are doing about them in Washington.

Leading the list at the moment is the Price-Anderson Act, and the proposed amendments to raise the retrospective premiums for compensation of damages in nuclear incidents. Shortly after I return to Washington, the Commission will appear before Chairman Udall's Subcommittee on Energy and the Environment to present our views on this issue, and the legislation that should be forthcoming this year.

The Nuclear Regulatory Commission has recommended to Congress that the maximum retrospective premium that can be charged a utility in case of an accident be raised from $5 million per reactor per incident to $10 million per reactor per incident per year, until all such claims of liability have been paid.

The adoption of this recommendation would certainly provide sufficient funds to pay all such claims. But I recognize the concern that this proposal introduces the perception (if not the practical reality) of "unlimited liability" in the payment of claims. And there is the legitimate question of whether such payments would be timely.

And after the spectacle the legal profession made of themselves in the wake of the Bhopal tragedy, I have developed a profound skepticism over the wisdom of dangling an annually renewable $1 billion in front of the noses of some of this country's attorneys at law.

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I am also quite well aware of the financial constraints under which many nuclear programs are operating today, and the potential problems that such perception may cause in today's financial climate.

So while I supported the original Commission recommendation that was formulated before the beginning of my tenure, I can tell you today that I also support some element of flexibility on this subject. The Commission should recognize there may be other (and better) solutions to this problem which can both protect the public adequately and treat the industry fairly.

Without committing myself to any particular solution, I am aware of alternative proposals which I believe hold promise. For example, one proposal is that the current retrospective premium of $5 million per incident be increased to an amount two or three times as large, but for a limited period of time after an accident. A further embellishment would involve the imposition by the NRC of a kilowatt-hour fee on all nuclear generation, in the event that primary and secondary layers of insurance have been exhausted. And there may be other good ideas as well.

But I must say the industry does itself no good by sometimes giving the appearance of wanting to have its cake and eat it too in this matter. Arguing for strictly limited liability under Price-Anderson on the one hand, and for a large reduction in source term on the other is an illogic not likely to escape the man on the street.

If it is true that an accident at a nuclear plant would be no more serious than that at many other large industrial facilities, then you cannot afford to be perceived as resisting normalizing adjustments to the Price Anderson premium level and payment of all legitimate claims in an accident.

[And if I may digress for a moment, it is worth noting that 1985 may be remembered as the year in which the chemical accident achieved the dubious distinction of becoming the new benchmark of industrial catastrophe. A major nuclear accident almost certainly would not have the life-threatening consequences of a Bhopal; its primary impact is likely to be economic -- with the potential for very large economic losses. And this, of course, is what Price-Anderson is designed to deal with.]

Some of your opponents have long argued that the nuclear enterprise can't survive without the subsidy they saw implicit in the much-maligned Price-Anderson legislation. But time has shown that no funds were ever paid by the federal government in connection with its Price-Anderson liability, and in fact the government's share of that liability has steadily diminished to zero as new powerplants have come on line in recent years.

In fact, events of the past few years, and the major and real problems facing the chemical industry and the EPA lead to the ironic conclusion that, instead of being an embarrassing step-child of the nuclear enterprise, Price-Anderson may become a model for rapid, assured compensation of the public in the case of catastrophic accidents -- chemical, nuclear, or whatever.

The message being learned is that there is no such thing as unlimited liablity for any industry, and there is no such thing as unlimited

compensation in real life. I believe time is proving Price Anderson to be enlightened, landmark legislation to protect the public from years of litigation, rather than to protect the industry from a bankruptcy that would still not compensate an injured public.

While I don't want to dwell on Price Anderson, some of you know that, in connection with the Commission's consideration of this issue, I have also urged a major modification of the Price-Anderson definition of an "extraordinary nuclear occurrence." If the Commission finds an incident to be an ENO, several legal defenses are waived by the responsible party, including the necessity that persons with damage claims prove negligence.

Even Three Mile Island fell far short of qualifying as an "ENO", but it did expose a number of fundamental flaws in the current definition of the term. I believe the most serious of these flaws in the current provision, even as modified in the package presently out for public comment, is that which calls both for a measure of the release of radionuclides in an incident and a measure of damage to persons and property caused by that release.

That definition should be changed to require only a measure of release, and to recognize that a given level of release would cause a given level of damage. I introduced this option for two fundamental reasons. First, the techology is clearly good enough to measure such releases accurately. Indeed, every nuclear powerplant is surrounded with all the instrumentation that's needed to accomplish the task.

And secondly, this approach frees the NRC and the parties involved from having to prove or disprove specific damages that are difficult or impossible to prove, let alone disprove. So, for example, under the Commission's proposed revised ENO provision, the Commission still might have to demonstrate whether or not five or more people had received a whole-body or organ-specific radiation dose equivalent to more than 100 rads during the course of an accident -- hard enough from a diagnostic standpoint. But it begs the question of why four people could incur a dose of, say 500 rads, or 1,000 people 80 rads, all without triggering an ENO waiver of defenses. That is as extraordinary to me as any nuclear occurrence could ever be, and such flaws persist in the Commission's latest proposed revisions.

An extraordinary nuclear occurrence should be determined instrumentally, by offsite surface contamination dose rate or by dose integration during the first 24 hours following a release -- a simple, inexpensive, and definitive solution to what is now a very complicated problem. The current law is a lawyer's dream and a plaintiff's (and licensee's) nightmare, and I think it's time we all woke up to the realities of this situation.

I cannot leave the subject of compensation without commenting briefly on the Silkwood case reviewed in 1983 by the Supreme Court. In a 5-to-4 decision, the Court held that a state may award punitive damages against an entity regulated by the NRC for actions a jury finds negligent -- even though all NRC regulations may have been complied with.

In other words, every jury in America can now theoretically serve as its own Nuclear Regulatory Commission. Or, as the original judge in the Silkwood

case so memorably charged his jury, "Your duty is to determine what constitutes the exercise of reasonable care in handling plutonium."

If it is any comfort, I should tell you that the Commission is considering asking Congress to make clear that punitive damages are not to be paid with Price-Anderson insurance funds. If a licensee can insure against punitive damages, such damages lose all deterrent value as punishment. Nor, in my judgment, did Congress ever intend the Atomic Energy Act to deny an injured person the opportunity to recover punitive damages in cases where NRC standards have been violated.

So the proposal before the Commission addresses only half the problem. The Commission should also seriously consider asking Congress to amend the Atomic Energy Act to reaffirm the principle missed by the Court in Silkwood, that a licensee fully in compliance with NRC regulations is not liable for punitive damages in matters of nuclear safety -- a principle made a shambles by the Supreme Court's erroneous acceptance in Silkwood of that lower court judge's instruction to the jury to serve, in effect, as a local NRC.

Let me touch briefly now on regulatory reform, ex-parte reform, and the Sunshine Act.

We at the Commission have long sought some clear direction from Congress on matters of regulatory reform. A central element of that reform is the question of licensing the next generation of nuclear plants.

The time has long since come for the United States to join the rest of the nuclear world in approving standardized plant designs. I do not believe it makes economic or regulatory sense to reinvent the wheel every time we try to license a nuclear plant. And I do not believe we have to wait until every last word is in, and every "global" issue is solved, before we can say with confidence that "this design is good enough and safe enough".

In fact, we have already licensed what could be very close to standard plant designs in the Combustion Engineering plant at Palo Verde, the General Electric BWR-6 plant at Grand Gulf, Mississippi, and the Westinghouse SNUPPS plant at Callaway, Missouri.

And with the Commission in the throes of finalizing its Severe Accident policy, we should speak clearly as well on the procedure for approving these standardized plants of the future.

I believe each combined construction and operation license issued for such plants should, on the day of issuance, carry with it the assurance that, short of an urgent new discovery in reactor safety, the NRC believes that plant to be suitable for a standard licensed lifetime of nuclear power generation, without further modification.

I know how much that will pain the fans of back-fitting in this audience, but the legislation we have recently sent to Capitol Hill -- the Nuclear Power Plant Licensing and Standardization Act of 1985 -- will accomplish just this purpose.

The new legislation addresses early site review, standard design approval, and the regulatory framework for any backfitting required and for a streamlined hearing process. It is an attempt to insure that both the hardware and the regulatory benefits of standardization are realized.

We can do some of these things administratively, of course. But I think it is important that the Congress and the American people be brought into this standardization process so that they can see its advantages and share our optimism that the standardized plant may be the salvation of the nuclear enterprise in this country.

I support this new licensing legislation with only one significant exception.

In its current form, the legislation provides that "operation of the facility shall commence...unless the Commission determines that good cause exists for delaying such operation". Fair enough. But the bill does not call for an affirmative finding by the Commission that a plant is ready to operate.

For a variety of reasons -- the assurance of safety, the reassurance of the public, and the insurance against liability, to name only three -- I believe we need to make this final approval a positive rather than a negative power of the Commission. I simply do not believe, as a practical matter, that this Commission or any future Commission is going to permit initial operation of a nuclear facility on procedural autopilot, as it were. I'm not talking two-step licensing here; I'm simply asking a formal, affirmative Commission finding that the NRC has done its job.

The Department of Energy's version of this bill is silent on this issue. It is not silent, however, on the subject of backfitting. DOE would allow the Commission to make a change in a facility only by issuing a rule, regulation, order, or license amendment. The Comission, of course, has chosen to deal with backfitting administratively rather than legislatively, and we have the final rule under consideration now. And we have not as yet decided the best method for imposing backfits.

But I can assure you we intend to bring some structure and order to the backfitting process. It's been an ad hoc and arbitrary process much too long, and this is one regulatory reform I can promise we will make.

Now, there's a lot I could say about ex-parte proceedings and the Sunshine Act rules at the Nuclear Regulatory Commission, but I know that most of this bothers us more than it bothers you. Still, I think it is worth reviewing with you, in the context of the licensing challenge, some of the roadblocks we encounter in doing even the simplest Commission business.

As you know, the Commission is prohibited by law from engaging in discussions with our own staff about substantive issues in the cases before the NRC.

A "separation of functions" rule prohibits employees of the agency with investigatory or prosecutorial responsibilities from advising the Commission in its decisions.

An "ex-parte" rule prohibits communications betweeen agency decision-makers and interested persons outside the agency.

An "on the record" rule requires that decisions in formal adjudicatory proceedings be made solely on the basis of the record -- testimony, arguments, and other papers filed in those proceedings.

And the Sunshine Act, as we've traditionally interpreted it, requires that where three or more Commissioners are gathered together, no conversation of substance may be held unless the public is also present.

In other words, we can't talk to our staff, we can't talk to you, and we can't talk to each other. Which is why, when you come to our offices in Washington, you see so many people talking to themselves.

There has been some talk of a "separated staff" proposal, under which part of the Commission's staff would be permanently available to advise the Commission on technical matters in the licensing process, and another part would report to the Director of Nuclear Reactor Regulation -- as a third party in the licensing process -- and would be off limits to the Commission.

Well, that sounds fine. But good as our staff is, there's only so much first-class technical expertise to go around. And who gets first pick? Harold Denton or me? I'm interested in talking to the guys most expert and closest to the work, not to the 2nd stringers. In sum, as nearly as I can tell, such separated staff proposals would amount to little more than a vast expansion of the Commission's Office of Policy Evaluation, and that may or may not be a good idea.

Stripped to its essentials, the ex parte/separation of functions problem is rooted in the fundamental precept that a party to an adjudicatory proceeding may not whisper in the ear of the judge. It is this elementary principle that the Commission, try as it might, may not ignore, as long as Congress chooses to assert that the requirements for us, as a regulatory Commission, are otherwise.

But we are making progress with another important problem, and that is a realistic definition of when Commissioners can talk with one another on matters of substance. For years, the Nuclear Regulatory Commission has interpreted the Government in the Sunshine Act far more strictly than the law required or than Congress, in its wisdom, intended. We have operated on the assumption that any gathering of Commissioners is a "meeting", as defined by the Act, and that all such "meetings" must be open to the public.

Well, the "meetings" the Sunshine Act had in mind are and will be open to the public. Those are the meetings, according to the law, "where deliberations determine or result in the joint conduct or disposition of official agency business." The legislative report which accompanies and explains the Sunshine Act says, more simply, that we can't hold private meetings which "effectively predetermine official actions."

And that's fine. But the law, the report language, the U.S. Administrative Conference Interpretive Guide to the Sunshine Act, and plain old common

sense all tell us that not every conversation among Commissioners is an official meeting of the Commission.

Moreoever, it's important in my judgment, to realize what's at stake here. And what is at stake is nothing less than the Commission concept itself.

We are a Commission because I think that the American people expect the checks and balances inherent in a Commission system for the regulation of something that is as controversial and as important as nuclear power.

We are a Commission because, for nuclear power, the American people deserve the cross-fertilization of ideas and expertise that comes from collegial decision-making.

And we are a Commission because we are an agency whose primary duty is protection of public health and safety, and I believe the American people want and deserve decion-making by the NRC to be stable -- free of the unpredictability of the political process.

But having the checks and balances and safeguards of the Commission system, nevertheless we -- not the politically-directed single-administrator agencies -- we with the safeguard of the public interest, are penalized into ineffectiveness and inefficiency. And thus is the worthwhile concept of collegial decisionmaking by commission rendered an illusion -- degraded in practice to what often amounts to decisionmaking by exhaustion.

When we treat our encounters in a false and stilted way - and more importantly, when we must scrupulously avoid talking to each other, we do ourselves and the public a great disservice.

It took no less than a Supreme Court decision last May to get the Commission off the dime. So in the last few weeks, we have made some changes in our interpretation of the Sunshine Act which comport more with common sense. We have decided, in other words, to accept the interpretation of the law which every other government agency in Washington has long since accepted, and I believe this single decision can do as much to improve the efficiency and effectiveness of the Nuclear Regulatory Commission as anything I've talked about today.

Let me close by recalling that the House Appropriations Subcommittee, in connection with that Subcommittee's recent investigative analysis of the NRC and its problems, asked the Commissioners to comment on the "flaws inherent in the Commission form".

Well, I do not believe there are flaws inherent in the the Commission form any more than in the single administrator form, in seeking to regulate a subject as controversial as nuclear power. The wrenching experience in the administration of the EPA in the early 1980's, had it occurred in the NRC, could have spelled the end of nuclear power in this country for the foreseeable future. If you want continuity and stability in the nuclear regulatory process, then you should be for a commission system. But the system we have now goes far beyond stability -- it's tying us in knots.

Indeed, I have reluctantly concluded that, absent significant change either in Commission procedures, or more likely in the laws governing those procedures, a single administrator, that second choice, may well be the prefera. arrangement for the NRC.

But in my judgment, the public interest would be the loser in that unfortunate circumstance. It would be far better to have the Commission system function as it was intended than to be forced to resort to a single administrator, so that the procedural conundrum I have outlined -- ex parte, separation of functions, and Sunshine -- recedes into irrelevancy.

Nevertheless, it is fair to say that the Commission is making progress, and it is good that the debate is finally being joined on many of these issues. And I believe the progress we are making -- coupled with the progress you are making in your various specialities -- can contribute significantly to the progress and prosperity and security of the nation we serve in common.

It is an honor to be in your company today, in the sunlit city of Dallas, and if you ever come to Washington, I'll be happy to see you -- if my legal assistant will let me.

Good luck with your conference, and thank you very much.

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