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NS-NRC-86-3102

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Dear Sir:

Subject: Comments on Proposed Revised General Statement of Policy and Procedure for Enforcement Actions

This letter is submitted by Westinghouse Electric Corporation ("Westinghouse") to the Nuclear Regulatory Commission ("Commission") in response to the Commission's request for comments on proposed revised General Statement of Policy and Procedure for Enforcement Actions (50 F.R. 47716, November 20, 1985).

The Commission's current General Statement of Policy and Procedure for Enforcement Actions (49 F.R. 8583, effective March 8, 1984) was initially published for comment in October 1980. At that time Westinghouse submitted a letter of comment, NS-TMA-2360, dated December 30, 1980. The general position taken by Westinghouse in that comment letter has not changed. Among the points made by Westinghouse in its comments was that the focus of the enforcement policy on the responsibility of licensees to assure safe and environmentally acceptable operation is appropriate. Limiting the application of the policy to vendors and supply firms only in the area of failures to report under the provisions of 10 CFR 21 is equally appropriate. The current proposal for revision of the policy statement deviates from this fundamental emphasis.

The current revised policy statement seems to ignore the basic thrust and the success of past enforcement efforts by the Commission. It also seems to ignore the current state of the industry and the realities of the market place.

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In the past, Commission enforcement efforts have held the utility-operator responsible for vendor performance to Commission requirements. The utility contracts for and audits such performance. The Commission audits both the utility and the vendor to assure compliance. This system devotes the appropriate resources of both government and private sector and is working. To change now and place the Commission in the position of enforcement directly with vendors of any tier is a serious miscalculation of the balance of resources and the focus of compliance. To devote Commission resources to directly enforce compliance with literally hundreds of vendors is questionable and perhaps unattainable. Faced with a choice, the vendor will staff and price its goods and services to satisfy Commission enforcement activities or, as is increasingly the case with small businesses, discontinue supply to the nuclear industry. The utility position, especially with respect to small businesses, becomes untenable with respect to diversity and competitiveness of supply.

The focus of the industry today is on safe plant operation to supply economically competitive electricity supported by competent vendors and suppliers accountable to the utility. The focus of the Commission enforcement policy should be the same and thereby encourage and reinforce these utility efforts rather than preempt or nullify by direct enforcement action.

Clearly, therefore, the revised General Statement of Policy and Procedure now being proposed is more than the mere publication of "minor revisions" to the Commission's enforcement policy. As discussed below, the characterization of the revisions in the opening paragraph of the current Federal Register notice as "minor" may be inappropriate and misleading.

Specifically, Westinghouse comments address:

- Acknowledged limits to the Commission regulatory authority.
- Whether vendors are to be made de facto licensees of the Commission
- Improper Commission enforcement of contractual obligations between vendors and licensees
- Improper application of civil penalties to vendors
- Improper implementation of 10 CFR 21 through licensees
- Use of violation rather than non-conformance and corrective action.

The Commission has frequently admitted that its regulatory authority is limited to NRC licensees or persons who are required to obtain a license under the Atomic Energy Act of 1954, as amended, or the Energy Reorganization Act of 1974. For example, in its September 28, 1983 promulgation of the final rule on "Authority to Issue Notices of Violation to Non-Licensees and Delegation of Authority to Regional Administrators", the Commission took cognizance

of this limitation on its regulatory authority. Indeed, in that notice the Commission stated that in some regulatory areas the Congress extended the Commission's statutory authority to include nonlicensees, citing as its only example Section 206 of the Energy Reorganization Act which was, in part, the impetus for the rule change then being made. Westinghouse believes that the Commission's recognition of its limited authority over nonlicensees was correct and that the instant revised General Statement of Policy and Procedure substantially departs from that recognition. Thus, Westinghouse believes that the revised General Statement of Policy and Procedure now being proposed by the Commission exceeds the authority of the Commission.

Moreover, Westinghouse does not believe that an extension of the policy statement to vendors is warranted or appropriate. As noted above, the original policy statement was limited to addressing the conduct of activities by Commission licensees. By extending the policy statement to include vendors, the Commission appears to be diffusing the direction of its enforcement activity and confusing the role of the vendor with the role of the licensee. The effect of the extension of the coverage of the policy statement to vendors appears to make vendors de facto licensees of the Commission without utilizing the procedural safeguards whereby the Commission issues licenses. For example, the notice of nonconformance for vendors parallels the notice of deviation for licensees; the confirmatory action letters are to be to both vendors and licensees alike. Even with regard to civil penalties, it is possible, as discussed below, to interpret the Commission statement as authorizing civil penalties against vendors for failure to meet Commission regulations beyond those contained in 10 CFR Part 21. Although the Commission may have authority to license vendors directly, it has not done so. The Commission should not attempt indirectly to achieve such licensing through the adoption of the proposed General Statement of Policy and Procedure.

One major problem with the Commission's proposed revised General Statement of Policy and Procedure is that it is based, at least in part, on the notion that the NRC's role in enforcement is to enforce the contractual arrangements between vendors and licensees. Under Part VIII of the proposed policy, enforcement action will be taken against vendors in two instances: (1) when inspections determine that violation of NRC requirements has occurred, and (2) when inspection determines that vendors have failed to fulfill contractual commitments that could adversely affect the quality of a safety significant product or service. In effect, the second instance puts the Commission in the position of enforcing contracts between vendors and licensees as a means of protecting the public health and safety. We believe this indirect method of obtaining compliance with Commission regulations is inappropriate. Westinghouse believes that the Commission lacks authority to base enforcement actions on breaches of contract between a vendor and a licensee, and that the provision which states that enforcement action will take place where a vendor fails to fulfill a contractual commitment is improper. There is no question that, in some regulatory areas, Congress has extended the Commission's authority to include nonlicensees as well as

licensees. In those areas, enforcement action can be taken where statutory violation or violation of regulations implementing the statute occurs. With regard to the protection of the public health and safety, the only area that we are aware such authority has been extended to the Commission is pursuant to Section 206 of the Energy Reorganization Act relating to reporting of defects and noncompliance. The Congress has not authorized the Commission to protect the public health and safety by acting as an extra-judicial contract enforcing agency. It is the responsibility of the licensees to make certain that their procurement documents require contractors and subcontractors to comply with certain Commission requirements, including those relating to an appropriate quality assurance program. The licensees should be accountable for any violation of this requirement. As part of the licensees' overall responsibility, they must make certain that the vendors comply with their contractual commitments. If a vendor does not so comply and there is a consequent breach of Commission quality assurance requirements, enforcement should be against the licensees and not by means of an action under which the vendors are found to be in breach of contract.

As currently written, the language relating to failure to fulfill contractual commitments could have results opposite to those intended by the Commission. The Commission interest is in making certain that applicable requirements of Commission regulations are met. A licensee, however, may elect by contract to impose greater obligations on a vendor with respect to products or services whose quality affects safety. Under the proposed statement as drafted, if a vendor program meets applicable requirements of NRC regulations but fails to meet those contractual commitments above and beyond NRC requirements, the NRC can take an enforcement action where such failure can adversely affect the quality of a safety significant product or service. Thus, there will be an incentive to contract only for those items which are required by NRC regulation and a disincentive to make contractual commitments to a higher standard. Moreover, by becoming involved in the licensee/vendor contractual relationship, as opposed to focusing on safety and on the obligations of its licensee, the Commission opens the door to attempts by licensees to contractually impose a licensee's responsibility on its vendors.

In connection with the notice of violation and civil penalties, the proposed statement is unclear whether the only notice of violation to be issued directly to vendors is for violation of Part 21 or whether vendors also will be subject to notice of violation and civil penalties where their programs do not meet other applicable Commission requirements. This lack of clarity stems from describing an enforcement action to be taken for violation of NRC requirements or vendor contractual commitments. The proposed statement says (Part VIII): "Notices of Violation and civil penalties will be used, as appropriate, for licensees failures to ensure that their vendors have programs to meet applicable requirements including Part 21." Westinghouse believes what was intended was that such notices of violation and civil penalties will be levied against licensees. However, the literal language may allow a notice of violation and civil penalties to be used against vendors for a licensee's

failure to ensure that the vendors have an adequate program. Westinghouse suggests that the words "against licensees" be inserted after the words "civil penalties" in the above-quoted sentence to make it clear that vendors are not subject to notices of violation or civil penalties, except for their own violations of Part 21. Westinghouse further suggests that references which tie enforcement action to vendor's failure to fulfill contractual commitments be deleted and that enforcement actions against licensees be taken with regard to vendors only where there is a matter of safety significance and a violation of licensee's obligations to the Commission.

Returning to the same unclear language: "...licensees failure to ensure that their vendors have programs to meet applicable requirements including Part 21." raises a troublesome area of licensee responsibility to audit vendor compliances with Part 21, an area heretofore reserved to Commission audits for compliance. Here, direct Commission enforcement appears to be the statutory mandate of Section 206 and any utility efforts to assure compliance would not have the force and effect of Commission imposed sanctions. A vendor with twenty or more utility customers would have an enormous burden to satisfy the several utility audits. The enforcement policy should be reworded to make it clear that the Commission will enforce Part 21 directly with vendors and not through audits by licensees.

In Section V.E. of the proposed statement of policy, there is a discussion of related administrative actions which can be taken against vendors. The policy statement, carrying forth a concept found in the current policy statement with respect to licensees, provides that "Notices of Nonconformance are written notices describing nonlicensees' failure to meet commitments which have not been made legally binding requirements by NRC." Westinghouse objects to any concept of enforcement action or related administrative actions based upon alleged failure to meet non-legally binding commitments. Unless an action has risen to the dignity of a legally binding commitment by the NRC, it should not be the subject of administrative or enforcement action which results in a notice of nonconformance or other type of informal mechanism. Notices of nonconformance, when used in this manner, give the public and the Congress the erroneous impression that there has been a thwarting of NRC law or regulations when, in fact, because any "commitments" have not been made legally binding, there has been no such deviation from Commission requirements. Westinghouse suggests that the NRC review its provisions with regard to administrative action where there has not been any violation of NRC requirements and adopt appropriate regulations to obtain the desired administrative result without burdening licensees or vendors with the stigma which accompanies the notice of nonconformance.

It is especially noteworthy that any revision to the General Statement of Policy and Procedure for enforcement should include a change in the definition of a violation. Current Commission enforcement policy seems to be based on the premise that perfection is required, and any deviation from Commission regulations is a de facto violation necessitating enforcement action. However, as the Atomic Safety and Licensing Appeal Board made clear

in the Callaway case, perfection is not required (ALAB-740, 18 NRC at 346 (1983)). It should follow, therefore, that not all deviations from Commission regulations should be classified as violations, and the enforcement policy should be revised accordingly. Westinghouse submits that if a licensee has an acceptable program for identifying and evaluating deviations and takes prompt corrective action as appropriate, those deviations should be classified as nonconformances even if they involved what would now be termed "a violation." Failure to take appropriate action in a timely manner could raise the deviation to the level of a violation depending on circumstances (for example, if management ignores the deviation after learning that it had significant safety implications). Failure to have an adequate process for identifying and evaluating deviations also could be in violation in and of itself if an unacceptable number of deviations were to go undetected for an extended period of time. (See the Callaway Appeal Board decision on this point.) A system of this type could provide incentives for early identification and correction of deviations adversely affecting the safe management of a facility, and such a change is worthy of consideration by the Commission. As the policy statement now stands, the general tone is unfair, particularly to those who openly and thoroughly report deviations.

Underlying the concerns expressed above is the fundamental question as to whether Commission enforcement policy, which to date has been appropriately focused on licensee compliance, should be diffused and diluted by incorporating vendor compliance provisions beyond those required to comply with Section 206 of the Energy Reorganization Act. If, as stated by the introduction to the proposed revised statement, the revisions are minor and are intended merely to describe how the enforcement policy applies to vendors, the revisions are not needed and only add confusion in areas which heretofore have not been the subject of controversy. On the other hand, if, contrary to the Commission characterization, the revisions are more than minor, there does not seem to be any adequate justification for changing the enforcement policy as it has heretofore applied to vendors. The basic concern is that the broad and inexact language used in the revised General Statement of Policy and Procedure will be interpreted to extend Commission enforcement activities beyond those which are appropriate or authorized by law. The result in terms of overall enforcement policy will be counterproductive. Westinghouse urges the Commission to reconsider the need for revision at this time of its General Statement of Policy and Procedure for Enforcement Actions. If the Commission continues to believe that such revisions are needed, Westinghouse urges the modifications discussed above, and the change in emphasis referred to above be adopted by the Commission.

Westinghouse appreciates the opportunity to comment on the proposed enforcement policy and will be available for further amplification of our views should the Commission deem advisable.

Very truly yours,

E. P. Rahe, Jr., Mgr.
Nuclear Safety Department

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