

September 19, 2006

DOCKETED  
USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

September 19, 2006 (4:21pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of

Westinghouse Electric Company LLC  
(Waltz Mill Service Center)

Docket No. 70-698  
NRC License No. SNM-770

COMMENTS OF WESTINGHOUSE ELECTRIC COMPANY LLC  
REGARDING THE PETITION FOR HEARING FILED BY CBS CORP.

I. INTRODUCTION AND SUMMARY

On August 25, 2006, CBS Corporation ("CBS") filed a Petition for Hearing (the "Petition") on its application to amend License SNM-770 held by Westinghouse Electric Company LLC ("Westinghouse"). The Petition is without precedent. There is no pending proceeding in the subject docket in which CBS may seek to intervene and CBS does not have standing to ask the Nuclear Regulatory Commission ("NRC" or "Commission") to amend Westinghouse's SNM-770 License. Westinghouse submits the comments that follow in an effort (1) to assist the Commission in understanding the context of the dispute that gave rise to the CBS attempt to amend Westinghouse's materials license and (2) to provide an analysis of the legal and regulatory issues that the CBS Petition raises.

The Petition must be understood in the context of the long running commercial dispute concerning the contractual allocation of financial responsibility for remediation of certain radiological contamination at Westinghouse's Waltz Mill Service Center ("Waltz Mill") resulting from licensed activities conducted by CBS as long as 40 years ago. The dispute is being considered by a panel of arbitrators appointed pursuant to an arbitration clause in the Asset

Purchase Agreement (the "APA") between CBS and British Nuclear Fuels, plc ("BNFL"), Westinghouse's parent, under which BNFL agreed to purchase CBS's commercial nuclear business.<sup>1</sup>

This submission describes the background of the transaction between CBS and Westinghouse, summarizes the history of NRC interactions with the parties related to this matter that are important for an understanding of the context of the filing, and examines factual allegations contained in the Petition in order to give context to the legal issues the Petition presents. The factual discussion is followed by an examination of the key legal issues: (1) whether CBS can seek to initiate a proceeding based on the NRC Staff action; and (2) whether the Petition meets the Commission's standing and contention requirements.

## II. BACKGROUND

The Waltz Mill Service Center is located approximately 30 miles southeast of Pittsburgh in Westmoreland County, Pennsylvania. Westinghouse's operations at Waltz Mill are conducted under the authority of NRC License Number SNM-770. The facilities associated with the Westinghouse Test Reactor ("WTR" or "TR-2"), which is separately licensed, are located in the northwest area of the Service Center. The WTR was a low-pressure, low-temperature, water-cooled 60-Megawatt reactor originally licensed for operation by Westinghouse Electric Corporation ("old" Westinghouse, the corporate predecessor to CBS) on June 19, 1959, and was maintained under NRC License Number TR-2 pursuant to 10 C.F.R. Parts 30 and 50. The reactor was permanently shut down in 1962 after suffering a partial fuel melt in 1960. Amendment No. 2 to the TR-2 license, issued March 25, 1963, allows possession of the

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<sup>1</sup> The APA was signed by CBS and WGNH Acquisition, LLC, an entity formed by BNFL to facilitate the transaction. WGNH assigned its rights under the APA to Westinghouse prior to the closing.

radioactive materials but not operation of the reactor. The reactor vessel and internals and most associated equipment have been removed. All that remains subject to the TR-2 license are the structures that once housed the reactor systems and associated residual contamination. Other nuclear material activities take place in the other areas of the Waltz Mill Service Center under NRC License Number SNM-770 pursuant to 10 C.F.R. Parts 30, 33, and 70. These activities include the ongoing nuclear services work of Westinghouse, and cleanup of retired facilities and contaminated soils from past work and events which were the responsibility of old Westinghouse, *i.e.*, CBS.

In 1997, old Westinghouse acquired CBS and changed its name to CBS Corporation. ("CBS"). In March 1999, CBS sold the business conducted under the SNM-770 license to Westinghouse, a newly created subsidiary of BNFL. NRC approved transfer of the SNM-770 license to Westinghouse on March 10, 1999. The license transfer became effective on March 22, 1999, when the acquisition transaction was closed. In May 2000, CBS was merged into Viacom, Inc., and NRC approved this change on the TR-2 license.<sup>2</sup> From issuance in 1959 to March 1999, the TR-2 and SNM-770 licenses were both held by the same licensee – the "old" Westinghouse, that changed its name to CBS in 1997. After March 1999, the licenses were held by separate licensees – the TR-2 license by CBS and the SNM-770 license by Westinghouse Electric Company LLC. The "old" Westinghouse Electric Corporation (a/k/a CBS) that held both licenses at the Waltz Mill Service Center from 1959 to March 1999 and the Westinghouse Electric Company LLC that has held the SNM-770 license since March, 1999 are not related. CBS, the successor to "old" Westinghouse, still holds the TR-2 license.

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<sup>2</sup> On January 10, 2006, Viacom, Inc. submitted an application to change the name of the TR-2 licensee back to CBS Corporation. The NRC has not yet acted on this request. Nevertheless, the convention of referring to CBS as the petitioner is retained.

CBS, *i.e.*, old Westinghouse, submitted the SNM-770 Remediation Plan in November 1996 to address decommissioning of the Waltz Mill Service Center.<sup>3</sup> The Remediation Plan was supplemented with additional information by CBS, and portions of the work in the plan were approved by the NRC (in letters from the NRC to CBS, dated March 16, 1998 and August 21, 1998) to allow CBS to begin remediation.<sup>4</sup> Those parts of the Remediation Plan not already approved were approved by NRC, as revised and supplemented, in Amendment 21 to the SNM-770 license on January 19, 2000.

CBS also submitted a Decommissioning Plan ("DP") for the WTR in July 1997. The DP was approved by the NRC in Amendment 8 to the TR-2 license on September 30, 1998. The DP (at 1-1) states that the TR-2 license will be terminated with the completion of decommissioning work at the WTR and the residual radioactive material will be transferred to the SNM-770 license.<sup>5</sup>

As noted previously, the CBS sale of its nuclear assets to Westinghouse was pursuant to the APA. Under the APA, CBS agreed to retain the TR-2 license and to decommission the WTR in accordance with the TR-2 DP as approved by the NRC. CBS also agreed to complete the

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<sup>3</sup> The NRC had identified the Waltz Mill Service Center as a Site Decommissioning Management Plan ("SDMP") Site in 1990, requiring CBS to address remediation of significant contamination in the soils that created the potential for offsite groundwater contamination.

<sup>4</sup> The SNM-770 Remediation Plan (at 1-1) states that it is not a decommissioning plan because Westinghouse is not pursuing license termination and will continue to conduct licensed operations at the facility.

<sup>5</sup> As discussed *infra*, the NRC has determined that all necessary decommissioning work under the TR-2 Plan has been completed and that contamination should be transferred to the SNM-770 license and further remediation carried out under the auspices of the SNM-770 Plan.

work required by the SNM-770 Remediation Plan. The parties also agreed to resolve disputes arising from CBS's agreement to complete the two plans through binding arbitration.<sup>6</sup>

The APA divides the economic responsibility for remediation at Waltz Mill between CBS and Westinghouse as follows:

1. CBS is economically responsible for remediation of the structures and components associated with the TR-2 reactor and certain retired facilities and areas pursuant to the TR-2 Decommissioning Plan and SNM-770 Remediation Plan (collectively "the Plans") in accordance with the Plans (and the remediation standards therein) approved by the NRC.

2. Westinghouse is responsible for SNM-770 license termination and decommissioning of the Waltz Mill Site at the end of the term of the SNM-770 license.

In fulfillment of certain provisions of the APA, CBS leased the entire Waltz Mill site to Westinghouse for 99 years, and granted to Westinghouse an option to purchase the site for a nominal amount at any time. Should the option not be exercised during the 99-year term, Westinghouse is responsible for terminating its NRC license and remediating the site to free release levels prior to the expiration of the term of the lease.<sup>7</sup>

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<sup>6</sup> In reviewing the APA leading to NRC's March 10, 1999 approval of the SNM-770 license transfer (*see* Safety Evaluation Report: Application To Transfer and Amend Westinghouse Materials Licenses, Quality Assurance Program Approvals and Certificates of Compliance, dated March 10, 1999), NRC found these provisions about the NRC-approved decommissioning plans to be consistent with NRC regulatory requirements. *Westinghouse Electric Company LLC (Waltz Mill Service Center) DD-03-02*, 58 NRC 115, 119 (2003). That decision documents another example of the use of the NRC regulatory process by CBS in relation to the economic dispute between CBS and Westinghouse. In that instance, CBS used the § 2.206 process to request relief under the SNM-770 license. Here, CBS eschews use of such process because the right to hearing or judicial review of a Director's Decision is not as broad as CBS would like. *See* Petition at 8.

<sup>7</sup> CBS has taken the position that the terms of the lease are such that CBS should not be viewed as the "Owner" of the site "because it has no real economic interest in the property, just legal title" and that Westinghouse is the "beneficial owner." *See* Viacom's

In its March 10, 1999 letter approving transfer of, among others, the SNM-770 license to Westinghouse, the NRC stated that "NRC will hold the licensees responsible for all requirements and conditions of their respective licenses, including financial responsibility for decommissioning."<sup>8</sup> With regard to CBS's agreement to complete the SNM-770 Plan, the NRC limited its interaction with CBS to notifying CBS, as well as the licensee, Westinghouse, about matters relating to decontamination.<sup>9</sup> By accepting the license transfer on these terms, CBS accepted this limited regulatory role with respect to Westinghouse's SNM-770 license.<sup>10</sup>

Well before closing of the sale of CBS's nuclear assets, CBS proposed specific remediation criteria to be applied to structures under the SNM-770 plan in an attachment to a June 19, 1998 letter (hereinafter the "June 19, 1998 criteria") that responded to an NRC request that CBS further define how it would implement the Commission's As Low As Reasonably Achievable ("ALARA") standard. The NRC accepted the June 19, 1998 criteria on August 21, 1998, stating that the June 19, 1998 criteria "provide[] acceptable criteria for residual contamination, based on your proposal for the areas future uses."

CBS undertook to remediate both portions of the TR-2 and inactive SNM-770 facilities in accordance with the June 19, 1998 criteria. Removal of the reactor and internals in accordance with the TR-2 DP (as revised by the section 50.59 process) was completed in May 2000. In early 2001, CBS demobilized the remediation effort and halted remediation activities. CBS took the

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Position Paper at 48, *Westinghouse Electric Company LLC and Viacom Inc.*, American Arbitration Association, Case No. 55 192 000385 02 (Nov. 5, 2003).

<sup>8</sup> NRC Letter to Westinghouse Electric Company, a division of CBS (March 10, 1999) at 1.

<sup>9</sup> *Id.*

<sup>10</sup> With the consent of the NRC, CBS provides a letter of credit to cover its financial responsibility for remediation under SNM-770.

position that all necessary structure and surface remediation had been accomplished in accordance with the June 19, 1998 criteria, that the project was complete and, as a result, the project was deactivated.<sup>11</sup> CBS continued to advocate that position before the arbitration panel and the NRC until, as discussed below, the NRC specifically rejected CBS's assertion.

On October 2, 2002, Westinghouse instituted an arbitration proceeding against CBS in accordance with the APA to resolve the economic dispute over the responsibilities of CBS in implementing the Plans. In 2004, after the conclusion of a hearing on a number of preliminary issues, the Arbitration Panel requested that CBS and Westinghouse jointly forward questions from the Arbitration Panel to the NRC inquiring whether the TR-2 and SNM-770 Plans had been completed and, if not, what further actions were necessary to complete the Plans. That request was made on October 8, 2004. The NRC treated these questions as a Touhy request under 10 C.F.R. § 9.200, *et seq.* of its regulations and requested position papers of CBS and Westinghouse and cross responses.

On March 17, 2006, the Solicitor of the NRC responded to the Panel's questions. The Commission determined that the requirements of the TR-2 Plan "have not been satisfactorily completed" (emphasis in original).<sup>12</sup> Furthermore, the Commission stated that the WTR decommissioning would only be considered complete when the "residual radioactive material and the WTR structure were transferred to the SNM-770 License for further remediation"

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<sup>11</sup> For its part, Westinghouse consistently took the position that the June 19, 1998 criteria had not been met for the applicable structures, and that the Plans had not been completed.

<sup>12</sup> March 17, 2006 Letter from John F. Cordes, Jr., Solicitor, U.S. Nuclear Regulatory Commission to, *inter alia*, Richard G. Murphy and Mark J. Wetterhahn, counsel for Westinghouse and Martin G. Malsch and Michael F. McBride, counsel for CBS. Attachment 1 at 1.

(emphasis and underscore in original).<sup>13</sup> Similarly, the Commission found the SNM-770 Plan was not yet complete:

The requirements in the SNM-770 Remediation Plan, *Remediation of Retired Facilities, Soil, and Groundwater* (SNM-770 RP) have not been satisfactorily completed. Requirements not yet satisfied include remediation of WTR structures, materials and equipment after their transfer to the SNM-770 License, as contemplated and described in the TR-2 DP and the SNM-770 RP. The remediation criteria that the WTR structures, materials, and equipment must meet after their transfer to the SNM-770 License are delineated in the June 19, 1998 letter titled *Submittal of Additional Information to Support Application for Approval of Remediation Plan*, which was approved by NRC on August 21, 1998, and cited in the Initial Arbitration Opinion and Order, as Item #19, at pages 13-14.<sup>14</sup>

The Commission also included a restatement of the June 19, 1998 criteria in its response.<sup>15</sup> In conjunction with its response to the CBS and Westinghouse inquiry, the NRC provided a document entitled "Path Forward" which provided detailed guidance as to how, from a regulatory perspective, the NRC expected CBS and Westinghouse to bring the remediation issues to closure. In the Path Forward, the NRC made it clear that the next regulatory action is to be the transfer of residual radioactivity remaining in the WTR facilities to the SNM-770 license. No further remediation is to be conducted under the purview of the TR-2 license.

Based on the NRC's response to its inquiry, the Arbitration Panel has requested that by September 29, 2006, both CBS and Westinghouse provide estimates of what it will cost to remediate the WTR and SNM-770 structures to various scenarios under the June 19, 1998 criteria and other areas to the requirements of the Plans.

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 2 (underscore in original).

<sup>15</sup> *Id.* at 2-3.



Rather than following the Commission's direction set out in the Path Forward, CBS has petitioned the NRC to revisit the June 19, 1998 criteria that CBS itself proposed. These are the same criteria CBS subsequently claimed it had met when it halted further remediation and demobilized the remediation project. Prior to its present action, in the eight years since CBS proposed the criteria and obtained NRC approval, CBS never sought to amend these criteria, insisting initially that it would meet them, and then that it had met them and had completed all remediation actions required by the Plans.

### III. ANALYSIS OF THE CBS PETITION

The CBS Petition is without regulatory precedent. First, CBS has no statutory right to a hearing as there is no pending proceeding in the subject docket in which CBS may seek to intervene. Second, in any event, CBS fails to demonstrate that it would have standing to intervene in such a proceeding. Finally, CBS fails to proffer at least one admissible contention. At bottom, CBS is improperly invoking the NRC hearing process in the hope of avoiding its contractual obligations to Westinghouse. The Commission, however, has long avoided agency involvement in the business affairs of its licensees (and non-licensees) and commercial disputes between private parties or litigants.<sup>16</sup>

#### A. CBS Has No Right to a Hearing Because There is No Agency "Action" or "Proceeding" of the Type Specified in Section 189a. of the Atomic Energy Act

Section 189a of the AEA, 42 U.S.C. § 2239(a), governs the *right* of a potentially affected party to request a hearing in an NRC "proceeding." Section 189a "deliberately limit[s] hearing

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<sup>16</sup> See, e.g., *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 48-49 (2001) (stating that the NRC "is not in the business of regulating the market strategies of licensees"); cf. *Florida Power & Light Co. et al.* (Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 & 2; et al.), CLI-06-21, 64 NRC \_\_ (slip op. July 26, 2006) at 4 (stating that "we are disinclined to "step into the middle of a labor dispute" or "involve [ourselves] in the personnel decisions of licensees") (citation omitted).

rights to those particular types of administrative actions that [are] listed in that section.”<sup>17</sup>

Section 189a provides, in relevant part, that:

In any *proceeding* under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239(a)(1)(A) (emphasis added). In discussing the legislative history associated with section 189a, the Commission has noted that “[t]he upshot of this history is that Congress intentionally limited the opportunity for a hearing to *certain designated agency actions*.”<sup>18</sup> Unless the NRC action at issue “can properly be characterized” as one of the “designated agency actions,” a party has no statutory right to request a hearing on that action.<sup>19</sup> Federal courts have similarly construed section 189a. and its associated legislative history to strictly limit hearing rights to the agency actions enumerated in section 189a.<sup>20</sup>

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<sup>17</sup> *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90, 94-95 (2000) (citing *United States Dep’t of Energy* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412 (1982)).

<sup>18</sup> *Zion*, CLI-00-5, 51 NRC at 96 (emphasis added).

<sup>19</sup> *Id.*; see also *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996) (citation omitted) (“If a form of Commission action does not fall within the limited categories enumerated in section 189a., the Commission need not grant a hearing.”); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 466 (2001) (citation omitted) (“Agency actions that are not among those listed do not give rise to a hearing right for interested persons.”).

<sup>20</sup> See, e.g., *Kelley v. Selin*, 42 F.3d 1501, 1514-15 (6th Cir. 1995), *cert. denied*, 515 U.S. 1159 (1995); *Massachusetts v. NRC*, 878 F.2d 1516, 1522 (1st Cir. 1989); *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1315 (D.C. Cir. 1984), *reh’g en banc on other grounds*, 789 F.2d 26, *cert. denied*, 479 U.S. 923 (1986); *Illinois v. Nuclear Regulatory Comm’n*, 591 F.2d 12, 14 (7th Cir. 1979).

Section 189a "requires the Commission to offer an opportunity for a hearing in certain kinds of 'proceedings,'" such as those involving the transfer or amendment of a license.<sup>21</sup> Accordingly, intervention is available only where there is a pending "proceeding" of the type specified in section 189a. of the AEA.<sup>22</sup> But to bring into existence such a "proceeding" and its associated hearing rights, one of the specified agency actions must occur.<sup>23</sup> As set forth below, that has not happened here.

Namely, CBS seeks a hearing in connection with Westinghouse's SNM-770 license. However, there is no pending "proceeding" in which CBS can request a hearing. CBS cites the NRC Staff's August 9, 2006, rejection of its request for a declaratory order or amendment of License Number SNM-770 as the purported basis for its hearing request. CBS also avers that "it is entitled to a hearing under 10 C.F.R. § 2.103 because it is the applicant." Petition at 1. However, neither CBS's July 12, 2006 submittal concerning the SNM-770 license nor the Staff's rejection thereof gives rise to any "proceeding" or related hearing right. CBS's representations regarding its alleged "applicant" status and the purported applicability of Section 2.103 are without basis. As the Staff explained in refusing to accept CBS's submittal for docketing: "CBS is not the holder License No. SNM-770 and, therefore, cannot apply for an amendment to that license." Moreover, Section 2.103 is clearly intended to apply to an *initial* license application, *not* to an application to amend an existing license submitted by someone other than the licensee.

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<sup>21</sup> *AmerGen Energy Co., L.L.C. (Three Mile Island Nuclear Station, Unit 1)*, CLI-05-25, 62 NRC 572, 573-74 (2005).

<sup>22</sup> *See State of New Jersey (Department of Law and Public Safety's Requests Dated October 8, 1993)*, CLI-93-25, 38 NRC 289, 292 (1993) (citation omitted).

<sup>23</sup> *See id.*

The plain language of the pertinent NRC regulations supports no other conclusion.<sup>24</sup> Section 30.38 states unequivocally that “[a]pplications for amendment of a license . . . shall specify the respects in which the *licensee* desires *its license* to be amended and the grounds for the amendment.” 10 C.F.R. § 30.38 (emphasis added). Section 30.39, which concerns the Commission’s application review criteria, refers specifically to “an application by a *licensee* to renew or amend *his license* . . . .” 10 C.F.R. § 30.38 (emphasis added). The NRC Staff thus correctly concluded that CBS has no right to apply for an amendment to a license held exclusively by Westinghouse.<sup>25</sup>

It follows necessarily that CBS has no right to a hearing on the Staff’s rejection of its ill-conceived request. Contrary to CBS’s suggestion, the mere fact that CBS submitted an “application” does not make it an “applicant” for purposes of 10 C.F.R. § 2.103, which provides for hearing opportunities under limited circumstances not present here. Section 2.103 applies, by its terms, to an initial “application for a byproduct, source, special nuclear material, or operator license.” 10 C.F.R. § 2.103(a). CBS is not applying for such a license, but rather, is seeking to modify an extant license held by Westinghouse. The Staff’s refusal to docket CBS’s application is fully justified, and does not constitute the type of “denial” that gives rise to the right to a hearing, as provided for in Section 2.103(b).<sup>26</sup>

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<sup>24</sup> See *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 361 (2001) (citation omitted) (stating that interpretation of an agency regulation begins with the language and structure of the provision itself).

<sup>25</sup> Subpart A of 10 C.F.R. Part 2, which CBS references as a basis for filing the Petition, prescribes the procedures for “amendment of a license *at the request of the licensee* . . . .” 10 C.F.R. § 2.100 (emphasis added). See also 10 C.F.R. § 2.310 (NRC regulation governing selection of hearing procedures and referring to proceedings involving a “licensee-initiated amendment”).

<sup>26</sup> NRC guidance states that applications for material licenses should be denied pursuant to 10 C.F.R. § 2.103(b) if the Staff cannot make the findings required by the regulations

Finally, CBS suggests that NRC regulations which limit license amendment requests to licensees contravene section 189a, which refers to "any person whose interest may be affected." Petition at 4. Petitioner contends that "[u]nder the plain meaning of the statute . . . the Commission has an obligation to grant a hearing to CBS *regardless of the agency's past practice with respect to non-licensees or the precise wording of its regulations.*"<sup>27</sup> *Id.* (emphasis added). Petitioner's argument is meritless and contrary to precedent. In amending its adjudicatory rules in 1989, the Commission expressly noted that "[a] member of the public has no absolute or unconditional right to intervene in a nuclear power plant licensing proceeding under the Atomic Energy Act."<sup>28</sup> The Commission added that section 189a "is subject to the Commission's rulemaking power under section 161p and, thus, to reasonable procedural requirements designed

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(e.g., 10 C.F.R. §§ 30.33, 40.32, or 70.23, as appropriate) because either: (1) the applicant does not satisfy the substantive requirements for *receiving* a license, even after providing information on which the staff can make a decision; or (2) the applicant has not submitted adequate information (*see* 10 C.F.R. § 2.108). *See* NUREG-1556, Vol. 20, "Consolidated Guidance About Materials Licenses: Guidance About Administrative Licensing Procedures" (Dec. 2000) at 4-20. Neither of these situations applies here.

<sup>27</sup> In support of this specious argument, CBS cites the Supreme Court's well-known decision in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). Petitioner's reliance on *Chevron* is utterly misplaced. *Chevron* relates to judicial review of an agency's construction of a statute that the agency administers, and holds that a court must reject administrative constructions that are contrary to clear congressional intent. There is no unresolved question of statutory construction in this case. It is clear that section 189a does *not* confer the automatic right of intervention upon any party, and that hearing rights are limited to those agency actions specifically enumerated in section 189a. CBS's interpretation of section 189a would have the Commission disregard valid procedural requirements, as well as longstanding legal precedent defining the scope of hearing rights under the AEA. It also would impermissibly expand the nature of actions that would provide an opportunity for a hearing.

<sup>28</sup> Final Rule, "Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,170 col. 2 (Aug. 11, 1989) (citing *BPI v. Atomic Energy Commission*, 502 F.2d 424 (D.C. Cir. 1974)).

to further the purposes of the Act.”<sup>29</sup> As discussed below, those requirements include a showing of standing to intervene and the pleading of at least one admissible contention. Finally, the Commission noted that the Administrative Procedure Act creates no independent right to intervene in nuclear licensing proceedings.<sup>30</sup> The Commission thus has previously rejected, and properly so, Petitioner’s position that the Commission is “obligated” to grant it a hearing.<sup>31</sup>

In sum, CBS has requested a hearing in a proceeding that simply does not exist. Neither CBS’s request for a declaratory order or an amendment of Westinghouse’s license, nor the NRC’s rejection of that request, confers upon CBS “applicant” status or any related right to a hearing. There is no legal basis for CBS’s Petition.

**B. Even if There Were a Pending “Proceeding” Concerning Westinghouse’s SNM-770 License, CBS Has Not Established Standing to Intervene**

Even *assuming* there exists an NRC proceeding on the issues of concern to a petitioner (which is not the case here), that petitioner must satisfy the minimum requirements of 10 C.F.R. § 2.309, which governs intervention in NRC proceedings.<sup>32</sup> The first of those requirements is standing. *See* 10 C.F.R. § 2.309(d)(1)(i)-(iv). Specifically, a petitioner must demonstrate that: (1) he has suffered (or will suffer) a distinct and palpable harm that constitutes injury-in-fact within the *zone of interests* arguably protected by the governing statute (*i.e.*, the AEA or

<sup>29</sup> *Id.* (citing *BPI*, 502 F.2d at 427-28; *American Trucking Ass’ns, Inc. v. United States*, 627 F.2d 1313, 1320-23 (D.C. Cir. 1980)).

<sup>30</sup> *See id.* (citing *Easton Utils. Comm’n v. Atomic Energy Comm’n*, 424 F.2d 847, 852 (D.C. 1970) (en banc); *Nat’l Coal Operators’ Ass’n v. Kleppe*, 423 U.S. 388, 398-99 (1976)).

<sup>31</sup> As one Licensing Board put it, “there is no general right to a hearing for a hearing’s sake.” *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273, 282 (2001).

<sup>32</sup> *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994).

NEPA),<sup>33</sup> (2) the injury can fairly be traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision.<sup>34</sup>

First, CBS has not alleged any specific “injury-in -fact” cognizable under the AEA. CBS asserts that the “[t]he denial of its application directly affects and harms CBS’s interests . . . because it leaves in place remediation criteria for SNM-770 structures that are costly [to CBS], arbitrary, and unnecessary for safety, thereby harming CBS’s interests as the owner of the site, as the co-licensee on the site, as the obligor under the letter of credit, and as the effective obligor under the SNM-770 Remediation Plan.”<sup>35</sup> Petition at 3-4. However, as CBS’s petition plainly reflects, CBS’s sole interest is to relax the current NRC-approved remediation criteria, so as to sharply reduce “the outer limits of CBS’s remediation responsibilities.” Petition at 6. As discussed above, CBS’s only responsibility is a financial one that derives from its contractual obligation to pay for the completion of the Plans (which include fulfillment of the June 19, 1998 criteria). In other words, the “affected interest” that CBS seeks to protect through its petition is its *purely economic interest in reducing its financial responsibility* for certain limited site remediation.

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<sup>33</sup> Such an “injury” must be “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted).

<sup>34</sup> See *First Energy Nuclear Operating Co.* (Beaver Valley Power Station, Unit Nos. 1 and 2; Davis-Besse Power Station, Unit No. 1; Perry Nuclear Power Plant, Unit No. 1), CLI-06-02, 63 NRC 9, 13-14 (Jan. 2006) at 5 (citing *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)).

<sup>35</sup> As discussed above, CBS’s representations regarding its purported interests in the Waltz Mill site either are inaccurate (e.g., CBS, while holder of the TR-2 license, is *not* a co-licensee on the SNM-770 license) or presented out of context.

CBS overlooks that "it has long been [the NRC's] practice as an agency to reject standing for petitioners asserting a *bare economic injury, unlinked to any radiological harm.*"<sup>36</sup> Bearing in mind the "zone of interests" regulated and protected by the AEA, the Commission has linked the notion of "injury" to a petitioner to the potential for health and safety consequences associated with the proposed action.<sup>37</sup> As such, "[t]he 'zone of interests' test for standing in an NRC proceeding does not encompass economic harm that is not directly related to environmental or radiological harm."<sup>38</sup> Furthermore, the "bare mention[]" of health and safety cannot be used to establish standing when the essence of the [petitioner's] concern is economics, not safety."<sup>39</sup> Here, CBS alleges no health and safety concern, but states only that the criteria it seeks to relax are "costly, arbitrary, and unnecessary for safety," and inconsistent with "rational regulation."

CBS's bare residual ownership interest in the Waltz Mill site (subject to a 99-year lease to Westinghouse that includes an option to purchase the site for \$1.00) does not, in and of itself, provide a basis for standing. CBS has not alleged that any "radiological injury" to its property will occur as a result of the Staff's rejection of its submittal. The Commission, however, has noted that while "[t]he [AEA] expressly authorizes [it] to accord protection from *radiological*

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<sup>36</sup> *Int'l Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 265 (1998) (citation omitted) (emphasis added).

<sup>37</sup> *See, e.g., Sequoyah Fuels and Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994) (citing *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95-96 (1993)).

<sup>38</sup> *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 336 (2002) (citations omitted).

<sup>39</sup> *Diablo Canyon*, CLI-02-16, 55 NRC at 337 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)).



*injury* to both health and property interests,”<sup>40</sup> any alleged harm to property must have some nexus to the interests protected by the AEA (e.g., economic loss occasioned by the necessity to cease doing business in the area affected by a radiological release).<sup>41</sup> CBS is not seeking to protect any property interest from radiological hazards.

Additionally, the *Seabrook* and *Nine Mile Point* cases cited by Petitioner involved readily distinguishable factual circumstances. In those cases, co-owners and/or co-licensees of nuclear power plants asserted that NRC approval of the subject license transfers would put in place financially incapable co-licensees or co-owners.<sup>42</sup> This, in turn, they claimed, would increase the risk of radiological harm to their property and their risk of being forced to assume greater-than-expected operating and decommissioning costs. Here, CBS has not alleged a similar injury. CBS is seeking to *relax* remediation criteria that *it* proposed. If anything, the NRC’s approval of Petitioner’s request to relax the criteria would *increase* the risk of radiological harm to Westinghouse (not CBS) employees present on the site.

Furthermore, CBS is not a co-owner or co-licensee in the same sense as the petitioners in the aforementioned license transfer proceedings. As explained above, CBS has effectively sold the Waltz Mill site to Westinghouse and has no regulatory obligation relative to Westinghouse’s SNM-770 license. Also, the NRC’s mere refusal to docket CBS’s submittal concerning that license will not compel CBS to assume a “greater-than-expected” share of the site remediation

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<sup>40</sup> *Gulf States Utils. Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48 (citing AEA, §§ 103b, 161b, 42 U.S.C. §§ 2133(b), 2201(b)) (emphasis added).

<sup>41</sup> *See, e.g., Gulf States Utils. Co.* (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31, 37-38 (1994), *aff’d* CLI-94-10, 40 NRC 43 (1994).

<sup>42</sup> The NRC requires all co-owners of nuclear power plants to be co-licensees and responsible for complying with the terms of their licenses. *See Pub. Serv. Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 200-201 (1978).

costs. To be sure, CBS is seeking to avoid costs, but those costs are far from unexpected. In fact, CBS *voluntarily* assumed those costs through an arm's length business transaction, and even proposed the underlying remediation criteria it now seeks to alter for self-serving economic reasons. Certainly, the NRC is not the appropriate entity to allocate or shift business risk among large business entities and should not be in the middle of a dispute regarding private contractual obligations.

In sum, CBS has failed to advance a plausible claim of injury. This fact alone is dispositive on the question of standing. Notwithstanding, it warrants mention that CBS also fails to make any showing on the other elements of standing, *i.e.*, causation and redressability.<sup>43</sup>

C. CBS Also Has Failed to Proffer An Admissible Contention

The Commission's rules also require that a petitioner proffer at least one admissible contention.<sup>44</sup> For a proffered legal or factual contention to be admissible, it must be pled with specificity and establish a genuine dispute with the applicant on a material issue of law or fact.<sup>45</sup> A contention that fails to meet any of the Commission's pleading requirements must be

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<sup>43</sup> A petitioner is required to show both causation and redressability. Specifically, a petitioner must establish a "plausible" causal nexus between the alleged injury and the challenged action. *See, e.g., Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149, 155 (1998). The redressability element of standing, in turn, requires that the petitioner show that its claimed actual or threatened injury could be cured by some action of the tribunal. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-02-2, 53 NRC 9, 14 (2001). CBS fails to meaningfully address either element.

<sup>44</sup> *See* 10 C.F.R. §§ 2.309(f)(1)(i)-(vi).

<sup>45</sup> Of course, in the instant petition, CBS is not seeking to challenge any licensing action proposed by Westinghouse. Instead, it is objecting to the NRC's refusal to docket its own request to modify criteria that have been incorporated into Westinghouse's license.

dismissed, as must a contention that, even if proven, would be of no consequence because it would not entitle a petitioner to any relief.<sup>46</sup>

CBS fails to meet the NRC's "strict" pleading requirements. Neither of its proposed "contentions" raises a genuine dispute as to a *material* issue of law or fact. CBS's purported contentions merely present procedural complaints rather than litigable legal or factual issues. Further, CBS fails to present adequate legal, factual, or expert opinion support to demonstrate that the relief it ultimately seeks -- modification of the remediation criteria which will affect only Westinghouse employees and contractors -- is even warranted.

Petitioner's first proposed contention alleges that the "NRC Staff's refusal to entertain CBS's request in the subject application for a declaratory order is unreasonable and *unlawful*." Petition at 5. CBS maintains that "[w]ithout such order, CBS is in the untenable position of being obligated to engage in, pay for, and be the ultimate obligor under a letter of credit for remediation that, in the final analysis, may not be necessary under the [AEA] and would be utterly inconsistent with criteria that apply elsewhere on the same Site." *Id.* CBS further asserts that its "unique situation" justifies the requested order and its "statutory right to be heard." *Id.*

Petitioner's proposed contention does not pass muster in several respects. Above all else, it fails to raise a genuine dispute on a material issue of law or fact. The NRC is under no legal obligation -- indeed, it would have no legal basis in this instance -- to issue a "declaratory order" pursuant to Section 554(e) of the Administrative Procedure Act. Section 554 sets forth certain minimum requirements for "adjudication[s] required by statute to be determined on the record after opportunity for an agency hearing."<sup>47</sup> It states that an agency "in its *sound discretion*, may

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<sup>46</sup> See, e.g., *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), LBP-98-33, 48 NRC 381, 383 (1998).

<sup>47</sup> 5 U.S.C. § 554.

issue a declaratory order to terminate a controversy or remove uncertainty.”<sup>48</sup> Section 554(e) thus authorizes an agency -- in the course of an adjudication -- to issue declaratory orders “for the purpose of removing uncertainty as to the interpretation of the law.”<sup>49</sup>

Here, there is no pending adjudication of the type contemplated in Section 554.<sup>50</sup> Moreover, even if Section 554(e) did apply here, there is no legal “uncertainty” that warrants declaratory relief from the NRC. The NRC has made clear that the remediation criteria applicable to the WTR structures, materials, and equipment are the NRC-approved criteria contained in the June 19, 1998 letter.<sup>51</sup> In the Path Forward, the NRC also has made known its expectations relative to the continued remediation of the Waltz Mill site, the parties’ respective remediation responsibilities, and future licensing actions to be taken by Westinghouse. Nonetheless, the NRC, like other agencies, has considerable discretion in deciding whether to

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<sup>48</sup> 5 U.S.C. § 554(e) (emphasis added).

<sup>49</sup> Jacob A. Stein, Glenn A. Mitchell & Basil J. Mezines, *Administrative Law* § 33.04 at 33-70 (2006); *see, e.g., Kansas Gas and Elec. Co.* (Wolf Creek, Unit 1), CLI-77-1, 5 NRC 1, 4 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967)).

<sup>50</sup> *See* 2 Charles H. Koch, Jr., *Administrative Law and Practices* § 5.17[2](b) at 40 (2d ed. 1997) (“Since this provision appears in the section on formal adjudication the drafters must have envisioned this device as auxiliary to formal adjudication.”); *see also Advanced Med. Sys.* (One Factory Row Geneva, Ohio 44041), LBP-89-11, 29 NRC 306, 314 (stating that “a genuine and live controversy” must exist to support a declaratory order).

<sup>51</sup> Insofar as the NRC treated the Arbitration Panel’s questions as a *Touhy* request (*i.e.*, a request for agency testimony or evidence for use in private litigation), the NRC’s responses unquestionably bear the imprimatur of the agency head, *i.e.*, the Commission. *See, e.g., Exxon Shipping Co. v. U.S. Dep’t of the Interior*, 34 F.3d 774, 776 & n.3 (9th Cir. 1994) (stating that *Touhy* regulations “generally provide that agency heads may authorize [] testimony [by agency employees or officials] when it is in the best interests of the agency”) (emphasis added).

issue declaratory orders.<sup>52</sup> Even if Petitioner's request for a declaratory order were procedurally viable, Petitioner has not demonstrated how it would demonstrate that the NRC has abused its broad discretion in refusing to issue the order.<sup>53</sup> The proposed "contention" is thus inadmissible.

CBS's second proposed contention alleges that "[a]part from CBS's statutory right to be heard, NRC Staff's refusal to entertain CBS's request for a waiver of its regulation (10 C.F.R. § 30.38) is unreasonable and unlawful." Petition at 6. CBS asserts that an exemption or a waiver allowing it to amend Westinghouse's license "would be in the public interest because *CBS's interests* would be protected and rational regulation would be promoted." *Id.* at 7. CBS, however, makes no meaningful *attempt* to explain why an exemption or waiver is warranted to assure that the public health and safety is protected,<sup>54</sup> let alone demonstrate that it has met the requisite criteria for such action.

Instead, CBS refers the Commission to unspecified portions of its July 12, 2006 submittal, and to the sparse affidavit of Richard K. Smith, as support for its assertion that

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<sup>52</sup> See Koch, *supra*, § 5.17[2](b) at 40 ("The APA authorizes agencies to issue declaratory orders in their sound discretion; it does not require them to do so just because a request is made."); see also *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 916 (5th Cir. 1993).

<sup>53</sup> CBS's reliance on Section 554(e) is telling in that the NRC has broad authority under various provisions of the Atomic Energy Act (*e.g.*, Section 161) to issue orders to correct licensee noncompliance and/or to assure protection of public health and safety. Because neither concern exists here, CBS has resorted to an obscure provision of the Administrative Procedure Act which provides no basis for the CBS contention.

<sup>54</sup> Neither an exemption nor a waiver is an appropriate procedural vehicle under the circumstances. CBS is not a licensee seeking relief from a "substantive" regulatory requirement. Recognizing that its request to amend Westinghouse's license application is "unusual" (*i.e.*, improper), CBS engages in yet another procedural subterfuge by requesting an "exemption" from (waiver of) 10 C.F.R. § 30.38. That provision, however, simply provides filing instructions to licensees properly seeking amendments of their *own* licenses. Additionally, Section 2.335 contemplates that any request for a waiver or exception will be made by "a party to an adjudicatory proceeding."

"special circumstances" exist. However, simply attaching a document in support of a contention without any explanation of its significance does not provide an adequate basis for a contention.<sup>55</sup> The Commission has previously admonished intervenors that it should not be expected to sift unaided through earlier submittals in order to piece together and discern a party's particular concern or complaint.<sup>56</sup> Moreover, Mr. Smith's affidavit states only that he is familiar with the remediation activities on the Waltz Mill site, that he signed CBS's SNM-770 and TR-2 submittals, that those documents and CBS's petition are purportedly "true and correct." The affidavit is devoid of any technical or substantive content that might support CBS's contention.<sup>57</sup> The other exhibits to CBS's pleading demonstrate, at most, that an application for amendment has been filed in another docket and do not provide an independent basis for admission of any contention.

In short, CBS's second proposed "contention" also fails to meet the NRC's pleading requirements. CBS gives no reason to believe that the Staff's refusal to entertain its request for a waiver is "unlawful." More fundamentally, CBS fails even to explain why an exemption or waiver is warranted, so as to effect Petitioner's ultimate objective of relaxing the June 19, 1998 remediation criteria.<sup>58</sup>

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<sup>55</sup> See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 298-99 (1988).

<sup>56</sup> *Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 15 (2001) (citation omitted).

<sup>57</sup> Cf. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998) (stating that an expert cannot merely state a conclusion "without providing a reasoned basis or explanation for that conclusion").

<sup>58</sup> As the Commission recently explained, for the agency to grant an exemption from, or waiver of, a regulation, it must first conclude under NRC regulations and case law that (i) the rule's strict application "would not serve the purposes for which [it] was adopted;"

IV. CONCLUSION

Westinghouse requests that the NRC consider Westinghouse's position in acting upon the CBS Petition.

Respectfully submitted,



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(ii) the movant has alleged "special circumstances" that were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;" (iii) those circumstances are "unique" to the facility rather than "common to a large class of facilities;" and (iv) a waiver of the regulation is necessary to reach a "significant safety problem." The Commission emphasized that all four factors must be met. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005) (citations omitted).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of

Westinghouse Electric Company LLC  
(Waltz Mill Service Center)

Docket No. 70-698

NRC License No. SNM-770

CERTIFICATE

I hereby certify that copies of the "COMMENTS OF WESTINGHOUSE ELECTRIC COMPANY LLC REGARDING THE PETITION FOR HEARING FILED BY CBS CORP." in the captioned docket have been delivered to the following by electronic mail and by deposit in the United States mail, first class, this 19th day of September 2006.

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