

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of	:	
	:	Application No. XR-120
WESTINGHOUSE ELECTRIC CORPORATION	:	Docket No. 50-574
	:	
(Exports to the Philippines)	:	Application No. XCOM-0013

MEMORANDUM OF  
WESTINGHOUSE ELECTRIC CORPORATION  
IN RESPONSE TO COMMISSION  
ORDER DATED OCTOBER 19, 1979

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November 19, 1979

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## INTRODUCTION

In February 1976, the Philippine National Power Corporation ("NPC"), an agency of the Philippine Government, entered into a contract with Westinghouse Electric Corporation ("Westinghouse") for the purchase and construction of a nuclear power plant on Napot Point on the Bataan Peninsula, about forty-five miles west of Manila. The plant is designed to generate 620 megawatts of electricity and will be used for base load generation in the Luzon Island grid which includes Manila. Under current projections, the plant will cost \$1.2 billion to complete. The plant is partially financed through the Export Import Bank with credits extended or guarantees in the amount of \$644 million.

A substantial portion of the work contemplated by the contract for the Napot Point plant has been completed. Almost \$400 million has been expended to date on manufacturing and construction work and approximately forty-five percent of the civil construction work has been completed.

On November 18, 1976, Westinghouse filed an application with the Nuclear Regulatory Commission ("NRC" or "Commission") for a license to export to the Republic of the Philippines the Nuclear Steam Supply System and related equipment. This application, No. XR-120, was assigned Docket No. 50-574 and was noticed in the Federal

Register on December 30, 1976 (41 Fed. Reg. 56895). Subsequently on August 3, 1978, Westinghouse filed an application for a license to export certain components to be used in the construction of the nuclear plant for which the facility export license had been sought. This application was assigned Application No. XCOM-0013. On March 6, 1979, Westinghouse applied to the NRC for a license to export nuclear fuel for use in the reactor under construction. The fuel license application, No. XSNM-1471, was assigned Docket No. 110-0495 and was noticed in the Federal Register on March 20, 1979 (44 Fed. Reg. 16987). Subsequently, petitions to intervene were filed with the Commission by several individuals and organizations.

By letter dated November 3, 1978, the Department of State informed the Commission that with respect to Application No. XCOM-0013 the Executive Branch concluded that the "proposed export would not be inimical to the common defense and security of the United States," and thus recommended issuance of the license.<sup>1</sup> Similar advice was given by the Department of State with respect to Application No. XR-120 by letter dated September 28, 1979.

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<sup>1</sup>The Commission Staff, in SECY 79-100 dated February 8, 1979, concurred in the Executive Branch judgment and recommended issuance of the license.

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In that letter the Executive Branch recommended issuance of the requested export license as follows:

"The Executive Branch, on the basis of its review of this case, has concluded that the requirements of the Atomic Energy Act and P.L. 95-242 have been met and that the proposed export would not be inimical to the common defense and security of the United States. Moreover, the Republic of the Philippines has adhered to the provisions of its Agreement for Cooperation with the United States. Therefore, the Executive Branch recommends issuance of the requested export license."

In an Order dated October 19, 1979 (the "Commission Order"), the Commission established a two-phase hearing procedure designed to reach a decision on the export license applications.<sup>2</sup> The first phase of the procedure involves "those issues which pertain to the proper scope of the Commission's jurisdiction to examine

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<sup>2</sup>The Commission Order consolidated consideration of Application Nos. XR-120 and XCOM-0013. The fuel license Application No. XSNM-1471 was not consolidated since no Executive Branch views had been received by the Commission for that application as of the date of the Commission's meeting on October 10, 1979 at which the Commission procedures now being followed were agreed upon. However, the Commission Order made it clear "that issues raised by all three license applications are substantially the same, and that the Commission would expect to consider all relevant matters pertaining to the Philippine exports in the scope" of the instant proceeding (Commission Order, pp. 5-6). On October 17, 1979, the Department of State provided the Executive Branch views on the fuel license application and recommended that the license be issued.



health, safety and environmental questions arising from the construction and operation of exported nuclear facilities, and what procedural framework would be appropriate for considering such issues, if they are found to lie within NRC authority" (Commission Order, p. 3). The Commission has requested that the participants and other interested persons file a statement of views on six procedural and jurisdictional issues outlined in its Order. This document is responsive to the Commission's request.

#### SUMMARY OF WESTINGHOUSE POSITION

The Commission previously has held in the context of nuclear export license proceedings that matters affecting health and safety in foreign countries are outside the jurisdiction of the Commission. In the Matter of Edlow International Company (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563 (1976); In the Matter of Westinghouse Electric Corporation (Application for the Export of Pressurized Water Reactor to Association Nuclear ASCO II, Barcelona, Spain), CLI-76-9, 3 NRC 739, 754 (1976). Similarly, the Commission has held that matters relating to environmental effects in foreign countries are outside the jurisdiction of the Commission.

Edlow International Co., supra, at 585; In the Matter of Babcock & Wilcox (Application for Consideration of Facility Export License), CLI-77-18, 5 NRC 1332, 1346-48 (1977). These positions of the Commission, based upon close examination of applicable statutes and policies behind those statutes, were correct and should be affirmed. Any other position taken by the Commission can only adversely affect the U.S. position as a reliable supplier of nuclear material and equipment, and can only be disruptive to our relations with foreign countries and frustrate the attainment of desirable nuclear non-proliferation goals of this country.

In the event the Commission elects to review in any way health, safety or environmental matters relating to an export license, the Commission review should be limited to an overview of the regulatory capability of the recipient country without in any way purporting to assume any of that country's responsibility for safety. Any such review should be made applicable to all nuclear power reactor exports. Further, in conducting such a review the Commission, if it believes a hearing will contribute to a resolution of the issues, should adopt a format for a non-adjudicatory, non-record hearing solely involving written comments by participants. Finally, any such format must include provision for an expeditious hearing process so as to comply with the Congressional

mandate under the Nuclear Non-Proliferation Act of 1978 ("NNPA") for expedition in the handling of nuclear export license applications.

#### DISCUSSION

The Westinghouse position with respect to each of the six issues which are identified in the Commission Order is set forth in the following six numbered sections.

- "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)?"
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Westinghouse submits that the Commission possesses no legal authority or legal obligation to examine the health, safety and environmental impacts of an exported nuclear facility in making licensing determinations. Moreover, Westinghouse submits that none of the seven issues identified in the intervention petition of the Center for Development Policy ("CDP") which are summarized at page 2 of the Commission Order are appropriate for Commission review in this export license proceeding.

The Commission historically has taken the position in nuclear export license proceedings that matters affecting

the health, safety and environment in foreign countries are outside the jurisdiction of the Commission, and thus that the Commission lacks authority to consider such health, safety and environmental effects in nuclear power export license proceedings. This position, which Westinghouse submits constitutes a correct understanding of the Commission's legal authority, was reflected as to health and safety matters in the Federal Register notice for the Napot Point facility export license application. In that notice the following phrase was included:

"In its review of applications solely to authorize the export of production or utilization facilities, the Nuclear Regulatory Commission does not evaluate the health and safety characteristics of the facility to be exported." (41 Fed. Reg. 56895)

The legal foundations providing for Commission export license responsibilities are the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011 et seq.), the Energy Reorganization Act of 1974 (42 U.S.C. § 5801 et seq.) and the Nuclear Non-Proliferation Act of 1978 (22 U.S.C. § 3201 et seq.). Nowhere in these Acts is the Commission authorized to review foreign health, safety and environmental considerations associated with nuclear facility export. In a June 1977 report to the Commission prepared by the Commission Export Study Group (SECY 77-280), the Commission was advised that neither the

Atomic Energy Act of 1954 ("AEA") nor the Energy Reorganization Act of 1974 ("ERA") requires the Commission to establish health, safety or environmental standards governing the use of nuclear exports in a recipient country or to assess site specification from impacts associated with such export. This advice was repeated by the Export Study Group in SECY 78-365 dated July 3, 1978 and entitled "Health and Safety (H&S) Considerations in NRC Reactor Export Licensing and Nuclear Assistance Programs." That document noted that the NNPA did not alter the conclusion reached by the Export Study Group in SECY 77-280. The Export Study Group found that the legislative histories of the AEA and ERA revealed "no Congressional intent that the Commission should establish health and safety standards for exports, review exports on H&S grounds, or otherwise assess the health, safety, or environmental impacts of exports." It thus concluded that any legal authority to conduct foreign health and safety reviews could not be based upon the Commission's organic statutes.

The term "public health and safety" has been defined in Commission regulations governing nuclear exports as meaning the "public health and safety of the United States" (see 10 C.F.R. § 110.2(ii)). This phrase has never been expanded by the Commission to



include the "health and safety" of U.S. citizens living abroad. In fact it is clear from the language in both Edlow International Co., supra, and Babcock & Wilcox, supra, that Commission consideration of "health and safety" pertains only to licenses for domestic use or where a domestic health and safety impact might be expected. See, infra, pp. 10-13. Further, those cases make it clear that consideration of foreign environmental impacts are outside the scope of Commission jurisdiction with respect to nuclear export license reviews. See, infra, pp. 11-13, 21-24.

The consistent position of the Commission that it possesses no legal authority to consider foreign health, safety and environmental aspects of nuclear facility exports has been clearly articulated by the Commission Staff in its initial Answer<sup>3</sup> to the petition filed by CDP and other prospective intervenors for leave to intervene with regard to Westinghouse's application for a fuel export license for the Napot Point power plant (Application No. XSNM-1471, Docket No. 110-0495). In the Staff Answer the Commission Staff stated (pp. 11-14):

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<sup>3</sup>"NRC Staff Answer to Petition for Leave to Intervene and Request for Hearing Filed by Center for Development Policy, Jesus Nicanor P. Perlas, III, and Philippine Movement for Environmental Protection" ("Staff Answer," May 22, 1979).

"[P]etitioners' interests related to the safety and environmental impact of the reactor are not within the zone of interests to be protected by the Atomic Energy Act of 1954, as amended and other pertinent statutes. Petitioners seek directly a review and assessment by the United States of impacts occurring in another country from the operation of the reactor and the disposition of its spent fuel and urge such a review and assessment in order to effect imposition of conditions or requirements upon an entity subject to the Government of the Philippines. . . .

"Addressing a similar question in Edlow International, the Commission emphasized that 'standing cannot be claimed on issues which the Nuclear Regulatory Commission has no legal competence to decide.' The NRC has held to the view that under the Atomic Energy Act, the Energy Reorganization Act, general principles of international law, and the National Environmental Policy Act (NEPA), it lacks authority to consider health, safety or environmental effects of its actions in another nation, or impose health, safety or environmental requirements upon a foreign country. The Commission has declared its strong belief that, 'a licensing proceeding...before a federal administrative agency in the United States, is not the proper forum for raising issues concerning the safe operation of a nuclear power plant operated by a sovereign foreign government, outside the territorial jurisdiction of this country, and distant from our borders.

"In Edlow International, the Commission stated (3 NRC 582):

'[We] agree with them [the Staff] that it 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 [health effects in the vicinity of the Tarapur reactors] 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.'

"With respect to environmental effects, the Commission stated in that opinion (3 NRC 585):

'When the environmental impact claimed consists of radiation hazards to Bombay and its environs, the same principles which forbid application of the Atomic Energy Act to regulate foreign health and safety, foreclose consideration of the environmental balance. It is not for us to make policy decisions for another sovereign nation on the social balance to be struck between energy needs and environmental impacts. While petitioners have made their contrary view a litigation issue with the Commission . . . , we are satisfied that the terms and history of the Act are most consistent with an interpretation which avoids speculation regarding another nation's internal affairs. Even if it were assumed that international impacts must be considered (and no great issue is made of this point by petitioners), impacts internal to a foreign nation need not be.'

"In Babcock & Wilcox, the Commission reiterated this position. In considering the international reach of NEPA, the Commission analyzed the statute and its legislative history and concluded (5 NRC 1340):

'Based on our reading of the statute and its legislative history, we conclude that Congress recognized the worldwide character of environmental problems, but we find no specific indication that the

Congress intended the United States Government to prepare environmental impact statements assessing the impact of U.S. exports on the local environment of foreign sovereigns.'

"The Commission concluded that Court cases concerning foreign impacts [Wilderness Society v. Morton, 463, F.2d 1261 (D.C. Cir., 1972) Sierra Club v. AEC (Civil No. 1867-73, D.D.C., August 2, 1974) and Sierra Club v. Coleman, 405 F.Supp. 53, 421 F.Supp. 63 (D.D.C., 1975)] gave slender judicial guidance on the issue of NEPA's foreign reach (p. 1341-1343).

"Taking into consideration established principles of international law and foreign relations, the Commission stated that (5 NRC 1346):

'A responsibility on the part of the U.S. government to assess impacts in nuclear export licensing would arise only if the principles militating against such an application of U.S. law were rebutted by clear statutory evidence, or modified by an agreement with the recipient country. The legislative history of NEPA fails to supply that clear evidence and the Additional U.S. Agreement for Cooperation with EURATOM does not provide for such a review.

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By enacting NEPA, Congress imposed on us no obligation to conduct the environmental impact analysis demanded in this case.'

"The U.S.-Philippine Agreement for Cooperation, far from providing for U.S. review of safety or environmental impacts of material or facilities supplied under the Agreement, makes clear that the United States has no responsibility in that regard (Article VI, Article X.I.)

"Finally, the Commission stated (5 NRC 1353):

'The Commission sees no circumstances in which the operation of the Mulheim-Karlich Nuclear Power



Station would affect the health and safety of the U.S. population. As we have explained in Part II [sic] of this opinion, this Commission takes the view that the health and safety impact in foreign nations of exported nuclear facilities and materials is outside the jurisdiction of the Commission.'" (Emphasis added.)

Westinghouse fully concurs with the above-quoted position of the Commission Staff. As the Commission has recognized repeatedly in the past "under the Atomic Energy Act, the Energy Reorganization Act, general principles of international law, and the National Environmental Policy Act (NEPA), it lacks authority to consider health, safety or environmental effects of its actions in another nation, or impose health, safety or environmental requirements upon a foreign country." Rather, the Atomic Energy Act, as amended by the NNPA, provides the Commission with narrow jurisdiction of certain well-defined issues related to nuclear exports. This jurisdiction is in furtherance of the goal of nuclear non-proliferation rather than nuclear safety or environmental protection. The Atomic Energy Act and the NNPA focus the export licensing scheme on non-proliferation concerns. Under international law and principles of comity, determinations regarding health, safety and environmental impacts of nuclear exports on a foreign nation clearly fall within the purview of the regulatory authority of the nation in



which the facility will be located. See generally Whiteman Digest of International Law, Volume 6, Chapter 14 (1968).

If the Commission in the instant case were to consider health, safety or environmental issues, it would clearly be entering an area which is properly addressed by the competent authorities in the Philippines.

It is an established rule of statutory construction that, unless Congress expressly provides for extraterritorial application, U.S. law applies "only to conduct occurring within, or having effect within, the territory of the United States." Restatement (Second) of Foreign Relations Law, § 38 (1972). This well-established judicial approach to statutory construction has the effect of creating a presumption against extraterritorial application of U.S. laws when Congress has failed to consider carefully the implication of extending the law beyond the borders of this nation.

This rule of construction reaches back to the earliest days of American law,<sup>4</sup> and has since been affirmed

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<sup>4</sup>Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1808) (Marshall, C.J.); The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); see also Endlich, A Commentary on the Interpretation of Statutes (169)(1888): "A nation has a right to impose its legislation on its subjects, natural or naturalized, in every part of the world, . . . Indeed, on such matters as personal status or capacity it is understood always to do

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in numerous court decisions.<sup>5</sup> The rationale for the rule is based on the recognition that applying a statute extraterritorially involves different kinds of problems and considerations than applying the same statute domestically. To apply American laws outside the United States without regard to the interests of the foreign nations involved could create serious sources of friction in United States relations with other countries. The presumption against construing a statute to apply outside the United States requires that before a statute is read to operate extraterritorially, there should be clear evidence that Congress recognized that there were international implications presented by the statute.<sup>6</sup> Clearly, there

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so; but, with that exception, in the absence of an intention clearly expressed or to be inferred either from its language or subject matter . . . the presumption is that the Legislator does not design its statutes to operate on them, beyond the supreme territorial limits of its jurisdiction." (Emphasis added.)

<sup>5</sup>E.g., Steele v. Bulova Watch Co., 344 U.S. 280, 285 (1952); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949); Blackmer v. United States, 284 U.S. 421, 437 (1932); U.S. v. Bowman, 260 U.S. 94, 98 (1922); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). See also United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977).

<sup>6</sup>The NRC has always followed these principles of statutory construction and international law. See, e.g., Babcock & Wilcox, 5 NRC at 1345-56; Edlow International Co., 3 NRC at 582.

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exists no such clear evidence with regard to the NRC's nuclear facility export license function.

Particularly in this case, the NRC should adhere to its historical position that health, safety and environmental concerns do not apply to exports, and do not extend beyond the boundaries of the United States. As was recognized by the Commission Staff in its answer to the petition to intervene with respect to Westinghouse's pending fuel export license application relating to the Napot Point plant, "[t]he U.S.-Philippine Agreement for Cooperation, far from providing for U.S. review of safety or environmental impacts of material or facilities supplied under the Agreement, makes clear that the United States has no responsibility in that regard (Article VI, Article IX.I.)."

In the present case, the Philippine Government has already made a detailed review of the safety and siting for the Napot Point power plant.<sup>7</sup> That review

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<sup>7</sup>The following brief background of the PAEC licensing and regulatory system governing construction and operation of an atomic power facility in the Philippines is appropriate. Pursuant to a recommendation embodied in a 1966 IAEA-UNDP Report entitled "Pre-Investment Study of Power, Including Nuclear Power in the Luzon Grid," the Philippine Government enacted Republic Act No. 5207 to provide a regulatory basis for securing reasonable assurance that nuclear installations could be constructed and operated in the Philippines without undue risk to the safety and health of the public, and to provide adequate financial

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took official cognizance of and applied existing U.S. Nuclear Regulatory Commission licensing regulations, codes and standards relevant to safety. The application for

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protection for third parties who may suffer damage in the event of nuclear incident. Among other requirements, this act adopted the considerations and rationale for licensing and regulation of nuclear power facilities as developed and adopted in the U.S. - namely, that the facility would not pose an undue risk to the public health and safety. The licensing system included both construction permit and operating license stage. In 1974, the PAEC adopted facility site criteria, general design criteria, quality assurance criteria and emergency planning substantially patterned after U.S. AEC regulations. The Philippine Government regulations have undergone minor revisions since that time, while requirements of the AEC and now the Commission in the U.S. have been continuously updated and expanded. In order to overcome this lag, the contract between the National Power Corporation and Westinghouse for the Napot Point plant stipulated that Westinghouse would utilize codes and regulations in effect as of October 1, 1973 in the U.S. and with respect to response spectra for earthquakes, the spectra depicted in AEC Regulation 1.60, Revision 1, December 1973. The contract further stipulated that Westinghouse could adopt codes and standards subsequent to October 1, 1973, and Westinghouse in a letter dated August 30, 1976 assured the Philippine Government that the Napot Point plant would be designed and constructed to meet pertinent safety criteria then in effect in the U.S. On this basis, the PAEC in its decision on the application for construction permit concluded as follows:

"... as the primary contractor of the PNPP-1, and in the national interest, this Commission has taken official cognizance of and had applied existing US Nuclear Regulatory Commission's licensing regulations, codes and standards relevant to safety in the conduct of its licensing actions and proceedings on the PNPP-1." (Decision, pp. 6-7)



construction permit filed with the PAEC by the National Power Corporation, together with its attachments and the Preliminary Safety Analysis Report were reviewed and evaluated by the PAEC regulatory staff and technical reviewers with the assistance of an IAEA nuclear reactor safety expert, local consultants, and 1977 and 1978 IAEA safety missions requested by the Philippine Government. The results of that review contained in Safety Evaluation Reports were further reviewed with particular attention to public health and safety aspects of PNPP-1 and thereafter were submitted to PAEC by an environmental review committee comprised of members of the PAEC senior staff. The Preliminary Safety Analysis which formed the basic document in support of the application was prepared essentially in accordance with the requirements of the U.S. Nuclear Regulatory Commission, and included substantial technical data and discussion addressing relevant provisions of 10 C.F.R. Parts 50 and 100.<sup>8</sup> Thus, the Philippine Government has conducted a detailed review of the safety of the Napot Point power plant. In addition to

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<sup>8</sup>For a discussion of nuclear development and regulation in the Philippines, see Part III of Concise Environmental Review, Philippine Nuclear Power Plant Unit 1, dated September 1979, which accompanied the Executive Branch advice, dated September 28, 1979, on Application No. XR-120.



safety reviews, the NPC also conducted and issued a detailed review of the environmental aspects of the project.

PNPP-1 is a turnkey project with Westinghouse International Project Corporation as the general contractor. Westinghouse thus is responsible for overall plant project and design as well as for supplying the Nuclear Steam Supply System and providing reactor operator training. The U.S. architect-engineer firm of Burns & Roe is a subcontractor to Westinghouse, responsible for overall plant layout, preparation of safety analysis reports, construction supervision and engineering. NPC also retained as its consultant the U.S. architect-engineer firm of Ebasco Services, Inc., and Ebasco participated in the preparation of the preliminary site investigation report and the environmental reports, as well as providing construction and engineering supervision and training to NPC personnel in environmental, quality assurance and startup areas. In addition, NPC obtained the expert assistance of the IAEA, which assistance included, inter alia, site reviews and review of information on the geologic and geotectonic characteristics of the site.

Public notice was issued by the Philippine Government that any person whose interest might be affected by the proposed construction of the PNPP-1 could file a petition to intervene in the licensing proceedings. No such petition was ever received. However, the PAEC conducted

complete review prior to granting the construction permit and issuing its initial decision in support thereof on April 4, 1979. Further, the Philippine Government recently concluded extensive hearings with respect to these matters by a special committee appointed by President Marcos. The interests of the residents of the Philippines, including any U.S. citizens living in the Philippines, are and have been more than adequately protected by these processes.

Nor is respect for Philippine sovereignty a matter of merely academic deference. The Philippine Government has understandably become concerned about "the failure to date of Westinghouse to secure . . . appropriate export licenses for the nuclear reactor components," and is considering termination of Westinghouse's contract for the Napot Point plant because of this problem. (See Letter of Instruction No. 893, dated July 20, 1979, and signed by Ferdinand Marcos, President of the Republic of the Philippines, Exhibit 1 hereto.) Moreover, the PAEC sent a telegram to the Commission dated August 6, 1979, attached as Exhibit 2 hereto, noting "with deep concern the continuous delay of issuance of [the] export license by [the] United States Government," in view of the extensive safety reviews already conducted, and the adequate and satisfactory addressing by the Philippine National Power Corporation of all of the issues raised by the IAEA review. In its telegram, the PAEC also "formally and

strongly urge[d] [the] grant of [the] export license" for the Napot Point power plant "and request[ed] status information."

Furthermore, in a letter dated August 8, 1979 from the President of the United States to Mr. Robert E. Kirby, Chairman of the Board of Westinghouse, attached as Exhibit 3 hereto, President Carter stated:

"I, too, am concerned that delay in the resolution of this matter could have an adverse impact on our nuclear non-proliferation objections, as well as on our relations with the Philippines. I have therefore asked my staff to review the status of this issue thoroughly. As you know, there appear to be continuing concerns about the health and safety aspects of the project which need to be resolved by the government of the Philippines." (Emphasis added.)

There are several additional reasons why it is clear that the Commission does not have any legal authority or obligation to consider foreign environmental considerations associated with nuclear exports.

Executive Order 12114, entitled "Environmental Effects Abroad of Major Federal Actions," was issued by the President on January 4, 1979. The order purports to require agencies having ultimate responsibility for authorizing and approving major federal actions significantly affecting the environment outside the United States in specified categories to take certain specified environmental impact documents into consideration in making

decisions. One of the categories to which the Executive Order specifically applies is "actions providing to a foreign nation a nuclear production or utilization facility as defined in the Atomic Energy Act of 1954."

However, there are serious questions about the enforceability of Executive Order 12114, particularly with respect to activities of the NRC. First, there is a serious question about the constitutionality of the Order itself. The purported bases for the Order are the National Environmental Policy Act ("NEPA"), the Marine Protection Research and Sanctuaries Act, and the Deep Water Port Act, as well as the President's "independent authority." There is a very serious question as to whether any of these statutes were meant by Congress to have any extraterritorial application. See, e.g., United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977); memorandum of points and authorities in opposition to plaintiffs' motion for preliminary injunction filed by defendants Department of State, Department of Defense and Department of the Army in Gemeinschaft zum Schutz des Berliner Baumbestandes, e.V. v. George Marienthal, Civil Action No. 78-1836 (D.D.C.); letter of May 31, 1977 from Louis V. Nosenzo, Deputy Assistant Secretary of State, to the NRC (Exhibit 4 hereto); affidavit dated March 25, 1974 of Mark B. Feldman, Deputy Legal Adviser to State (Exhibit 5 hereto); and the

lengthy memorandum entitled "The Application of the National Environmental Policy Act to Major Federal Actions With Environmental Impacts Outside the United States," prepared by the Office of the General Counsel of the Department of Defense and dated June 21, 1978 (hereinafter "Defense Department NEPA Memorandum"). To the extent that these statutes do not serve as the basis for the Executive Order, the Constitutional doctrine of the separation of powers would appear to preclude the "independent authority" of the President as the basis for it.

Furthermore, the Commission, an independent agency, has always strongly resisted suggestions that it must take into account environmental considerations in connection with individual equipment or material export license applications. See, e.g., Edlow International Co., supra; Babcock & Wilcox, supra.<sup>9</sup>

It should also be pointed out that the Commission has always taken the position that to the extent it does have a responsibility to consider international environmental impacts of nuclear exports, the generic environmental impact statement on U.S. nuclear power

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<sup>9</sup>Moreover, Westinghouse submits that Executive Orders are not binding on independent regulatory commissions, such as the NRC, to the extent that such orders relate to their substantive statutory responsibilities. See authorities cited in Staff Answer, p. 15, n.18.



export activities prepared by ERDA entitled "Final Environmental Statement on U.S. Nuclear Power Export Activities" (ERDA-1542, April 1976), satisfies all of the Commission's NEPA obligations, and that site-specific assessments of environmental impacts relating to individual export license applications would be unnecessary and could have major adverse foreign policy consequences. See, e.g., Babcock & Wilcox, 5 NRC 1332 (1977).

There is nothing in NEPA or in its legislative history which indicates that environmental impact statements should be prepared or environmental reviews conducted in connection with major federal actions having environmental consequences abroad. Congress specifically addressed the matter of extending environmental protection outside the borders of the United States in Section 102(2)(E) of NEPA. Section 102(2)(E) is the only section of NEPA which specifically addresses matters outside the United States and nothing in that Section requires environmental impact statements or environmental reviews. Thus, there is no support from the language of NEPA for the proposition that Congress intended to extend an agency's NEPA responsibilities to the world rather than just to the United States.

Furthermore, there is nothing in the legislative history of NEPA to show that Congress ever intended to

mandate environmental reviews of major federal actions which result in environmental impacts abroad. The legislative history of NEPA is voluminous, including thousands of pages of documents covering a multi-year period. Given this voluminous record, the conclusions from a detailed review of it, as reported in the Defense Department NEPA Memorandum at pp. 3-4 are revealing:

- " . There is no statement by any witness, member, or staff contributor to written reports that there was an intent to apply the environmental impact statement requirement of section 102(2)(C) of the Act to the extraterritorial impacts of federal actions.
- " . There is no discussion--in the hearings, in the reports, or on the floor of the House and Senate--of the unique problems in applying section 102(2)(C) of NEPA to federal activities that have environmental impacts outside the United States. No member of Congress or any person testifying at the hearings discussed the problem of acquiring environmental information from foreign countries, the effect of an 'international' NEPA on United States foreign policy, or the difference between federal agencies making value choices for the United States and for foreign countries.
- " . The use by participants in the legislative process of particular words, such as 'man's environment' or 'human environment' that introduce some arguable element of ambiguity into the statutory language, are in every case consistent with an intent to have a wholly domestic application of the environmental impact statement requirement."

Moreover, any decision by the Commission to assess the foreign health, safety and environmental

impacts associated with nuclear facilities exported from this nation cannot be made in a vacuum. There are important policy considerations which clearly should preclude any Commission interpretation of its mandate under the AEA or NEPA to conduct foreign health, safety and environmental reviews. These considerations include the following significant harms that will occur if the Commission were to decide to conduct health, safety and environmental reviews of nuclear facility exports: (1) substantial harm to the foreign relations of the United States; (2) substantial competitive harm to U.S. nuclear facility exporters resulting in unfavorable impact on the U.S. balance of trade; and (3) frustration of the goals established by Congress in the NNPA.

The nuclear export health, safety and environmental review process of this nation is geared to the American system of government and to the U.S. Government perception of priorities. Other nations have significantly different systems of government and very different government priorities. Developed nations make choices about risk assumption and environmental protection that are consistent with their peculiar government priorities, and which do not necessarily match our own. Some lesser developed nations have decided against expending limited resources on many environmental matters of concern to

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certain developed nations. Moreover, some foreign nations may very well possess different attitudes toward risk assessment than does the United States. Westinghouse submits that such matters are policy decisions that clearly fall within the sovereignty of the foreign nation. Clearly any reversal by the Commission of its past policy against considering foreign health, safety and environmental aspects of nuclear facility exports would inevitably raise serious questions about United States regard for the sovereignty of other nations and have a significant adverse effect on the foreign relations of this country.

Westinghouse submits that if the Commission were to conduct any foreign health, safety or environmental reviews in connection with nuclear export license proceedings, significant additional time would be needed to complete the review process, with the potential for a diminution in Commission attention to U.S. health, safety and environmental matters.<sup>10</sup> The substantial delays which already exist in the Commission review of export license applications can only be exacerbated by the addition of new foreign health, safety and environmental assessments

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<sup>10</sup>It should be noted in this regard that Commissioner Ahearne in a speech to the American Nuclear Society Executive Conference on September 11, 1979 observed that "we are devoting a disproportionate time to international matters."

to the licensing process. The obvious result of additional delay in the export license review process will be a significant decline if not outright elimination of all nuclear facility exports. Such additional delay would create a major competitive disadvantage for American exporters, would result in fewer exports, and seriously and adversely affect our nation's balance of payments.

Finally, any interpretation by the Commission of its legal mandate as authorizing foreign health, safety and environmental reviews of nuclear facility exports clearly would fly in the face of the goals Congress was attempting to achieve when it enacted the NNPA in 1978. Such an interpretation of the Commission's legal authority would do great and perhaps irreparable damage to the NNPA objectives. Spurred by a growing concern about the damage to the security interests of the United States and to international peace and development posed by the international proliferation of nuclear weapons, in 1978 the Congress enacted the first comprehensive legislation aimed at curbing the proliferation of nuclear weaponry (P.L. 95-242, 92 Stat. 120). A keystone to achieving foreign nations' compliance with the restrictive non-proliferation provisions associated with U.S. exports was to assure to potential foreign purchasers the reliability of the United States in meeting its commitments to supply



nuclear facilities and components in an expeditious fashion. Obviously if this could not be guaranteed in some manner, such foreign nations would purchase their reactor needs from other countries, countries which do not require foreign purchasers to abide by any comparable set of non-proliferation standards.

One of the declared policies of Congress in enacting the NNFA was to "take such actions as are required to confirm the reliability of the United States in meeting its commitments to supply nuclear reactors and fuel to nations which adhere to effective non-proliferation policies by establishing procedures to facilitate the timely processing of requests for . . . export licenses" (22 U.S.C. § 3201(b)), thus deterring such nations either from purchasing nuclear power plants and fuel from foreign sources from whom they are readily available with few non-proliferation controls and with limited regulatory restrictions or from establishing equivalent national capabilities. Moreover, one of the stated purposes of the NNPA was to "authoriz[e] the United States to take such actions as are required to ensure that it will act reliably in meeting its commitment to supply nuclear reactors and fuel to nations which adhere to effective non-proliferation policies" (22 U.S.C. § 3202(b)).

It is clear, not only from the face of the statute, but also from its legislative history, that the

"timely processing of requests for . . . export licenses" was the method by which the policy and purpose of establishing the reliability of the United States as a supplier of nuclear reactors and fuel was to be achieved. For example, during Senate consideration of the proposed legislation, Senator Hollings expressed the concern felt by many that the bill did "not pay enough attention to one factor vital to the success of our Nation's nonproliferation policy: The need to reassure other countries that we indeed will be a reliable supplier of nuclear fuel and technology." 95 Cong. Rec. S1316, February 7, 1978.

This concern was not limited only to members of Congress. For example, in a letter to Senator Church dated January 26, 1978, Commissioner Kennedy of the NRC stated:

"I believe that we will maximize our influence in the nonproliferation 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.

\* \* \*

"Energy independence is not the exclusive quest of the United States. Many nations, like our own, seek an uninterrupted source of supply to meet

their energy needs. And many of them must rely to a much greater extent than we on fuel imports to meet those needs. Certainly our recent experience in dealing with foreign governments on nonproliferation matters confirms this hypothesis. The widespread international concern which has recently been expressed reflects a deeply-rooted sentiment reflecting the desire of those nations to eliminate or at least significantly decrease their dependence on foreign fuel sources. 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 consequence can only be a level of United States influence over the nonproliferation policy of these nations correspondingly diminished at the very least and possibly forfeited entirely.

"It is not only our nonproliferation 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." (95 Cong. Rec. S1092, February 2, 1978)

Thus it is clear that any Commission decision to conduct foreign health, safety and environmental reviews in connection with export license proceedings would contravene the clear Congressional mandate in the NNPA directing federal agencies to perform such reviews in an expeditious manner so as to insure the reputation of U.S. exporters as reliable suppliers. Any involvement of the Commission in foreign health, safety and environmental

assessments would undoubtedly result in protracted licensing reviews and cause potential foreign purchasers to conclude that U.S. exporters are unreliable suppliers.

For all the foregoing reasons, it is clear that the Commission possesses no legal authority or obligation to examine the health, safety and environmental impacts of an exported nuclear facility in reaching its licensing determination.

- "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?"
- 

Any jurisdiction asserted by the Commission to review health, safety or environmental matters relating to nuclear export license applications must arise from a Congressional mandate. As noted previously, Westinghouse does not believe any such Congressional mandate exists. However, should the Commission find that its responsibilities with respect to common defense and security authorize it in some manner to review health, safety or environmental aspects of export license applications, any such review would of necessity be limited to the connection between those issues and the common defense and security.

Westinghouse is aware of no legal principles which would permit or require the Commission to examine health, safety or environmental matters outside the context of its statutory framework. One Commission Staff paper, in discussing possible procedures for analysis of the current export license application, suggested some type of "moral" responsibility on the part of the Commission to assure protection of the foreign public. However, the translation of any such moral responsibility into a base for Commission jurisdiction can only take place by statutory grant from the Congress. To the extent that the NNPA and the Atomic Energy Act are based on moral imperatives, the Congress has already drawn the line and given the Commission the limits of its jurisdiction.

It also has been suggested that jurisdiction of health, safety and environmental matters can be grounded on the requirement of a common defense and security determination because of the location of the Philippine reactor near two important U.S. defense facilities.<sup>11</sup> Under such an argument, it is claimed that the

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<sup>11</sup>"Supplemental NRC Staff Answer to Petition for Leave to Intervene and Request for Hearing Filed by Center for Development Policy, Jesus Nicanor P. Perlas, III, and Philippine Movement for Environmental Protection" ("Supplemental NRC Staff Answer," October 5, 1979).



Commission should review the risks and health and safety factors associated with the reactor to determine the magnitude of the potential impact on any required common defense and security determination. Such an argument is totally bootstrap. Such an approach would make the determination of the Commission's jurisdiction turn on the location of a proposed power plant vis-a-vis the happenstance of an American military base near the facility. Those foreign nations who are allies of the U.S. and where we maintain military bases, would be most affected, while those foreign countries in which we maintain no military presence would be subject to no Commission review of health, safety and environmental aspects of proposed nuclear export. Thus the most harm from adoption of any such jurisdictional base would occur in U.S. relations with its closest allies. It would be an absurd result for the Commission to assert jurisdiction of health, safety and environmental issues in nuclear power export cases in those instances where power plants are proposed to be located near U.S. bases overseas, while at the same time denying such jurisdiction where the proposed power plants are not to be sited near U.S. bases.<sup>12</sup> Obviously Congress

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<sup>12</sup>The Executive Branch analysis contained the following comment on the safety of U.S. military forces who are stationed in the Philippines at bases near the proposed Napot Point site:

never intended such an absurd result. Its statutory grant to the Commission to make a common defense and security determination was focused on the Commission examining any non-proliferation concerns associated with a proposed export. Congress never intended to authorize the Commission to review foreign health, safety and environmental matters under the guise of the required common defense and security determination.

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[Footnote continued from previous page]

"Questions have been raised about our responsibility for the U.S. military forces who are stationed at the Subic Bay Naval Base. This base is located about 10 miles from the Napot Point site, and U.S. personnel are stationed there pursuant to a Military Bases Agreement with the Government of the Philippines, which has guaranteed in that agreement the security and protection of the U.S. bases. The Philippine Government's actions with respect to evaluation of the site-safety issue, mentioned above, are considered to provide reasonable assurances, in accordance with internationally accepted standards, concerning the safety of U.S. personnel stationed at this base."

The Department of Defense, of course, provides one of the important inputs to the Executive Branch judgment.

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

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The only issues which the Commission should examine in connection with the application to export the nuclear facility to the Philippines are those established under the NNPA and contained in Sections 127 and 128a(1) of the Atomic Energy Act. It should be noted in this regard that the Executive Branch, both in connection with the components license application and the facility license application, has recommended granting of the export license and has found specifically that each of the statutory tests under the NNPA has been met. Although the Commission legally must make its own determinations with regard to these matters, the views of the Executive Branch are entitled to great weight.

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

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Assuming that contrary to the view expressed above the Commission determines certain foreign health, safety or environmental issues fall within its jurisdiction, and assuming the Commission decides in the instant case to examine any such foreign health, safety or environmental issues, Westinghouse believes that under applicable

statute and Commission regulations such a hearing should be based upon the procedures provided in 10 C.F.R. Part 110, and should not encompass any adjudicatory or trial-type, on-the-record hearing. In this regard Westinghouse agrees with the recommendation of the NRC Regulatory Staff concerning hearing procedures set forth at pages 9-10 of the Supplemental NRC Staff Answer. The NNPA, in authorizing the Commission to adopt regulations establishing procedures for the granting of nuclear export licenses and for public participation in such proceedings, specifically provides that the procedures do not require the Commission to grant an on-the-record hearing in any export license proceeding (NNPA, § 304(c)). Commission regulations adopted pursuant to the NNPA provide for hearing procedures in export license cases which exclude characteristics of on-the-record, trial-type hearings such as rights to cross-examine, discovery and issuance of subpoenas. Indeed, 10 C.F.R. Part 110, which "constitute the exclusive basis for hearings on export license applications" (§ 110.80), specifically provide that Commission licensing decisions on exports "will be based on all relevant information, including information which might go beyond that in the hearing record" (§ 110.113). Thus, it is clear that Commission regulations do not contemplate any on-the-record, trial-type hearings for nuclear export license proceedings.

Further, Westinghouse believes that the appropriate hearing procedure is one using a format consisting of written comments. In this regard Westinghouse agrees with the position expressed by the Office of General Counsel ("OGC") and the Office of Policy Evaluation ("OPE") of the Commission at pages 11-12 of their October 3, 1979 Memorandum to the Commissioners entitled "Request for Public Hearings on Philippine Export License Applications." In that document OGC and OPE recommend that with respect to substantive issues any views of the participants initially should be submitted in writing. While Westinghouse believes that no oral argument should be necessary and that the Commission's determination can be made solely on the basis of the written comments, OGC and OPE in their document suggest that the Commission may determine, after reviewing the written documents, "that oral argument would be useful on certain selected issues and order such a hearing on an expedited basis" (p. 11). In the event the Commission were to adopt such a view, the major purpose of such oral argument should be to enable the Commissioners to question each party in order to clarify positions. Oral argument to the Commission thus substantially is different from an oral presentation of witnesses and testimony, and if the Commission elects a

1442 039



procedure which, even as an optional matter, allows for oral presentations, such a procedure should not be turned into a trial-type hearing process.

Westinghouse believes that the Commission's adoption of any procedures beyond those of allowing written comments are fraught with danger. In this and any other license application, the Commission must zealously guard against being used as a forum for allowing political debates under the guise of examining matters relevant to whether to grant an export license. Attempts already have been made in the present proceeding to drag issues which have no bearing on this proceeding into the Commission's arena. Several groups petitioning for intervention appear to be comprised of political opponents of the current government of the Philippines. Any opportunity which the Commission affords such groups to present orally their political grievances cannot assist the Commission in the fulfillment of its responsibilities concerning nuclear export licenses, but only can serve greatly to harm the U.S. relations with a friendly foreign government, a situation clearly inimical to the U. . common defense and security.

In the event the Commission elects to provide for written comments, it is essential that the Commission adopt a procedural format giving rise to a prompt decision

on the export license applications. The applications before the Commission have been pending for an extended period of time,<sup>13</sup> and failure of the Commission now to act promptly and responsibly will defeat one of the main purposes of the NNPA - to establish the U.S. as a reliable supplier of nuclear facilities. We submit the Commission should adopt a timetable such that written comments be due twenty days following the date of any Commission order authorizing such comments. Although under ordinary circumstances such a timetable might appear short, the following factors militate in its favor:

1. The license applications are of long-standing;
2. One of the major thrusts of the NNPA is to provide for prompt action on export license applications;
3. The issues sought to be raised by the intervenors have been the subject of substantial hearings and consideration by the Philippine Government and the PAEC and, accordingly, the intervenors should have no difficulty in presenting information on whatever issues the Commission allows in this proceeding;

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<sup>13</sup>The facility license application has been pending for more than three years.

4. The costs of additional delay in terms of additional construction costs and lack of power in the Philippines are very substantial; and
5. The U.S. role as a reliable supplier of nuclear equipment can only be viable if decisions with regard to nuclear export licenses are made in a prompt fashion.

Westinghouse believes that the Commission should adopt a schedule whereby the entire export licensing process, including the decision of the Commission, is reached no later than January 28, 1980, with the following as interim dates:

- |                   |   |  |
|-------------------|---|--|
| November 30, 1979 | - | Commission decision on first phase of proceedings.   |
| December 7, 1979  | - | If Commission decision orders any further proceedings (which Westinghouse submits are not needed for all the reasons previously discussed), publication of notice in Federal Register defining the nature and scope of such further proceedings. |
| December 27, 1979 | - | Written comments due from all participants.  |
| January 7, 1980   | - | Replies to written comments due from all participants.   |
| January 28, 1980  | - | Commission decision on export license.   |

- "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?"
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In the previous sections of this Memorandum Westinghouse has discussed at length the numerous reasons why the Commission possesses no legal authority to examine the health, safety and environmental aspects of a U.S.-supplied nuclear facility in making export licensing determinations. In the event that, contrary to those views and the prior decisions of the Commission, the Commission decides to evaluate the health, safety and environmental aspects of the nuclear facility to be exported, Westinghouse submits that the scope and conduct of the review should be substantially different from the Commission's domestic reactor license proceedings. Before setting forth the Westinghouse position with respect to such scope, we believe it is important to emphasize that if the Commission were to adopt, in whole or in part, the scope of review for exports that the Commission currently utilizes for domestic reactor license proceedings, the U.S. nuclear export program would become nonexistent. Clearly no foreign government could allow the lengthy U.S.

licensing review involving detailed consideration of internal matters. Accordingly, Westinghouse believes the question raised by this item 5 is solely a question of "How should the review be conducted differently from the Commission's domestic reactor licensing proceedings?"

Westinghouse believes that if the Commission elects to evaluate the health, safety and environmental aspects, such evaluation should be limited to an assessment of the regulatory capability of the recipient country. Such an evaluation would be limited to an overview of the regulatory process of the recipient country<sup>14</sup> without in any way purporting to assume any of that country's responsibility for safety. The NRC evaluation should not in any way attempt to independently conduct or otherwise duplicate, in whole or in part, the health, safety and environmental assessments performed by the recipient country. Utilization of nuclear health and safety standards similar to those established by the NRC or the IAEA, or equivalent standards, should be conclusive evidence of regulatory responsibility. Absolute equivalency should not be

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<sup>14</sup>The NRC might factor into a determination as to the nuclear regulatory capability of the recipient country the question of whether the recipient country, in addition to vendor expertise, has made arrangements to have access to or has utilized outside experts, including that of the IAEA, to augment its own capabilities.



necessary or desirable; rather, the inquiry should focus on whether the standards utilized demonstrate a commitment to evaluation of health, safety and environmental matters. The goal which Westinghouse suggests if the Commission decides to conduct, contrary to the views of Westinghouse and the Commission's own past decisions, any review of health, safety and environmental aspects of a U.S.-supplied nuclear facility should be to help insure that the recipient country approaches its nuclear program with a sense of responsibility comparable to that in the U.S. or other technically advanced nuclear supplier nations.

In a Staff document entitled "Procedure for Staff Analysis of Philippine Reactor Export," a draft of which, dated June 14, 1979, has been provided to Westinghouse pursuant to a Freedom of Information Act request, the Staff recommended that Staff review be conducted at a level similar to that discussed above (Level II in the June 14, 1979 document). Westinghouse urges the Commission, if it otherwise elects to review health, safety and environmental matters, go no farther than this recommendation.<sup>15</sup>

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<sup>15</sup>Other potential levels of review discussed by the Staff in its document included evaluation of the seismic and volcanic design bases selected by the PAEC (Level III) or full Commission construction permit review (Level IV).

[Footnote continued on next page]

"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?"

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Westinghouse submits that the standards to be applied for review of each export license application must be identical and that the Commission cannot apply varying standards to different export license applications. If the Commission adopts the view that it has jurisdiction to conduct any type of foreign health, safety or environmental

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[Footnote continued from previous page]

Westinghouse believes that adoption of either of these alternatives would be destructive to the U.S. goal of nuclear non-proliferation and would adversely affect our national security. Serious problems in U.S.-Philippine relations would arise from any attempt by the NRC to conduct either a full construction permit review or a detailed and duplicative evaluation of the seismic and volcanic design bases selected by the PAEC. The Staff noted with regard to the so-called Level III review that such a level of review "would have a clearly adverse effect on the US image as a reliable supplier," "could well lead to serious problems in the US-Philippines relations" and "could do serious damage to US national security." In its criticisms of the so-called Level IV review the Staff spoke of such damage as being irreparable and the impact on our national security as being strongly adverse. Westinghouse concurs in these Staff assessments of any level of review beyond a review with regard to nuclear regulatory capability and responsiveness to legitimate safety issues.

1442 046

review for an export license, Westinghouse thus believes that such a review must be essentially the same regardless of what country is involved.

In the present case the intervenors have attempted to assert seven issues for public hearing. As a legal matter if any of those issues are considered in this proceeding, Westinghouse sees no basis for excluding such consideration in other export license proceedings. With regard to factual considerations, obviously if the Commission elects, contrary to the views expressed here, to conduct a full-scale health, safety and environmental review, it will be necessary in each instance to focus the review on those matters factually relevant to the particular export involved. However, within the framework discussed in answer to question 5 above - to-wit, that the review by the NRC should be limited to an overview of regulatory capability, the factual review for each export license would be substantially the same. The Commission in all cases would need to look at the regulatory framework adopted by the recipient country.

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### CONCLUSION

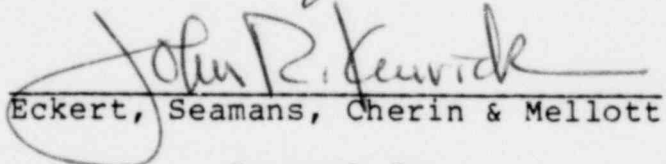
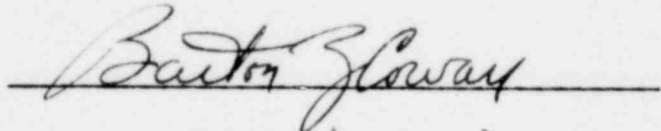
Westinghouse submits that the Nuclear Regulatory Commission does not possess the legal authority to evaluate the health and safety characteristics of any nuclear facility which is the subject of an export license proceeding, and does not possess the legal authority to review the environmental impacts of such facility in a foreign country. Westinghouse further submits that to the extent the Commission has a responsibility to consider environmental impacts of nuclear exports on the global commons, the generic environmental impact statement prepared by ERDA on U.S. nuclear power export activities satisfies the Commission's obligations.

Commission responsibilities with regard to nuclear exports ultimately must be found in statutory authority granted to the Commission by the Congress. That statutory authority is contained in the Atomic Energy Act of 1954, as amended, including the amendment made by the Nuclear Non-Proliferation Act of 1978. The clear thrust of that statutory authority is to invest the Commission with nuclear power export licensing authority so as to further U.S. goals of nuclear non-proliferation. Any position taken by the Commission which would allow for investigation of foreign health, safety or environmental impacts will frustrate the attainment of nuclear

non-proliferation goals established by the Congress, will adversely impact on United States relations with foreign countries, and will adversely affect the position of the United States as a reliable supplier of nuclear material and equipment.

Westinghouse also urges the Commission to act promptly in this matter. The facility export license application before the Commission has been pending for more than three years. Congress in the Nuclear Non-Proliferation Act of 1978 made it clear that expeditious processing of nuclear export licenses was required. Unless timely consideration and prompt action is taken by the Commission, this goal of Congress and the major goal of promoting nuclear non-proliferation will not be achieved.

Respectfully submitted,

  
Eckert, Seamans, Cherin & Mellott

Counsel for  
Westinghouse Electric Corporation

Dated: November 19, 1979

1442 049




UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	:	
WESTINGHOUSE ELECTRIC CORPORATION	:	Application No. XR-120
(Exports to the Philippines)	:	Docket No. 50-574
	:	
	:	Application No. XCOM-0013

CERTIFICATE OF SERVICE

I hereby certify that copies of the Memorandum of Westinghouse Electric Corporation in Response to Commission Order Dated October 19, 1979 were served upon the persons listed on Attachment 1 to this Certificate of Service by deposit in the United States Mail (First Class), postage prepaid, or by messenger delivery, this 19th day of November, 1979.

  
\_\_\_\_\_  
Barton Z. Cowan  
Counsel for  
Westinghouse Electric Corporation

1442 050

ATTACHMENT 1

SERVICE LIST

Joseph M. Hendrie, Chairman  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Victor Gilinsky, Commissioner  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Richard T. Kennedy, Commissioner  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Peter A. Bradford, Commissioner  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555

John F. Ahearne, Commissioner  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Samuel J. Chilk, Secretary  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
ATTN: Chase R. Stephens, Chief  
Docketing & Service Section

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Joanna Becker, Esquire  
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Office of the General Counsel  
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42nd Floor, 600 Grant Street  
Pittsburgh, Pennsylvania 15219

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**MALACANAN PALACE**

**MANILA**

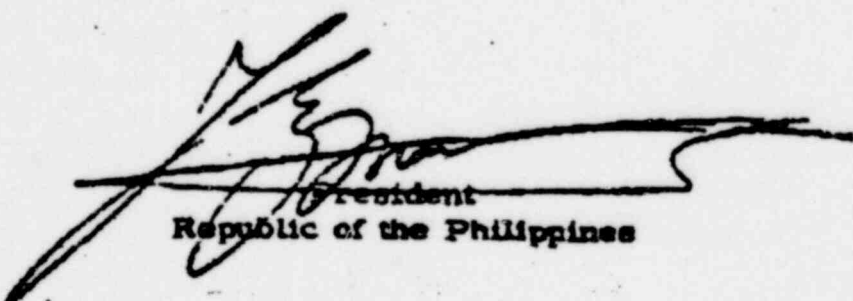
**LETTER OF INSTRUCTIONS NO. 893**

**To: The Minister of Energy  
The Solicitor General  
The President, National Power Corporation**

**Circumstances relating to the nuclear power plant project, more specifically the failure to date of Westinghouse to secure an appropriate export licenses for the nuclear reactor components, places in serious doubt the ability of Westinghouse to perform its obligations under the NPC-WIPCO Contract.**

**In view thereof, and independent of the question of safety, you are hereby directed to evaluate the situation, and if warranted, to terminate the NPC-WIPCO Contract, for cause.**

**Done in the City of Manila this 20th day of July in the year of Our Lord, nineteen hundred and seventy-nine.**



**President  
Republic of the Philippines**

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CHAIRMAN JOSEPH M HENDRIE  
US NUCLEAR REGULATORY COMMISSION  
WASHDC20555

AS THE NATIONAL REGULATORY AGENCY, PHILIPPINE ATOMIC ENERGY  
COMMISSION HAS ALREADY ISSUED A FULL CONSTRUCTION PERMIT  
FOR THE PHILIPPINE NUCLEAR POWER PLANT STOP DECISION  
ARRIVED AT AFTER EXTENSIVE SAFETY REVIEW OF PSAR  
AND AFTER ALL ISSUES RAISED BY THE 1978 IAEA

COLL WASDC20555 1978 IAEA

P/2

SAFETY MISSION HAVE BEEN ADEQUATELY AND  
SATISFACTORILY ADDRESSED BY APPLICANT NATIONAL POWER  
CORPORATION ON BASIS OF RELEVANT USNRC SAFETY REGULATIONS  
AND CRITERIA STOP THIS COMMISSION NOTES WITH DEEP CONCERN  
THE CONTINUOUS DELAY OF ISSUANCE OF EXPORT LICENSE BY  
UNITED STATES GOVERNMENT STOP PAEC FORMALLY  
AND STRONGLY URGE GRANT OF EXPORT

COLL PAEC

P3

LICENSE FOR PNPP-1 AND REQUEST STATUS INFORMATION  
STOP REGARDS  
DR ZOILO BARTOLOME  
OFFICER IN CHARGE PHILATOMIC

COLL PNPP-1

1442 053

NNNN

Exhibit 2

THE WHITE HOUSE

WASHINGTON

August 8, 1979

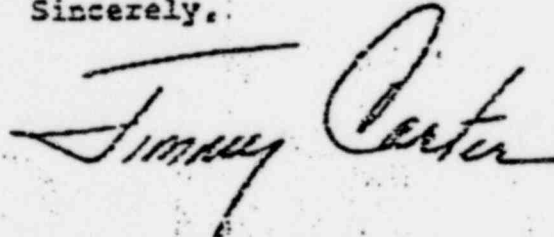
To Robert Kirby

Thank you for your letters concerning the timing of action on the export license applications for the Philippine Nuclear Power Project.

I, too, am concerned that delay in the resolution of this matter could have an adverse impact on our nuclear non-proliferation objectives, as well as on our relations with the Philippines. I have therefore asked my staff to review the status of this issue thoroughly. As you know, there appear to be continuing concerns about the health and safety aspects of the project which need to be resolved by the government of the Philippines.

I think it would be helpful for you to meet with my staff to discuss the project in more detail. Gerald Oplinger of Dr. Brzezinski's staff will be arranging a meeting with you very soon. I can assure you that we will continue to monitor progress on this reactor to avoid unwarranted or unnecessary delays.

Sincerely,



Mr. Robert E. Kirby  
Chairman  
Westinghouse Electric Corporation  
Pittsburgh, Pennsylvania 15222



BUREAU OF OCEANS AND INTERNATIONAL  
ENVIRONMENTAL & SCIENTIFIC AFFAIRS

May 31, 1977

Mr. James J. Shea  
Director, Office of  
International Programs  
Nuclear Regulatory Commission  
Bethesda, Maryland



Dear Mr. Shea:

The Department of State, on behalf of the Executive Branch, recently has recommended NRC issuance of an export license for the Muelheim-Kaerlich reactor (XR-118). We are, of course, aware that Burgeraktion Atomschutz Mittlerhein e.V. has petitioned the NRC to intervene in this matter and that a Commission decision on this petition has not yet been taken. The Department's views on the procedural issues raised by the petition were forwarded to Mr. Chilk by letter of March 24, 1977.

In addition, I should like to take this opportunity to call the Commission's attention to certain other aspects of this license application. The Federal Republic of Germany (FRG) recently has made a demarche to the Department of State on this matter. Among other things, the FRG has pointed out that the petitioner has, under German law and procedure, received a full opportunity to present his position. This has included both a public hearing on granting of the construction permits at which a representative of the petitioner spoke and the filing of a legal suit designed to halt plant construction. The latter action was rejected by the German courts. The FRG has noted that the granting of a hearing to the petitioner within the NRC export licensing framework would place the FRG's own reactor construction and operating licensing process in doubt, with detrimental foreign policy implications. The FRG also has indicated that receipt of reactor components from the U.S. are within the "critical path" for reactor completion and that delays in their delivery will result in a day-for-day delay in plant operations.

1442 055

Exhibit 4

(Page 1)

It is the Department's judgment that any U.S. attempt to make site-specific assessments of environmental impacts within the territory of another country would have major, adverse political consequences. A majority, if not all, governments would be expected to take the position that, among other things:

- decisions affecting primarily their national environments are a matter of sovereign responsibility;
- relatedly, the degree and means of public participation in the national environmental decision-making process, which involves a relationship between the government and its citizens, should not be substantially influenced by the actions of other governments; and
- they have full competence to make the necessary analyses and judgments.

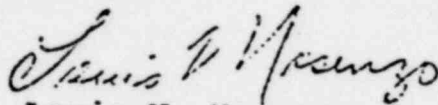
Further, from the practical standpoint, it would only be possible for the U.S. to make a meaningful environmental assessment in another nation with the full cooperation of the government involved.

In the case of the present export license application for the Muelheim-Kaerlich reactor, it is clear from the demarche made by the FRG that it would not favor any efforts by the U.S. to superimpose a further environmental review on the FRG's internal nuclear reactor licensing process.

Finally, it is our judgment that to delay issuance of this reactor export license would be inconsistent with both our non-proliferation and energy policies. With regard to the former, reliability of the U.S. as a supplier of light-water reactors and their fuel to nations sharing U.S. non-proliferation objectives is a keystone of this policy, which is contained in the Administration's recently introduced legislation, the "Nuclear Non-Proliferation Policy Act of 1977." Insofar as energy policy is concerned, the President has determined that light-water reactors provide a proven

technology which will be used in the United States to help us meet current and future energy needs. In comparison with the United States, the FRG and most of our other allies have far more limited indigenous energy resources and, hence, are even more dependent on nuclear power than we plan or need to be. We are committed in the International Energy Agency and elsewhere to cooperating with these nations, including the FRG, in efforts to meet their vital energy needs and decrease dependence on high-cost, unreliable sources of oil. Any deferral in issuance of the Muelheim-Kaerlich reactor export license on environmental grounds specific to the territory of another country would appear to run counter to these important U.S. policy objectives.

Sincerely,



Louis V. Nosenzo  
Deputy Assistant Secretary

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SIERRA CLUB, et al.,                     )  
  )  
                                  Plaintiffs,       )  
  )  
                                  v.                     ) Civil Action No. 1867-73  
  )  
ATOMIC ENERGY COMMISSION,        )  
et al.,                                 )  
  )  
                                  Defendants.         )

DISTRICT OF COLUMBIA   SS

AFFIDAVIT

I, MARK B. FELDMAN, being duly sworn, depose and say:

1. I am now and have been since January 30, 1974, a Deputy Legal Adviser of the Department of State.
2. The Department of State is of the view that subjecting the Export-Import Bank (Eximbank) to the disclosure and impact statement requirements of section 102(2)(C) of the National Environmental Policy Act with respect to export transactions which have the sole significant environmental effect in a foreign country is likely to impair the effectiveness of Eximbank as an instrument for promoting the foreign commerce of the United States, and may give rise to foreign policy problems. It has reached these conclusions in the light of the following considerations:
  3. The Export-Import Bank plays an important role in implementing the trade and financial policies of the United States. Financing is an integral part of any major export transaction. For the United States and for American exporters to gain contracts in international export, it is generally necessary that competitive

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financing arrangements be offered. Eximbank provides the United States with a way of meeting the competition from national export credit institutions in other industrial countries which offer long-term financing on special terms. The U.S., therefore, is assured through the activities of Eximbank that it will not lose vital export contracts because of non-competitive financing arrangements.

4. It will be appreciated that exporting nations must exercise restraint to avoid the appearance of imposing their own concepts and views on the regulation of domestic affairs of importing countries. It has in particular been made clear that many nations are extremely sensitive about any suggestion that their domestic activities may be subject, on environmental grounds, to the scrutiny or control of any other nation. This attitude on the part of many nations has led to the adoption in the 1972 Stockholm Declaration on the Human Environment and in several recent environmental treaties of language which expressly reaffirms the sovereign right of all countries to conduct their domestic activities in accordance with their own environmental policies. The developing countries, particularly, have expressed serious concern over any environmental controls or standards of industrialized countries which might make their development projects more costly.

5. The Department of State accordingly believes that international agreements and cooperative programs are the most effective means of encouraging action by other States to protect their environment and the world

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environment (an approach supported by the Congress in section 102(E) of the Act). In this connection, a number of important steps have been taken in recent years to promote effective international solutions for environmental problems. The 1972 United Nations Conference on the Human Environment in Stockholm established the basic framework for international environmental cooperation, and a new U.N. Environment Program was created to coordinate and stimulate the environmental activities of various intergovernmental organizations. Since the Stockholm Conference, a series of international agreements have been concluded to deal with the most pressing world environmental concerns, including new treaties on ocean dumping, marine pollution from ships, endangered species of wildlife, and the preservation of unique natural areas. Work is now in progress on a comprehensive treaty on the Law of the Sea, which will adopt further measures to protect the oceans from land-based or marine-based pollution. The United States has been a major promoter and supporter of these efforts, and a leading proponent of rigorous international environmental regulations. For example, the U.S. was host to the 1973 conference which produced the Endangered Species Convention, and contributed substantially to the formulation and drafting of the Ocean Dumping, Ship Pollution and World Heritage Conventions. The United States is now by far the largest contributor to the U.N. Environment Fund, which exists in the

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financing of international environmental programs. At the same time, the United States has concluded a number of bilateral agreements to solve mutual environmental problems, such as the 1977 Great Lakes Water Quality Agreement with Canada and the 1973 Colorado River Salinity Agreement with Mexico. It also is pursuing programs for the exchange of environmental information and experts on a bilateral basis (such as the continuing U.S.-U.S.S.R. environmental exchange program) and on a multinational basis (such as the environmental programs of the Organization for Economic Cooperation and Development).

6. It is believed that there is a substantial possibility that this movement toward international environmental cooperation and positive environmental action by foreign States within their territorial jurisdiction may be impaired if the United States Government were to insist that there be a formal and public examination under U.S. procedures of the environmental effects in foreign nations of projects which these nations propose to undertake with our assistance, and which have no significant effect on the U.S. environment. In such cases, it is likely that many of these foreign nations would find unacceptable the submission of data to be used in environmental analyses to be prepared by U.S. agencies, or the publication by U.S. agencies of information and analyses which might directly and openly challenge the wisdom of their domestic environmental policies.

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7. Accordingly, if Eximbank were to be directed to comply with the full disclosure and impact statement requirements of section 102(2)(C) of the National Environmental Policy Act with respect to export transactions which have their sole significant environmental effect in a foreign country, the Department of State believes that there could be significant embarrassment to the conduct of the foreign relations of the United States.

Michael B. Feldman

Subscribed and sworn to  
before me this 25th day  
of March, 1974.

Maria E. Miskiewicz  
Notary Public

My commission expires: ~~My Commission Expires April 23, 1978~~

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