

NUCLEAR ENERGY INSTITUTE, INC.

QUESTIONS AND TOPICS FOR DISCUSSION

for

February 20, 2015 U.S. Department of Energy Public Workshop

on the

**Notice of Proposed Rulemaking for the Convention on Supplementary
Compensation for Nuclear Damage Contingent Cost Allocation**

Docket Number DOE-HQ-2014-0021

Regulatory Information number 1990-AA39

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**QUESTIONS for FEBRUARY 20, 2015 DOE WORKSHOP
Notice of Proposed Rulemaking for the Convention on Supplementary Compensation
for Nuclear Damage Contingent Cost Allocation
Docket Number DOE-HQ-2014-0021; RIN 1990-AA39**

In response to the Notice of Public Meeting published by the U.S. Department of Energy (DOE or the Department) on January 27, 2015 (80 Fed. Reg. 4227-28), the Nuclear Energy Institute, Inc. (NEI) submits the following list of questions and proposed discussion topics for use at the February 20, 2015 DOE public workshop. As announced by the DOE notice, this workshop will discuss “the U.S. Department of Energy’s December 17, 2014 notice of proposed rulemaking to establish a retrospective risk pooling program under section 934 of the Energy Independence and Security Act of 2007.”

NEI is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and entities involved in the nuclear energy industry. As such, NEI, on behalf of its members, has a strong interest in this DOE rulemaking.

NEI appreciates the opportunity to provide input for use at the public workshop. We urge DOE to carefully consider the questions and discussion topics raised by NEI and its member companies, and address those issues at the workshop to the extent possible. NEI and its members also reserve the right to provide additional comments as the rulemaking proceeds, and our submittal today in no way limits or replaces NEI's response to the December 17, 2014 Notice of Proposed Rulemaking (NOPR), which will be submitted by the comment deadline. We also urge DOE to grant NEI's January 28, 2015, request for a 60-day extension of the public comment period.

Impact of NOPR on U.S. Exports, U.S. Competitiveness, and the President’s National Export Initiative

We do not believe the DOE notice of proposed rulemaking (NOPR) achieves the goal of providing a fair and equitable retrospective risk pooling system while reducing the impact on the competitiveness of U.S. suppliers. The NOPR leaves unknown or unquantified critical factors such as the aggregate risk exposure and a cap on supplier liability, and would impose unduly burdensome reporting requirements on U.S. nuclear suppliers. NEI believes any rule should be based on certain key principles, including:

Simplicity. A complex and incomplete system (such as that proposed in the NOPR) will create uncertainty for U.S. suppliers and discourage U.S. suppliers from participating in the nuclear export market, which will be to the detriment of safety and security at foreign projects.

Clarity. The risk allocation system should be clear, transparent, and based on known variables so that suppliers can reasonably ascertain their potential exposure. To the contrary, the NOPR is based on many factors that are currently unknown. This makes it impossible for affected suppliers to ascertain their potential exposure and evaluate the alternatives proposed.

Equity and Minimization of Burden. The final rule should be designed to minimize the reporting and compliance burden on U.S. suppliers, and should recognize that records may not be available in the form contemplated by the proposed rule.

- Does DOE agree with the principles above?
- What studies has DOE conducted to assess the impact of the proposed rule on U.S. nuclear suppliers? Are the results of these studies available to the public?
- Are the required contributions of other countries to the supplemental fund generally paid by the government Party to the Convention (especially nuclear exporting nations)?
- Has DOE considered other, potentially simpler models (e.g., a fee-based model, or a fee on future U.S. exports to covered nuclear installations) that some may view as more equitable and that may provide greater certainty? If so, what are those models?
- Additional information and considerable analysis is necessary to determine whether the proposed rule will provide a workable and equitable methodology for assessing the fees associated with the U.S. government's obligation under the CSC. Does DOE believe it can seek reimbursement if a call is made prior to the rule being promulgated in final form?

Determining “Covered Nuclear Suppliers” and “Covered Installations” under the NOPR

A clear and workable definition of what suppliers will be covered under the DOE final rule is essential. The absence of a clear definition in the NOPR makes it difficult for stakeholders to provide meaningful comment on the NOPR and its effects. Although the construction and operation of a commercial nuclear reactor requires hundreds of different goods and services, the NOPR would determine CSC cost allocation to a “final nuclear supplier” and/or “lead nuclear supplier.” See 79 Fed. Reg. 75,076, 75,080-81, 75,085. A related concern is that the lack of clarity as to what nuclear installations are “covered installations” makes application of the NOPR methodologies and processes problematic. We urge DOE to make this information available immediately so that public stakeholders can apply that information during the NOPR comment period.

- What is the basis for DOE’s assumption that the NOPR would apply to approximately 25 U.S. nuclear suppliers? See 79 Fed. Reg. 75,093.
- Regarding the concept of a “final nuclear supplier” (the supplier that obtained the export license or authorization), if the supplier of the item used an authorized agent or freight-forwarding company to handle the export license paperwork, would it be regarded as the final nuclear supplier under the NOPR?
- How would DOE identify the “lead nuclear supplier” for projects before 2007? Would it be the NSSS vendor, the constructor, the project integrator (which may have been the foreign customer), or some other party?
- How would a company that merely licenses its technology be treated under DOE’s definition of final nuclear supplier?
- For the purpose of defining a “nuclear incident” or otherwise applying DOE’s proposed methodology, how would DOE propose to treat an event that affects multiple units at a single installation?
- Is there public information available to determine what entities now meet or previously met the definition of a supplier under NRC regulations in 10 CFR Part 21? Similarly, is there public information available to identify what entities now have or previously had a 10 CFR Part 50 Appendix B quality assurance (QA) program, or possess an NRC export license, or a DOE export authorization? If so, please identify the relevant sources of information.
- Does DOE believe that, to avoid double jeopardy, a supplier should be exempted from paying any part of the U.S. premium if a CSC member country’s laws or regulations implementing the Convention allow a legal action to be brought against suppliers?
- 10 CFR Part 21 applies to “basic components” (safety-related) as well as commercial grade items (CGI) that are “dedicated” to nuclear safety-related use. Thus, a supplier of a CGI that “dedicates” the item for safety-related use under Part 21 would be covered by DOE’s proposed rule. However, if the facility operator (rather than the CGI supplier) dedicates the item for safety-related use, why should the CGI supplier be covered by DOE’s proposed rule since it sold its item as commercial grade without any intent (or perhaps knowledge) that its item would be used in a nuclear installation?
- With respect to “covered transactions,” if a U.S. supplier used a local fabricator in the installation state (a requirement in some countries), shouldn’t the value of the local fabrication be backed out of the value of the transaction?

- Does DOE intend for nuclear power plant architect-engineers (A/E) and constructors to be included as “final/lead nuclear suppliers” under the NOPR? Please explain.
- Please explain whether the NOPR’s approach assures that an entity that produces the product exported corresponds to the “final nuclear supplier.”
- In DOE’s view, would a model that allocates risk as between the NSSS vendor, the A/E, and the constructor be as equitable, or more equitable, as that proposed in the NOPR? Similarly, would a model that considers the presence of other/post-construction suppliers of equipment and services, e.g., post-construction vendors, be more equitable? Please explain the Department’s position.
- The types of covered installations under the proposed rule include some fuel cycle facilities that are not necessarily covered by the Price-Anderson Act in the United States. This could create confusion over the scope of the foreign nuclear installations covered by the CSC. Will DOE ensure that the IAEA list of covered facilities and any updates thereto are made available to U.S. suppliers? Will DOE post them on the DOE website as part of the rulemaking?
- In developing the cost allocation formula, DOE would apparently look only to the “covered installations” located in countries that have ratified the Convention. Alternatively, would DOE consider adding covered installations located in countries that DOE concludes are likely to join the CSC within a reasonable period of time (e.g., countries that have signed but not yet ratified and/or deposited the instrument)? (This factor will affect the pool of covered nuclear suppliers.)

Which NOPR Alternative More Effectively Mitigates Impacts on U.S. Nuclear Exports?

We do not believe the NOPR provides sufficient information to enable affected suppliers to calculate their potential exposure or assess which of the two alternatives is more workable. Accordingly, suppliers are unable to comment meaningfully on the NOPR.

- Has DOE collected data or conducted studies to determine the aggregate quantities or values of U.S. nuclear exports? For example:
 - ✓ Has DOE reviewed data on U.S. Nuclear Regulatory Commission (NRC) export licenses (10 CFR Part 110) to covered installations?
 - ✓ Has DOE reviewed DOE specific authorizations and general authorization reports for technical assistance and technology transfers (10 CFR Part 810) for covered installations?

- ✓ Has DOE reviewed U.S. Commerce Department (DOC) data on exports of relevant items?
- If so, are the results of these studies and reviews available to the public?
- Without knowing the number of nuclear suppliers covered under the NOPR and the amount of each nuclear supplier's risk exposure, how can DOE calculate the overall or aggregate risk exposure of U.S. nuclear suppliers?
- Does DOE believe stakeholders can meaningfully comment on the proposed rule if material information, including the number of suppliers sharing the risk and the aggregated risk exposure, is not available for stakeholder consideration? Please explain.
- Has DOE performed any analysis of how application of Alternatives 1 and 2 impacts the competitiveness of individual suppliers, specific supplier segments, or how each Alternative impacts the overall competitiveness of the U.S. industry? If so, has this information been made available to the public?
- Did DOE analyze risk-informed assessment formulas / methodologies that could be more simply applied and would involve less burdensome reporting requirements?
- Is DOE willing to consider a risk allocation process other than that proposed in the NOPR, if stakeholders were to suggest such an alternative approach?

Cap on Retrospective Premium Payments

DOE seeks comment on what specific amount (or percentage of contingent cost) is appropriate for a cap on a supplier's premium payment. 79 Fed. Reg. 75,085. NEI believes that a cap is essential in order to provide an upper limit on the amount any one nuclear supplier would owe under the risk pooling system. To provide certainty and predictability for suppliers, and facilitate industry's ability to make such liability an insurable risk, we propose that the final rule include the following: (1) an annual cap on the risk premium payment, (2) a cap on the total risk premium payment by a supplier, and (3) a provision for future increases in the cap. We recognize the rule may need to allow for adjustments if payments are not sufficient to cover the total contingent costs for the United States, but such caps should be set to the extent possible.

- The NOPR does not propose a specific cap on supplier liability, but instead seeks comment on whether a cap should be calculated as a certain amount or a certain percentage of contingent cost. In DOE's view, what calculation method is best suited to ensure that the amount owed by the nuclear supplier can be an insurable matter?
- If DOE were to use a specific dollar amount (e.g., \$25 million) as the cap for all U.S. nuclear suppliers, it would seem that this would penalize smaller suppliers who would be subject to the same cap as large suppliers. Has DOE considered using different cap amounts depending on the size of the supplier or other factors?

- Would DOE consider including in the final rule an annual cap on risk premium payments? What amount would DOE support? Please explain your answer.
- Would DOE consider including in the final rule a cap on the total risk premium payments by any one supplier? What amount would DOE support? Please explain your answer.
- Would DOE consider including in the final rule a provision for future increases in the caps on annual and total risk premium payments? Please explain your answer.
- If the insurance community will not insure the risk of loss without a per-incident cap for any one supplier, will DOE be willing to go to Congress to request a cap?

Reporting & Data Collection Requirements under the NOPR

Subpart D of the NOPR addresses information collection and reporting. 79 Fed. Reg. 75,088-90. The NOPR states (79 Fed. Reg. 75,079) that DOE “believes that sufficient information and data are available to develop a formula and that a data collection system can be implemented to supplement the operation of such a formula if it needs to be used in the future.” For numerous reasons, we believe the NOPR’s proposed data compilation and reporting requirements are unrealistic and unduly burdensome. For example, DOE correctly recognizes that “recordkeeping back to 1960 may be challenging” for Appendix A items, and other types of suppliers (including successor entities) indicate that their records may not be in a form contemplated by the proposed rule. Additionally, it would be arbitrary for DOE to effectively penalize suppliers that have retained records of all long-ago (55 year old) transactions by making them subject to larger assessments than companies which cannot produce such records. We are also concerned that DOE’s cost estimate for compliance (see discussion of the NOPR in connection with the Paperwork Reduction Act of 1995) is unrealistically low. See 79 Fed. Reg. 75,093.

NEI urges DOE to include in the final rule a realistic, workable approach that will minimize unnecessary reporting burdens on suppliers. The final rule should eliminate the requirement for detailed data collection going back to 1960.

- Regarding the reporting requirements for prior transactions, what is DOE’s basis for the NOPR’s 6 month period for reporting on prior transactions? Even assuming that corporate records are available, this reporting schedule appears to be unrealistic and should be extended.
- What is DOE’s basis for the number of nuclear suppliers it estimates to be affected by the data collection and reporting requirements in the NOPR?
- What is DOE’s basis for its estimate of the impact of the requirements on those nuclear suppliers in terms of burden hours, capital/start-up costs, and competitiveness?

- Has DOE considered alternative methods or criteria to streamline the reporting requirements (e.g., broader categories or ranges of values/quantities) while achieving the objectives of the law? If so, what were those alternatives?
- How does DOE propose to determine whether the information submitted is complete and accurate?
- We understand that it is unlikely many corporate entities affected by the proposed rule have retained the relevant records for the lengthy period of time required (e.g., back to 1960). What is the basis for DOE's request that nuclear suppliers examine records going back as far as 1960? Did DOE interact with any nuclear suppliers in an effort to determine whether this proposed requirement is feasible? What is the consequence if suppliers cannot provide data going back to 1960?
- How should complications associated with mergers, acquisitions, bankruptcies, and technology transfers within the U.S. nuclear industry over the last five decades be addressed by the reporting entities?
- The expense and undue burden associated with the proposed reporting requirements, and the unavailability of some records sought, raise the need for DOE to consider a modified standard for records disclosure. Would DOE consider using a "best available records" and "disclosure following a good faith review" standard, rather than imposing a requirement for certification under oath or affirmation and completeness and accuracy standard? If not, why not?
- What is the basis for the NOPR's position that the information required to be provided by suppliers will not entail the production of supplier trade secrets, proprietary, or business confidential information? Such a position appears unrealistic. How would DOE protect sensitive information from public disclosure?

Payment of Risk Premiums; Penalty for Non-Payment

We believe the final rule should include alternative payment options other than those in the NOPR, a provision making penalties discretionary, and consideration of factors to mitigate the penalty or support a claim of extraordinary circumstances.

- Will DOE consider including in the final rule a provision allowing affected suppliers to spread the payments out over varying lengths of time (e.g., 10 years or more) based on the amount of the liability? This would mitigate the impact on suppliers and might help make the risk insurable. Is DOE willing to ask Congress for authority to increase the time over which suppliers could pay their assessed amount?
- What is the mechanism in the proposed rule that would prevent some suppliers from bearing an inequitable share of the risk/potential loss due to other suppliers' failure to

report covered transactions, or failure or inability to pay? If there is no such mechanism, is DOE willing to add such a provision to the final rule?

- The NOPR states (79 Fed. Reg. 75,083) that within 60 days of a request for funds under the Convention, DOE will calculate the retrospective premium payment owed by each nuclear supplier and notify the affected suppliers via the Federal Register. Given the proposed method of notification and the short payment deadline, will DOE consider revising the final rule to reduce the penalty for untimely payment (assessment + interest + mandatory penalty), which appears excessively punitive?
- Will affected entities be notified of the amount of premium payment owed by any method other than notice in the Federal Register?
- Is there any provision for DOE to exercise discretion in imposing the payment penalty?
- Will DOE adjust a penalty to account for the time value of money?

Clarifying Definitions under the NOPR

- Some structures and contracting methods do not appear to fit squarely into DOE's supplier construct. A consortium, joint venture, technology licensee or construction partner may perform or bear primary responsibility for much of the 'nuclear build' in an EPC contract. In developing the NOPR's approach, did DOE consider that while a nuclear plant is licensed by one supplier, the majority of the build may be undertaken by means of other contractual relationships, e.g., joint ventures or consortia? Will these types of partners or co-suppliers bear some portion of the funding burden under the NOPR?
- Please clarify whether, and to what extent, sub-suppliers and sub-contractors would be "suppliers" under the NOPR.
- How does the NOPR define the "value" of a transaction (versus revenue, contract price, or other metric)?
- Does the NOPR's proposed methodology account for variables such as whether or not the system, structure or component (SSC) or equipment has in fact been installed at the covered installation, or replaced since its installation?

Allocation of Risk

To provide meaningful comment on the NOPR, the industry needs to better understand the bases for DOE's allocation of risk exposure under Alternatives 1 and 2. See 79 Fed. Reg. 75,083, 75,087, 75,090. We believe the final rule should specifically explain and justify the bases for DOE's decision on how to define the nuclear sectors and how to allocate risk among those sectors.

- Does DOE believe Alternative 2 potentially would provide a simpler approach than Alternative 1? If so, please explain.
- What are DOE's bases for assigning the relative risks of the nuclear sectors identified in Alternative 2, including the relative weight and percentage to each sector? Is the underlying analysis to support these bases publicly available?
- What is the justification for differentiating between Sectors 1 and 3 (quantity based) and Sectors 2 and 4 (value based) for purposes of calculating a supplier's risk exposure?
- Has DOE considered the potential additional burden/effect upon a supplier that operates in more than one sector?
- How is the appropriate sector/weighting to be determined for transactions or contracts involving the sale of both goods and services?
- Would DOE consider eliminating "transportation" from segment 3 of the nuclear sector (currently defined as "nuclear material and nuclear material transportation"), on the basis that transportation activities are arguably so unlikely to cause a nuclear incident triggering a request for funds under the CSC that this probability should be considered minimal?
- In developing the 2 to 1 risk weighting to be applied across the nuclear sectors (Alternative 1), did DOE consult with NRC, Department of Commerce, and/or international insurers?
- Regarding the allocation of risk share, has DOE performed any sample calculations or sensitivity studies of these Alternatives based on estimated aggregate numbers for all suppliers?

Requirement to Demonstrate Financial Assurance

The NOPR's proposed requirement that suppliers demonstrate financial assurance of their ability to cover a risk premium payment appears unwarranted, and would add unnecessary administrative cost and burden for U.S. suppliers.

- What is DOE's basis for seeking to require nuclear suppliers to demonstrate they have adequate resources e.g., state-administered fund, bond, private insurance, or certificate of

deposit) to cover the risk premium payment? Has DOE considered the feasibility, cost, and necessity of the financial assurance provision?

- What would the consequence be if a supplier does not demonstrate financial assurance as requested in the NOPR?
- Would DOE consider allowing alternative methods of demonstrating financial assurance, e.g., permitting suppliers to submit annual financial reports as an adequate demonstration, similar to the NRC's approach under 10 CFR Part 140 for licensees to demonstrate the ability to meet retrospective premium obligations under the Price-Anderson Act?

Dispute Resolution Process

The NOPR does not provide for any process for suppliers to challenge DOE's assessment calculations, either for the supplier in question or another supplier. This issue should be addressed in the final rule.

- How does DOE plan to address disputes in a transparent and equitable manner?
- What data will be made available to a supplier who contests DOE's allocation of liability in the event of a nuclear incident?

Exclusion of Small Nuclear Suppliers

It is important for the rule to provide an exclusion for small nuclear suppliers so that they are not subjected to potentially bankrupting liability under the risk pooling system. The NOPR seeks comment on the use of a dollar amount or other criterion, such as qualification as a small business by the U.S. Small Business Administration, to establish the small nuclear supplier exclusion under Alternative 1; or quantity or dollar amounts or other basis for exclusion under Alternative 2.

- What analysis has DOE conducted to determine whether the cut-off under the Small Business Administration (SBA) definitions would provide a meaningful exclusion for small nuclear suppliers?
- Does DOE intend to apply the small entity exclusion to the current entity or to the entity at the time of the export?
- Has DOE considered the possibility that exclusion of "small" nuclear suppliers under the SBA standard would not be appropriate? SBA size standards are matched to North American Industry Classification Systems (NAICS) Codes, and are based on *average annual* sales receipts expressed in millions of dollars or *average current* number of employees. Any number based on *annual* sales would not take into account total sales during the reporting periods in the NOPR.

- Would DOE consider an alternative approach to the small supplier exclusion, such as exclusion based on quantity of, or revenue from, goods and services sold? Would DOE consider excluding a supplier from the formula if its average revenue from the export of nuclear goods and services over a prescribed period prior to the date of an incident is less than a set minimum share?

Legislative Reform

- Is DOE willing to request that Congress amend the statute to remedy the effects of unfair and/or unworkable legislative provisions?