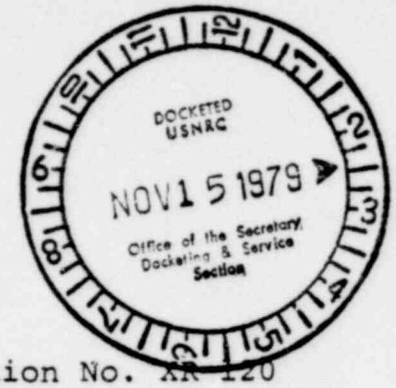
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION




| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | Application No. XR-120 |
| WESTINGHOUSE ELECTRIC CORP. | ) | Docket No. 110-0495 |
| | ) | |
| (Exports to the Philippines) | ) | Application No. XCOM-0013 |

VIEWS OF THE DEPARTMENT OF STATE
ON PROCEDURAL AND
JURISDICTIONAL ISSUES

This pleading is filed by the Department of State, on behalf of the Executive branch, in response to the Commission's Order of October 19, 1979, in the captioned proceeding requesting views on a number of specifically enumerated procedural and jurisdictional issues. These issues arise in the context of the Commission's decision to order, in accordance with Section 304(b)(2) of the Nuclear Non-Proliferation Act of 1978, 42 U.S.C. 2155a, and 10 CFR 110.84(a), public proceedings relating to its consideration, pursuant to sections 103, 109 and 126 of the Atomic Energy Act of 1954, as amended. 42 U.S.C. 2133, 2139, 2155, of Westinghouse Electric Corporation's export license applications XR-120 and XCOM-0013, for the export of a nuclear power reactor and related components to the Philippines.

Question 1. Whether (and if so, to what extent) the Commission possesses the legal authority or a legal obligation to examine the health, safety and environmental impacts of an exported nuclear facility in reaching its licensing determination (specifically, which of the seven issues raised by Petitioners are appropriate for Commission review)?

1435 250

7911280 548

The Department of State believes that the Commission's previously announced holdings that it generally does not have jurisdiction to consider health, safety and environmental impacts within a recipient country of a United States nuclear export are correct. Edlow International Company, 3 NRC 563, 584-85 (1976); Babcock & Wilcox, 5 NRC 1332, 1336-46 (1977); Edlow International Company, 5 NRC 1358, 1364 (1977). We fully support the position, justified in detail in the Babcock case, that the National Environmental Policy Act of 1969 does not require any such review. Further, while the Commission may not issue a reactor or fuel license if the issuance of the license would be inimical to the health and safety of the public, 42 U.S.C. 2077 (c), 2133 (d), we agree with the previous Commission holdings that this standard refers to persons within the United States. Neither the legislative history nor consistent administrative practice support any other view. Edlow International Company, 3 NRC 563, 582-84 and footnote 10 (1976).

However, the Department believes there are circumstances in which certain health, safety and environmental factors may be taken into account by the Commission.

First, the health and safety of the United States public may be affected by potential serious impacts a project may have on the environment of the "global commons". Since the Commission is authorized to review impacts on the public within the United States, it may necessarily review any global commons impacts of a project which would be so severe as to be likely to affect that public. As indicated below, the Department believes that the way for the Commission to meet any obligation to review such impacts

is by reference to the existing environmental documentation. U. S. Nuclear Power Export Activities, ERDA-1542 (1976).

Second, the Commission is responsible for determining that a proposed export would not be inimical to the common defense and security of the United States. 42 U.S.C. 2014 (g), 2077 (c), 2133(d) 2139 (b), 2155 (a). It is conceivable that a health, safety or environmental risk could so threaten United States relations with a recipient country -- or a U. S. military facility in that country -- that it would jeopardize important United States security or defense interests. The Department believes that the Commission should be guided by the Executive branch on whether, in a particular case, considerations of a health, safety or environmental nature might have such an impact. Only then does the Department believe consideration of these factors by the Commission would be warranted, as only then might it be maintained that the common defense and security is implicated.
It should be noted that in respect of issues relating to the common defense and security, the Commission has recognized the weight to be accorded to Executive branch views. Edlow International Company, 3 NRC 563, 586 (1976).

With specific reference to the seven issues raised by petitioners and listed on page 2 of the Commission's October 19 Order, the Department believes that any of these issues may be considered to the extent it impacts on the common defense and security of the United States or on the health and safety of the United States public.

Question 2: Is the Commission's health, safety or environmental review of export license applications limited to the connection of these issues with the U. S. common defense and security or are there other legal principles which permit or require the Commission to examine these matters as part of its licensing review?

The Department's view with respect to the Commission's authority to consider foreign health, safety and environmental issues is set forth above. The Department believes that there are no other legal principles which permit or require the Commission to examine these matters as a part of its licensing review. Indeed, the Commission, in its licensing review, is required by statute to grant export licenses on a timely basis when all the applicable statutory requirements are met. 22 U.S.C. 3221, 42 U.S.C. 2155. Thus, the law makes clear that the Commission may only review matters encompassed by statutory criteria set forth in the Atomic Energy Act of 1954 and the Nuclear Non-Proliferation Act of 1978 and may not base its review of licenses on other, more vaguely defined, legal "principles".

Question 3: What issues arising from the application to export a nuclear facility to the Philippines should the Commission examine in any future public proceeding?

In the instant case, questions were raised as to whether the criteria chosen for the plant were appropriate in view of the area's general seismic and volcanic activity. The Department considered these questions serious enough to warrant a review to determine whether health, safety or environmental impacts could be anticipated which would be of a sufficient gravity to lead to the conclusion that issuance of the export license would be inimical to U. S. common defense and security. Moreover,

in the instant case there are a large number of United States citizens located at close proximity to two major U. S. defense facilities on a sustained and continuing basis: Subic Bay Naval Base is approximately 12 miles from the Napot Point site, with approximately 6500 United States citizens, and Clark Air Force Base, approximately 42 miles distant, with approximately 20,800 United States citizens.

In the instant case, the Department believes the Commission may appropriately review the judgment of the Executive branch that the criteria chosen for the plant, taking into account the area's seismic and volcanic activity, are not likely to cause health, safety or environment risks of a gravity sufficient to warrant the conclusion that issuance of the export licenses would be inimical to the United States common defense and security. Further, the Department considers that if the Commission thinks that public participation can assist it in its review of this limited issue, this is the issue which future public comment should address.*

---

*The Department notes that the Commission has discretion to afford a hearing on this issue if it decides the statutory standards for a hearing are met. Section 304 (b)(2) of the Nuclear Non-Proliferation Act of 1978, 42 U.S.C. 2155a, 10 CFR 110.84(a). The Department does not believe petitioners are entitled to a hearing since in our view section 304 (c) of the Nuclear Non-Proliferation Act of 1978, 42 U.S.C. 2155a, eliminated any right to a hearing in a nuclear export licensing proceeding based on section 189a of the Atomic Energy Act, 42 U.S.C. 2239, and established that the exclusive basis for hearings in such a proceeding are the Commission procedures established pursuant to Section 304(b). The District of Columbia Court of Appeals supported this view when it held that the precedential value of NRC orders on rights of persons to intervene had been eliminated and that new NRC procedures would control hearing rights in future cases. Natural Resources Defense Council, Inc., v. U. S. Nuclear Regulatory Commission. 580 F.2d 698, 700 (D. C. Cir. 1978) (per curiam). In our view, the Congress intended to

1455 254

(continued next page)

Question 4: What procedural format should the Commission adopt to examine any foreign health, safety and environmental issues falling within its jurisdiction?

The possible procedures which the Commission may employ for public hearing are set forth in 10 CFR 110, subparts I-K. The Commission's procedures provide for written or legislative-type oral hearings, or a combination of the two. Both the law and the Commission's own procedures provide that these procedures constitute the exclusive basis for hearings in nuclear export licensing proceedings. The Nuclear Non-Proliferation Act of 1978, section 304 (c); 110 CFR 110.80.

The choice open to the Commission, if it determines to conduct a hearing on the substantive aspects of the instant proceeding, is thus to hold either a written hearing or a legislative-type oral hearing, or a combination of the two. It is the Department's view that the preferable format would be a written hearing on an expedited schedule. The substantive issues are primarily of a technical nature and we believe can most usefully be addressed in a written manner. The Department believes oral argument would not provide the Commission information that could not be communicated equally well in writing.

Given th: long period of time that this proceeding has been

(continued from previous page)
eliminate the need for complex standing arguments in export licensing proceedings and instead establish by statute one simple criterion -- whether, in the Commission's judgment, public participation would be in the public est and assist the Commission in making its statutory rminations.

pending, we believe expedited treatment is warranted. We do not believe participants in the hearing should require additional time because they have had ample time to prepare their positions, have in fact already done so in great detail in the context of litigation before the Federal District Court for the District of Columbia, and have previously pursued Freedom of Information Act procedures to obtain any required documents from the Commission and the Executive branch. In addition, we believe substantial further delay can have an extremely negative impact on U. S. relations with the Philippines.

In the event the Commission were to decide to hold oral hearings, the Department notes that, in accordance with section 304 (c) of the Nuclear Non-Proliferation Act, the procedures in 10 CFR 110 do not provide for adjudicative type hearings. Since the procedures are the exclusive basis for hearings, such hearings are not available in an export licensing case unless the Commission decides to waive its regulations. Pursuant to 10 CFR 110.111, the Commission may only waive a rule or regulation if a participant petitions the Commission requesting a waiver and then only if the Commission determines that because of special circumstances concerning the subject of the hearing, application of the rule or regulation would not serve the purposes for which it was adopted. The Department of State is unaware of any petition for waiver of the Commission's rules and regulations regarding hearings. In the event any such petition were received, the Department would have an opportunity to file a response pursuant to 10 CFR 110.111(d). However, we note that we concur with the policy view adopted by the Commission that the

legislative format for any oral hearings provides a more rational presentation of information and analysis and can be conducted without prejudicing important national interests on which export licensing determinations are based. Edlow International Company, 3 NRC 563, 589-91 (1976).

Question 5: If health, safety and environmental aspects of a U. S.-supplied nuclear facility are to be evaluated in the NRC export licensing process, in what specific manner should this review be conducted differently from the Commission's domestic reactor licensing proceedings? Should the scope of review be different, and if so, in what precise way?

As noted earlier, the Department concurs with the Commission that the NEPA does not apply to impacts within foreign countries. Further, taking into account the special considerations of a foreign policy nature noted in Babcock & Wilcox, 5 NRC 1332 (1977), the Department believes it would not be appropriate to review these issues in the same manner as in a domestic reactor licensing proceeding. We do not believe the same kind of health, safety or environmental review is either appropriate or possible in view of the limitations on availability of information to the United States and the sovereign jurisdiction of foreign nations over activities in their own territory. As the NRC has affirmed, the U. S. Supreme Court, foreign courts, international tribunals and the United Nations recognize the basic right of nations to conduct their internal affairs free from interference from other nations. Id. at 1343. Preparation of a detailed impact statement would, in the Department's view, be perceived as an intrusion by the United States into the domestic affairs of a foreign nation. The Department of State's views on this point are set forth in

its letter to the Commission of May 31, 1977. Id. at 1344. Moreover, from a practical point of view, it is not possible to collect the amount of information and conduct the kinds of site and facility specific examination in an export case that would be possible in a domestic case. Id. at 1344-45. To attempt to do so would seriously intrude on a foreign state's sovereignty. Id.

Further, in the nuclear export area, the non-proliferation interests of the United States mandate timely and reliable supply to nations that meet our non-proliferation criteria. 22 U.S.C. 3221, 42 U.S.C. 2155. Complex, lengthy or duplicative reviews of health, safety or environmental factors would jeopardize our ability to meet these objectives.

Because of these special considerations, the President promulgated Executive Order 12114 on January 4, 1979. That document establishes for federal agencies a framework for reviewing nuclear reactor exports. The Executive Order requires the establishment of implementing procedures. In the nuclear area, the Department of State was designated lead agency and worked with other Executive branch agencies and the staff of the Nuclear Regulatory Commission to develop procedures by which environmental concerns may be taken into account by the Executive branch, consistent with the foreign policy and national security policy of the United States.



The implementing procedures relating to nuclear activities covered by Executive Order 12114 became effective on November 13, 1979. 44 Fed. Reg. 65560-63. They define the kind of concise

environmental review to be conducted for nuclear reactor exports. Because of time constraints, the Commission declined formally to agree to the procedures and to agree that its staff would assist in the preparation of environmental documents under the procedures. The Department of State believes that the Commission should decide to participate in these procedures since this would permit a unified federal government review of health, safety and environmental factors in a manner consistent with the special foreign policy and national security considerations associated with such a review. The Commission could participate by agreeing to permit its staff, which has relevant expertise, to participate in the preparation of the documents under the procedures. Since the Department's authority and ability to discuss health, safety and environmental matters with foreign governments is different from and broader than that of the Commission, this would serve the United States overall interests in cooperating internationally on these important matters.

It should be noted that, while the scope for an Executive branch negative finding based on health, safety or environmental risks is limited, as a substantive matter, to the same common defense and security ground as available to the Commission, the Department has more latitude to review environmental, health or safety considerations as a procedural step before taking action on an export license application. The Atomic Energy Act requires that the Executive branch complete its judgment on whether issuance of the license will be inimical to the common

defense and security within 60 days, but the Secretary of State is given discretion to waive the time requirement if it is in the "national interest". 42 U.S.C. 2155(a)(1). This discretion, coupled with his authority to address other factors in addition to the specified export criteria, provides latitude to review environmental, health or safety considerations. It may be in the "national interest" to delay action on an export license application while reviewing these factors within the Executive branch and with concerned foreign nations, even if it may not be "inimical to the common defense and security" to permit the issuance of an export license application. This procedural authority to address environmental, health or safety considerations where they relate to the common defense and security is not available to the Commission.

In any event, the Department believes that the Commission should not conduct a review that would duplicate the work done by the Executive branch under the unified nuclear procedures to implement Executive Order 12114. Any such effort would, we believe, have serious detrimental impacts on U. S. non-proliferation and foreign policy interests. Any such effort would appear to add further U. S. unilateral requirements and new criteria to be considered in export licensing. This would decrease the certainty of the export licensing process and add additional time delays, both of which would be inconsistent with the efforts of the Government to establish the United States as a reliable nuclear supplier to those countries that adhere to effective non-proliferation policies.

1435 200

In the case of the Philippines, although the environmental procedures applicable to nuclear exports under Executive Order 12114 were not yet formally in effect, the Department of State prepared an environmental document designed to accomplish the objectives of those then-pending procedures. We believe that any review of health, safety, and environmental factors by the Commission should be based on the information transmitted with the Executive branch judgment of September 28, 1979, which included a discussion of site safety factors (Part 3C of the license application analysis), as well as a concise environmental review of the Philippine nuclear power plant Unit 1 and all comments concerning that review received by the Department from other U. S. Government agencies. This information, we believe, is of the appropriate level of detail for an assessment relating to impacts in a foreign country.

Concerning impacts on the global commons and impacts on the United States of the proposed reactor export, an appropriate environmental document already exists. Final Environmental Statement, U. S. Nuclear Power Export Activities, ERDA-1542 (1976). The Commission has previously relied on that document. Edlow International Company, 3 NRC 563, 585 (1976), 5 NRC 1358, 1364-65 (1977). We believe the Commission should rely on this document for any such anticipated impacts in the instant proceedings.

Question 6: Are there any factual or legal considerations which would justify a different NRC health, safety or environmental review for some export license applications than for others? Specifically, are such considerations applicable to the present matter?

In addition to the factual considerations set forth above, the Department notes that the Philippines Government is itself acting in a responsible manner to evaluate and resolve health, safety and environmental concerns that have been raised. The steps that have been taken as well as the Philippine Government's plans for further expert review are set forth in detail in section 3C of the Department's license application analysis for XR-120, submitted to the Commission on September 28, 1979.

The Department has set forth its view on the relevant legal considerations in its above responses. These considerations may justify different Commission health, safety or environmental reviews for some export license applications for nuclear facilities than for others.

Ronald Bettauer

Ronald J. Bettauer
Assistant Legal Adviser
for Nuclear Affairs
Department of State

Attorney for the Department of State

November 14, 1979