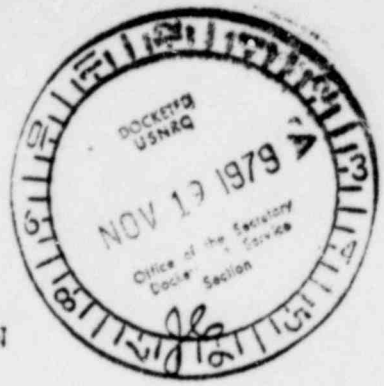

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

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

COMMENTS OF
EBASCO SERVICES INCORPORATED
IN RESPONSE TO COMMISSION ORDER
ISSUED OCTOBER 19, 1979

I. STATEMENT OF FACTS

Ebasco Services Incorporated hereby submits its comments in response to the Commission's Order of October 19, 1979 (the order). That order requests comment from interested parties on the Commission's jurisdiction to consider the health and safety effects of exports of nuclear materials.

The order arises from a series of applications for the export of nuclear equipment and materials from the United States to the Philippines filed by Westinghouse Electric Corporation (Westinghouse). On November 18, 1979 Westinghouse applied for a license (XR-120) to export a nuclear reactor for use at Napot Point on the Philippines. On August 3, 1978, Westinghouse applied for a license (XCOM-0013) to export components for that same project. On November 3, 1978, the Executive Branch recommeded approval of

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the component license. On September 28, 1979, the Executive Branch submitted its views recommending the overall facility license. On October 10, 1979, faced with requests for intervention, the Commision ordered further proceedings. The order phased such further proceeding into two parts. The first or instant phase concerns the broad general scope of the Commission's legal authority and jurisdiction to consider the effects which an export might have on the health and safety of other nations. The second or future potential phase concerns the particular factors relevant to the Napot Point facility. The order directed comments only on the jurisdictional aspects in Phase I. Accordingly, these comments are submitted in response.

II. IDENTIFICATIONS OF PARTY AND INTEREST

Ebasco Services Incorporated (Ebasco) is one of the largest engineering and construction firms in the United States and operates throughout the world. It presently has contracts or assignments relating to the engineering, construction, and planning for nuclear power plants or facilities within the United States and in other countries of the world. Ebasco serves as a consultant to the National Power Corporation on the Napot Point facility. The services which Ebasco has performed in connection with this facility

have been erroneously and irresponsibly described by the proposed intervenors in these proceedings. Although the order specifically reserves comment on the specifics of the Napot Point facility until a possible future Phase II, Ebasco feels compelled to assert unequivocably that any future inquiry by whomsoever conducted will confirm the thoroughness and quality of all of the work which has been performed by it. */ Ebasco's comments in this Phase I, however, in accordance with its understanding of the order, are made in a general sense rather than as a participant in the Napot Point facility.

With its direct involvement with the Napot Point project and with its other worldwide interests, Ebasco is in a unique position to comment in this docket. In addition, Ebasco's experience gives it a particular sensitivity to and understanding of varying political situations abroad.

III. DISCUSSION OF DESIGNATED ISSUES

A. The Commission possesses no legal authority under existing law, and has no obligations, legal or otherwise, to examine generally into the health, safety and environmental impacts of an exported nuclear facility.

*/ Ebasco's performance has been reviewed and accepted in comprehensive investigations conducted by the Philippine Atomic Energy Commission and the International Atomic Energy Agency.

In questions 1 and 2 posed by the order, the Commission has requested comment on its legal authority or jurisdiction to consider issues concerning foreign health, safety or environmental issues and the effect of exports upon America's common defense and security.

The Nuclear Regulatory Commission cannot and should not consider generally the health, safety and environmental aspects of a nuclear export unless specifically authorized or directed to do so by applicable law. It has no inherent legal authority or jurisdiction to do so. No legal authority exists for a general probe into the health, safety and environmental issues in distant nations. The applicable statutes, the appropriate regulations and the Commission's own case law acknowledge this fact. Existing law with respect to export licensing limits and specifically defines the authority and jurisdiction of the Commission solely to a consideration of the limited question of protection of the United States common defense and security.

The basic provisions governing nuclear exports are found in the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2153-2160 (AEA). Nothing in this statute gives the Commission authority to make a general investigation into foreign safety and health considerations. The same is true of the Nuclear Non-Proliferation Act of 1978, 22 U.S.C. §3201 et seq (NNPA).

The Commission's Regulations are the only authority dealing with the questions of foreign health and safety. These Regulations reaffirm lack of authority. 10 C.F.R. §110.44(a)(1)(ii) prohibits licensing only when it is determined that the export constitutes an unreasonable risk to the public health and safety. Elaborating on this requirement, the Regulations state explicitly that "'public health and safety' means the public health and safety of the United States." 10 C.F.R. §110.2(ii) (Emphases added). Thus, 10 C.F.R. §110.2(ii) limits Commission scrutiny solely to matters directly affecting the health and safety of the United States. Scrutiny of Philippine health hazards as such is not authorized.

Case law reaffirms these clear limits upon the Commission's authority and jurisdiction. In Edlow International, 3 NRC 569 (1976), the Commission held that it had no authority to assess the health, safety or environmental effects which its licensing might have upon the Indian subcontinent. In discussing potential health hazards from a reactor to be built in India, the Commission noted:

> [I]t would be extraordinary, as a matter of international law, to conclude that we had the authority to address ourselves to or attempt to regulate, matters so clearly domestic to the Indian nation and within the purview of its own regulatory responsibilities. The Atomic Energy Act of 1954, while requiring us to make export decisions (as all others) with a view to the 'common defense and security of the United States,' notably omits reference to public health and safety in its provisions addressed to international matters. (Emphasis added)

This echoes the logic of a more recent case, Transnuclear, Inc., (Three Applications for High-Enriched Uranium Exports to the Federal Republic of Germany), 6 NRC 854 (1977). The Commission there stated:

> Positive action on an export license application is warranted if the export in question (1) will take place under an agreement for cooperation, (2) is unlikely to create a significant health or safety risk to the U.S. population, and (3) will not be inimical to the common defense and security of the U.S. In making its licensing determination, the Commission will also consider whether failure to act would have an adverse impact on U.S. foreign relations. 6 NRC 855.

The Commission then recommended approval of the application.

The only question raised by the instant applications is whether the presence of United States citizens and facilities at Subic Bay provides the rationale for treating the Philippine Islands as "the United States." The answer to the question is clear -- the Subic Bay installation does not transform the Philippine Islands into the United States for purposes of the Commission's statutory authority. The Commission has already decided this question. Despite the presence of hundreds of thousands of American troops in West Germany, the Commission "[did] not foresee circumstances where the export of this high-enriched uranium is likely to create a significant health or safety

risk to the U.S. population." 6 NRC 859. Furthermore, no significant threat to American security was found. Hence, Commission jurisdiction over foreign health concerns did not exist. Id.

To hold otherwise would extend the Commission's authority worldwide on a plenary basis. There are American personnel, property or facilities virtually throughout the world. Congress clearly did not intend that the Commission would have plenary authority throughout the world. To imply such authority or to seek to imply authority on the basis that American personnel or facilities are present at Subic Bay is totally contrary to the law, to the best interests of the United States and the Commission, and to common sense.

Thus, existing law does not authorize Commission study of general health, safety or environmental concerns in distant nations. The Atomic Energy Act does not create such authority. The Nuclear Non-Proliferation Act likewise does not create such authority. On the contrary, none of the applicable regulations authorize a general Commission inquiry into these matters. If the Commission suddenly expands its jurisdiction on this matter, that expansion would be a radical and unauthorized departure from precedent. A most important consideration is the fact that the Department of State to which Congress has delegated specific authority has specifically and formally recommended that the applications be granted.

B. Public policy dictates that existing law should not be changed.

Under existing law it is clear that the NRC does not have the legal authority to examine the foreign health, safety and environmental impacts of an exported nuclear facility. This absence of authority is made clear by the NNPA, the Commission's regulations, and by the decisions of the NRC itself. However, it is not merely the legal authority which must be considered, but the public policy of the United States as well. The NNPA and the Senate Report accompanying it (S.R. 95-467) outline five purposes of the Act and five elements of the policy underlying the Act. These purposes are as follows:

(1) establish more effective framework for international cooperation to meet energy needs of all nations;

(2) insure that the worldwide development of peaceful nuclear activities and the export by any nation of nuclear materials and equipment and nuclear technology intended for use in peaceful nuclear activities and the export by any nation of nuclear materials and equipment and nuclear technology intended for use in peaceful nuclear activities do not contribute to proliferation;

(3) authorize the U.S. to take such actions as are required to ensure that it can act reliably in authorizing the export of nuclear reactors and fuel to nations which share our non-proliferation policies;

(4) provide incentives to the other nations of the world to join in such international cooperative efforts and to ratify the Treaty;

(5) ensure effective controls by the U.S. over its exports of nuclear materials and equipment, and of nuclear technology.

The Senate Report lists the following five elements of the statement of policy:

(1) to try to prevent proliferation through international initiatives and more effective controls over commerce;

(2) to confirm the U.S. ability to be a reliable supplier to nations sharing our non-proliferation objectives;

(3) to encourage all nations to ratify the non-proliferation treaty;

(4) to aid other nations with energy technology, including alternates to nuclear energy;

(5) to cooperate with others in protecting against contamination from nuclear activities.

Clearly, none of these purposes or elements involve an examination of health, safety or environmental factors. The only mention of health and safety is in the Commission's regulations (10 C.F.R. 110.84(a)(1) & (2)) and they have been interpreted to mean health and safety of the United States population not of foreign nations. The emphasis of the Act is upon meeting the energy needs of all nations as long as such nations adhere to the non-proliferation policy of the United States. The government of the Philippines adheres to such policies. The Act was intended to assure that the United States would be a reliable supplier of nuclear reactors and fuel. This emphasis in the Act is the direct result of prior United States delay in processing licensing due to extended regulatory proceedings which made supply totally unreliable.

Besides the evidence of Congressional intent which is outlined in the policy statement of the Act, there are other extremely important policy considerations. The United States must be cognizant of its proper role in international affairs. Notions of comity dictate that administrative decisions by foreign nations should be given respect in the United States if we are to expect similar treatment in the field of nuclear export and in other areas as well. The Philippines counterpart to the NRC, the Philippine Atomic Energy Commission (PAEC) is a competent, professionally staffed agency with full and complete jurisdiction and authority concerning health and safety considerations. PAEC has acted. It has conducted a full review of health

and safety concerns regarding the Napot Point plant and concluded that all issues raised were addressed, and a construction permit was issued by PAEC. In addition, the safety of the plant has received further and continuing review by the Philippines authorities. For this Commission to attempt o reexamine these questions would be tantamount to saying that the Philippine government is incapable of judging what is in the best interests of its nation and its citizens in the sphere of health, safety and environment. The jurisdiction of the NRC under the NNPA does not extend to making judgments as to whether foreign nations are capable of carrying out their regulatory role in the areas of safety, health and the environment.

Further, the United States must always be cognizant of the climate in the international community. There may have been a time when U.S. intervention in the domestic affairs of foreign nations in a regulatory capacity would have been, if not welcome, at least tolerated under the guise of superior U.S. know-how in a given area. Such is not the case today. Besides the fact that the United States no longer has a monopoly on the technical expertise necessary to make judgments about nuclear safety, there is growing resentment among foreign nations of U.S. interference in matters that are seen as internal regardless of the effects the U.S. may foresee at home. A prime example of this sentiment is the legislation which was very recently introduced in the British Parliament

to protect British businesses from the wide-ranging extra-territorial application of U.S. antitrust laws (October 31, 1979). As British Trade Secretary John Nott was quoted, "It is one thing for a firm to be expected to abide by the laws of an overseas country whilst it is doing business in that country. It is quite another thing to be expected to abide by the laws of that country, to accept the judgments of its courts or the requirements of its authorities, when operating elsewhere." (N.Y. Times, Nov. 1, 1979, Col. 1, D. 11). Mr. Nott termed this attempt by the U.S. to apply its antitrust laws extraterritorially as "American economic imperialism."

Certainly, the Philippine government could levy, and has in fact already levied, a similar charge against the United States in the present circumstances. With no statutory authority upon which to base its attempt to regulate health, safety and the environment abroad, the NRC is in an even more vulnerable position than are the FTC, SEC and CFTC which rely upon statutory authority to support their activities abroad. The United States cannot operate in a vacuum. It and its administrative arms must deal fairly and on a level of equality with foreign nations. There is no gain to be achieved by putting our administrative or judicial rules and regulations on a pedestal and attempting to force other nations to pay homage to them. Such a posture is politically untenable and indefensible and, more importantly, is contrary to the very notions of sovereignty and comity to which we ascribe

The Executive Branch of the United States government has been charged with developing the foreign policy of this government. Whether the United States will intervene in the internal affairs of another nation is certainly an issue involving foreign policy. The State Department has passed judgment upon this particular license application, and the NRC has no jurisdiction to interject itself into a situation involving local conditions about which it has no knowledge and international affairs over which it has no expertise or authority. The Philippines are a valuable ally and the international political ramifications of the proposed NRC inquiry are much better judged by the Executive Branch which is charged with carrying out those foreign policy functions.

Aside from the political and theoretical reasons for maintaining NRC policy in its present posture, there are other reasons as well. A health and safety examination of the type which the intervenors propose would frustrate and defeat the specific purposes of NNPA. One of the principal purposes behind the NNPA was to insure the reliability of the United States as a supplier. To further delay the issuance of the licenses by a new and lengthy investigation procedure may well result in the cancellation of the contracts by the Philippine government. Such a course of action may have already been initiated. If this occurs, the reputation of the United States

and United States firms supplying nuclear facilities may well be irreparably harmed. The United States and United States firms may be regarded in the eyes of the world as a totally unreliable supplier due to the unpredictable and uncontrollable reaction of its regulatory agencies to the supplications of individuals or groups with dubious definable interests. The purpose of the Act will be frustrated and eventually the United States will lose its share of the worldwide market for nuclear facilities. This practical approach to the matter is necessary not only to the economic interests of the United States but also to the non-proliferation goal of the Act and Treaty. NRC Commissioner Kennedy in a letter to Senator Church dated January 26, 1978 stated:

> I believe that we will maximize our influence in the non-proliferation area only if other nations perceive us as a reliable and predictable supplier of nuclear fuels and equipment. Unfortunately, many representatives of recipient countries with whom I have spoken find us all too predictable, but in the wrong sense. What seems to be predictable is that we will often approve licenses at the last possible moment only after expressions of urgency by foreign nations... If these nations perceive the United States as potentially a capricious supplier, they can be expected to turn to other suppliers, or, if they have the capacity, to develop their own resources. The consequences can only be a level of United States influence over the non-proliferation policy of these nations correspondingly diminished at the very least and possibly forfeited entirely.
>
> It is not only our non-proliferation goals which can suffer. If export licensing continues in fits of stopping, starting, and stalling, the United States will alienate countries with which it has had its closest and most supportive relationships.

The logic of Commissioner Kennedy's statements is clear. Delay can serve no goal of the NNPA. The only parties who can conceivably benefit from further delay are those who have neither the interests of the United States nor the people of the Philippines at heart. Only those who oppose all nuclear export licensing on abstract principles can benefit from this delay, a tactic which should be all too apparent to the NRC. Further delay can only cause an abortion of the Napot plant project as evidenced by the fact that the government of the Philippines is already threatening to terminate the contract on the basis of non-performance because of the failure to obtain requisite export licenses. The issue before the NRC is one of procedure, and yet further delay can act as a decision on the merits. Under no circumstances should the NRC allow a delaying tactic to resolve the issue.

In the order the Commission also asked for views regarding the issues to be examined in future public proceedings. (See question 3 of page 4 of the order). Under the regulations, the Commission has the authority to determine the health, safety and environmental effects on the United States population. This does not, as stated above, authorize a review of effects abroad. The only effects abroad that may be examined are those which affect the common defense and security of the United States and its non-proliferation goals under the NNPA.

In question 4 of the order the Commission asks for views on the procedural format to be adopted. As already noted, Ebasco believes that no further proceedings are necessary or appropriate. However, if there are further proceedings we believe that the issues could be better and more expeditiously resolved by written submissions.

In terms of the scope of review of the Commission in the case of a U.S.-supplied nuclear facility, (question 5 in the Commission's order) there is no question that the authority of the NRC is vastly different from that which it possesses in a domestic reactor licensing proceeding. The Commission, as stated previously, has very limited authority in determining effects abroad and these are confined to national security and defense implications. The more intensive review done in a domestic proceeding is wholly inapplicable to one in which the United States supplies a nuclear facility for operation abroad.

In answer to question 6 of the order, the Commission can only proceed under the authority of the AEA, as amended by the NNPA and its implementing regulations; there can be no justification for exceeding those bounds. Factual and legal considerations cannot change the authority of the NRC. Any fundamental change in the direction or policy of the NRC is not within the agency's own prerogatives. Rather

it is for Congress to legislate any fundamental changes in policy. In an area which directly impinges upon foreign affairs, an arena in which the NRC has neither expertise nor authority, it is doubly important that the NRC narrowly construe its function. The NRC has not been entrusted by the Constitution or any statute to formulate U.S. foreign policy and in a case of potential conflict such as this, the NRC must clearly defer to the State Department and the Executive Branch. This proceeding has the potential for profound impact on public policy both domestic and foreign and it is crucial that the proper arm of the United States government is making the decisions.

Wherefore, we submit the foregoing comments and trust that they will be considered carefully and prove to be of value to the Commission in its deliberations on the jurisdictional and procedural issues under review.

Respectfully submitted,

EBASCO SERVICES INCORPORATED

By J. A. Scarola
President and Chief Executive Officer

19 November 1979