

October 8, 2004

Karen D. Cyr, Esq.
General Counsel
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Ms. Cyr:

As you may be aware, Viacom Inc. ("Viacom"), the corporate successor to CBS Corporation (formerly known as Westinghouse Electric Corporation), and Westinghouse Electric Company L.L.C. ("Westinghouse") are adversaries in a commercial arbitration addressing the scope of Viacom's responsibility for remediation of the Waltz Mill Site in Pennsylvania under an Asset Purchase Agreement. On September 14, 2004, the Arbitration Panel, consisting of The Honorable Patricia M. Wald, Gerald Charnoff, Esq., and The Honorable Steven S. Honigman, issued its Initial Arbitration Opinion and Order ("Initial Opinion and Order"). Among other things, the Panel ordered that "the parties shall forthwith *jointly* file with the NRC a copy of this Initial Arbitration Opinion and Order." Initial Opinion and Order at pg. 31. Accordingly, a copy of the Initial Opinion and Order is enclosed.

The Initial Opinion and Order also ordered that the parties jointly request that the NRC answer questions posed by the arbitration panel. Initial Opinion and Order at pg. 32. The Initial Opinion and Order recognized that the NRC would decide the procedures to be followed in answering the specified questions, but also requested that NRC ensure that both parties would have an equal opportunity to be heard. Initial Opinion and Order at pg. 32. Accordingly, undersigned counsel for the parties are also writing to request a meeting with you as soon as practicable to discuss how the parties might participate in the process the NRC decides to follow in preparing answers to the Panel's questions.

The parties are discussing possible procedures to suggest to the NRC. They have, however, already agreed that, effective immediately, there should be no communications to anyone at the NRC concerning any matter relevant to the answers to the Panel's questions other than through the process ultimately adopted by the NRC; that is, the parties have agreed that neither party would make any communication to the NRC about any matter relevant to the answers to the Panel's questions except with timely notice to and opportunity for the other party to participate. An exception would be made for a licensee's urgent communications to the NRC about a safety problem when advance or contemporaneous notice to the other party is impossible, but in such an event the other party would be informed of the communication as soon as practicable after it occurs.

Undersigned counsel for the parties will contact your office in the near future to establish a mutually acceptable date and time for the meeting requested in this letter. Thank you for your consideration.

Final

September 14, 2004

AMERICAN ARBITRATION ASSOCIATION

Westinghouse Electric Company, LLC,

Claimant,

and

Viacom, Inc.,

Respondent.

Case No. 16 V 192 00937 02

INITIAL ARBITRATION OPINION AND ORDER

I. INTRODUCTION AND PROCEDURAL HISTORY

This arbitration involves a dispute between Claimant Westinghouse Electric Company LLC ("Westinghouse") and Respondent Viacom, Inc. ("Viacom") arising under a 1998 Asset Purchase Agreement ("APA") in which Westinghouse's parent company, British Nuclear Fuels plc ("BNFL"), agreed to purchase the Energy Systems Business Unit of Viacom's predecessor, CBS Corporation ("CBS"). A division of the Energy Systems Business Unit used the Waltz Mill Service Center ("Waltz Mill"), an 85 acre site southeast of Pittsburgh, Pennsylvania, to provide services to commercial nuclear power plants. Some buildings and soil at Waltz Mill were contaminated with radioactive waste following an accident in 1960 in a nuclear test reactor that CBS had built at Waltz Mill before it began using the property to service nuclear power plants.

As explained in detail below, Westinghouse and CBS agreed in Section 8.1(a) of the APA that CBS would retain responsibility for cleaning up some of this so-called

"legacy contamination" at Waltz Mill in accordance with "approvals received and to be received" by the Nuclear Regulatory Commission ("NRC") in connection with two plans that CBS had prepared and submitted to the NRC. These two Plans were (1) the "TR-2 Decommissioning Plan," which addressed the removal of the damaged test reactor vessel and biological shield, and (2) the "SNM-770 Remediation Plan," which addressed the remediation of contaminated soil areas and "retired facilities" that were not being used as part of the ongoing nuclear services business. At the time of the negotiation and execution of the APA, neither of these Plans had been approved by the NRC.

The Parties also agreed, in Section 8.8 of the APA, that "[a]ny dispute as to the scope of the work or the type of Remedial Action . . . or the matters concerning the Waltz Mill Service Center described in [Section 8.1(a) of the APA] . . . shall be settled by arbitration in accordance with the Commercial Rules of the American Arbitration Association." On November 8, 2002 Westinghouse invoked that arbitration clause, filing a Demand for Arbitration and Statement of Claim that alleged that Viacom (which acquired CBS in 2000) had breached its obligations under the APA by failing to complete the remedial measures required under the TR-2 and SNM-770 Plans that NRC had approved, with some modifications, following execution of the APA. As explained in detail below, Westinghouse's principal contention is that Viacom breached its obligations under the APA by failing to remediate all of the retired facilities to the specific numerical criteria specified in a June 19, 1998 letter from CBS that answered the NRC's questions about the initial version of the SNM-770 Plan. Westinghouse therefore requested that the arbitration panel (1) award damages in the amount Westinghouse will be required to spend to complete the remediation, a sum that Westinghouse estimates will exceed \$25

million; (2) declare that Viacom will be financially responsible for any additional remedial measures required by the NRC pursuant to the Plans; (3) declare that because of Viacom's breach, Westinghouse is not contractually obligated to accept transfer of the former test reactor facilities that remain following removal of the test reactor and biological shield as specified in the TR-2 and SNM-770 Plans; and (4) grant Westinghouse an award of attorneys' fees and costs.

On December 16, 2002, Viacom filed Respondent's Answering Statement, Defenses, Counterclaims, and Prayer for Relief. As described in detail below, Viacom's principal contention is that the numerical criteria in its June 19, 1998 letter to the NRC were simply a goal and that higher levels of contamination are permitted in the retired facilities as long as the remaining contamination is "as low as reasonably achievable" ("ALARA"). Viacom therefore denies that it has breached its obligations under the APA and instead claims that it is Westinghouse who has breached its obligations under the APA.¹

After extensive discovery, both parties filed motions for dispositive relief on April 22, 2004. This Arbitration Panel heard oral argument on the motions on May 20, 2004 and the following day issued an order denying those motions without prejudice to their

¹ In particular, Viacom seeks (1) a declaration that Westinghouse must accept transfer of the test reactor facilities or pay damages of at least \$10 million to remediate those facilities to the NRC's license termination criteria; (2) an award of damages for unnecessary work that Westinghouse allegedly required Viacom to perform and for interfering with Viacom's ability to communicate with the NRC about the remediation; and (3) an order that Westinghouse return equipment Viacom used for remediation at the Waltz Mill site or compensate Viacom for the equipment. The June 2004 hearing was limited to the questions identified in the pre-hearing order, *see infra*, at 4-5, and there was no evidence presented about these claims.

resubmission at a later stage of the proceeding.² The May 21, 2004 order also specified that the Panel would convene a hearing on June 15, 2004, to receive evidence and testimony exclusively with respect to the following issues:

(1) The nature of the compromise that led to the development of Section 8.1(a) of the APA. Particularly, who participated in the negotiation and drafting of this Section, and what was the intent of each such participant with respect to this Section.

(2) Section 8.1(a) of the APA refers to "remedial measures . . . as may be required by and are in accordance with approvals received or to be received from the NRC (the 'Plans')." What was the intent of the Parties with respect to the meaning of the quoted words? Were the Parties referring to NRC "approvals" of (1) the Plans; (b) the remediation criteria; and/or (c) satisfactory completion of the remediation?

(3) In the attachment to the June 19, 1998 letter to the NRC, why did CBS set forth in two separate paragraphs the "criteria applicable to inactive restricted areas which may be used for future licensed activities within buildings that are used for other principal licensed activities"? Who drafted and reviewed the June 19, 1998 letter and attachment prior to their submission to the NRC? Did the author(s) consider placing the last two sentences of the second paragraph of the criteria in a separate third paragraph? If so, why did they decide to place these sentences in the second paragraph instead?

² In the May 21, 2004 Order, we also denied Viacom's motion in limine, which sought to exclude from the hearing evidence of the negotiating and drafting history of Sections 8.1(a) and 8.2(x) of the APA. In our view, there was sufficient ambiguity about the meaning of the words "remedial measures . . . as may be required by and are in accordance with approvals received or to be received from the NRC ('the Plans')" in Section 8.1(a) of the APA to justify the use of extrinsic evidence to clarify the intent of the parties with respect to the scope of Viacom's remediation obligations under the "Waltz Mill Compromise" incorporated in that section. See, e.g., Alexander & Alexander Servs., Inc. v. These 16 Certain Underwriters at Lloyd's, London, 136 F.3d 82, 86 (2d Cir. 1998).

(4) Have there been any instances in which the NRC authorized a regulated party to use the ALARA principle to allow exposures above limits specified in NRC-approved site-specific plans or NRC regulations? Describe those instances.

(5) What financial commitments or assurances were made, or proposed to be made, to the NRC by each Party concerning the remediation at Waltz Mill, Pennsylvania? What was the negotiation history of any such commitments or assurances; what was their purpose and scope; and what are the conditions and procedures for their release by the NRC? The Parties shall provide the Panel with copies of all documents concerning such commitments or assurances.

A hearing on these questions was held over five days between June 15 and June 21, 2004, and the Parties submitted post-hearing memoranda on July 9, 2004. This opinion answers those questions based on the evidence and post-hearing memoranda.

II. FACTUAL FINDINGS

A. Background

1. In the 1950s, CBS built and began operating a nuclear test reactor on the Waltz Mill site pursuant to a TR-2 license from the NRC.³ Following an accident in the test reactor that significantly contaminated portions of the Waltz Mill site in 1960, CBS permanently shut down the test reactor in 1962. The following year, the NRC amended the TR-2 license to authorize CBS to possess the test reactor and related radioactive material, but not to operate the reactor. See Jt. Ex. 41, In the Matter of Westinghouse

³ CBS was originally named Westinghouse Electric Corporation, but to avoid confusion with Claimant Westinghouse Electric Company LLC, we refer to the entities that owned and operated Waltz Mill prior to the execution of the APA as "CBS." We use the term "Westinghouse" to refer to the claimant in this arbitration.

Electric Company LLC, Waltz Mill Service Center, Madison, PA, Nuclear Regulatory Commission Docket No. 70-698 (Director's Decision under 10 CFR 2.206, Aug. 26, 2003), at 5 [hereafter "NRC Director's Decision"].

2. In the 1980s, CBS began to use the Waltz Mill site for its nuclear services business. In order to conduct this business, CBS obtained the SNM-770 license from the NRC, which authorized CBS to possess and use radioactive materials at Waltz Mill (with the exception of the reactor facilities covered by the TR-2 license). See Jt. Ex. 41, NRC Director's Decision, at 5.

3. In 1990, the NRC placed Waltz Mill on its Site Decommissioning Management Plan ("SDMP") list, because the site had significant contamination in the soils that created the potential for offsite groundwater contamination. See Jt. Ex. 41, NRC Director's Decision, at 6. As a result, CBS got "a lot of attention" from the NRC and was told to follow an "Action Plan" that identified a sequence of specific actions to be taken by licensees on the SDMP list. Testimony of A. Joseph Nardi, June 15, 2004, at 249-50.

4. Thus, in November 1996, CBS submitted the SNM-770 Remediation Plan to the NRC to address remediation of the soils and the retired facilities covered by the SNM-770 license. Nardi Testimony, at 250. The SNM-770 Remediation Plan states that it is not a decommissioning plan, because CBS was not seeking to terminate the SNM-770 license but rather would continue to conduct licensed nuclear services operations on the site. Jt. Ex. 41, NRC Director's Decision, at 7. Therefore, the "objective of the Plan is to remediate retired facilities and soil areas to the extent considered prudent for the

continued licensed operations at the site." Jt. Ex. 1, Waltz Mill Facility SNM-770 Remediation Plan (Rev. 0, Nov. 27, 1996), at 1-2.

5. In July 1997, CBS submitted the TR-2 Decommissioning Plan to the NRC to "address the activities required to terminate the TR-2 License," such as "removal of the remaining reactor vessel internal contents, the reactor vessel, and the biological shield." Jt. Ex. 2, Westinghouse Test Reactor, TR-2 Final Decommissioning Plan (Rev. 0, July 25, 1997), at 1-1. Once that decommissioning work is done, the TR-2 license will be terminated and the residual radioactive material and facilities will be transferred to the SNM-770 license. Id.; see also Jt. Ex. 41, NRC Director's Decision, at 7.

Decontamination of the facilities transferred to the SNM-770 license is to be completed by CBS in accordance with the "approved acceptance criteria associated with the retired facilities in the SNM-770 Remediation Plan." Jt. Ex. 2, TR-2 Decommissioning Plan, at 1-3.

B. The Negotiation and Execution of Section 8.1(a) of the APA (Issues 1 & 2)

6. In early 1998, before the NRC had approved either the SNM-770 Remediation Plan or the TR-2 Decommissioning Plan, CBS decided to sell its Energy Systems Business Unit. In May 1998, a consortium consisting of Morrison Knudsen Corporation and BNFL (hereafter referred to collectively as "BNFL") submitted an offer. See Jt. Ex. 10. CBS subsequently began to negotiate with BNFL, but the parties soon reached an impasse over the test reactor and retired facilities at Waltz Mill. Because CBS planned to exit the nuclear business and focus on its media operations, it wanted BNFL to acquire all of the facilities at Waltz Mill, including those that were not currently in use, and to assume responsibility for all of the remediation work that needed to be done at the site.

See Testimony of William Wall, June 17, 2004, at 726; Testimony of Peter Rodgers, June 15, 2004, at 47. BNFL, on the other hand, initially refused to take the test reactor and retired facilities at Waltz Mill because they were not part of the ongoing nuclear services business that BNFL desired to purchase, and BNFL did not want to assume the large and potentially uncertain costs of remediating these facilities. See Rodgers Testimony, at 45; Wall Testimony, at 775.

7. During the course of intense negotiations in the offices of CBS's outside counsel in New York, lawyers for both parties reached a compromise. Lawyers for CBS proposed that if BNFL would agree to take the entire Waltz Mill site, including the test reactor and other retired facilities, CBS would complete the remediation of those facilities in accordance with the TR-2 and SNM-770 Plans, as approved by the NRC. See Rodgers Testimony, at 49-50; Testimony of Michael Sweeney, June 17, 2004, at 500-01; Wall Testimony, at 727.

8. During these negotiations, the CBS lawyers repeatedly stressed that the Plans pending before the NRC (which had not yet been approved) were not designed to remediate the retired facilities to the "free release" standard that the NRC would require upon license termination. Instead, the Plans proposed a partial remediation, under which CBS would remediate the facilities to render them suitable for future licensed use under the SNM-770 license. See, e.g., Sweeney Testimony, at 512-13; Wall Testimony, at 727. Final decommissioning of these facilities upon the cessation of licensed activities and the termination of the SNM-770 license would be BNFL's responsibility. See, e.g., Rodgers Testimony, at 88; Wall Testimony, at 727.

9. After much discussion, lawyers for BNFL agreed that CBS's proposed compromise would get BNFL where it "needed to go, which was to have the benefit of such parts of Waltz Mill as were involved in the service business, and have the legacy [contamination] taken care of by the predecessor." Rodgers Testimony, at 54-55. The lawyers then began hammering out language to insert into the APA. See, e.g., Jt. Ex. 13 at WM 001 0001712 (CBS's initial proposal contained in Rider 10 to the draft APA); Jt. Ex. 14, at SM 005 0002222-23 (changes made by counsel to BNFL).

10. In the end, lawyers for CBS and BNFL agreed upon language that became the penultimate paragraph of Section 8.1(a) of the APA, which was executed by the parties on June 25, 1998. That paragraph states, in relevant part:

Notwithstanding any other limitation in this Section 8.1, with respect to the Waltz Mill Service Center, CBS shall, at its sole cost and expense, implement all remedial measures, including removal and decontamination activities, as may be required by and are in accordance with approvals received or to be received from the NRC (the "Plans") (x) in those areas of the Waltz Mill Service Center identified in the Plans as "Retired Facilities" and (y) which are associated with the termination of the TR-2 NRC License, which Plans are incorporated herein by reference. CBS shall have the responsibility and sole and exclusive authority to negotiate with and respond to the NRC . . . with respect to any issues which may arise during implementation of the Plans . . . CBS shall continue to be ongoing with respect to responsibility and liability for implementing the Plans and shall so advise the NRC. Purchaser shall have the right, at its sole cost and expense, to review and provide CBS with written comments in a reasonable time prior to transmission of plans, reports and submissions to the NRC . . . and CBS shall review and in good faith consider any of Purchaser's comments on such plans, reports and submissions. Any dispute between CBS and Purchaser with respect to such plans, reports and submissions shall be addressed in the manner set forth in Section 8.8 of this Agreement (Arbitration of Certain Environmental Liabilities). Notwithstanding any leasehold interest, Purchaser shall afford CBS, its agents, employees, contractors, subcontractors and other representatives reasonable access to the Waltz Mill Service Center from and after the Closing, until such time as the Plans have been completed and NRC has approved completion of the Plans. . . .

Jt. Ex. 17, at 110-11.

11. The APA states that CBS is obligated to complete the remediation in accordance with approvals "received or to be received from the NRC" because, when the APA was negotiated and signed in June 1998, the NRC had not yet approved either the TR-2 Plan or the SNM-770 Plan. See, e.g., Rodgers Testimony, at 98; Testimony of Lisa Campagna, June 15, 2004, at 173; Sweeney Testimony, at 558-59; Wall Testimony, at 734. At that point, CBS had submitted the Plans to the NRC for approval, had hired a remediation contractor and begun doing some preliminary work under specific NRC approvals, and was communicating with the NRC about the ultimate criteria to be used in the remediation. Nardi Testimony, at 253-57.

12. The lawyers who negotiated the APA for CBS and BNFL had no detailed understanding of these Plans or the ongoing discussions that were occurring between NRC staff and the CBS employees at Waltz Mill. See, e.g., Rodgers Testimony, at 54; Sweeney Testimony, at 511-12, 544. But they did understand and agree that the ultimate remediation standard that CBS would be obligated to meet under the APA would be the standard required by the NRC in the process of approving the Plans. As Mike Sweeney, a lawyer for CBS testified, the "deal was that we were going to do what was required under the Plans, as approved by the NRC. . . . [W]e understood that that was a living, breathing document. To the extent that the NRC required us to do additional things, that was a risk we were taking." Sweeney Testimony, at 558-59. Peter Rodgers, a lawyer for BNFL, similarly testified that "to the extent that the NRC said this plan is good as far as it goes, but there are three more things that [CBS] ought to do," then CBS would have to do those additional things. Rodgers Testimony, at 122. On the other hand, Mr. Rodgers also

recognized that the NRC might not "approve a plan that did what our client wanted to come out of this." Id., at 123. But the bargain was that BNFL "had to take" what the NRC ordered, "so if the NRC said dirty is fine, [BNFL] would have unfortunately had to live with it." Id.

C. Transfer of the SNM-770 License and Financial Assurances to the NRC After Closing (Issue 5)

13. After execution of the APA, CBS filed an application with the NRC to transfer the SNM-770 license to Westinghouse. Included in that application was a letter from CBS (which had been the subject of extensive negotiation with BNFL) explaining that under the APA, CBS has agreed to "retain certain, but not total, responsibility for decontaminating certain facilities at the Waltz Mill Service Center." Jt. Ex. 24, Letter from Louis J. Briskman to NRC (Sept. 28, 1998), at 2. Specifically, the letter explained that CBS agreed to remediate the retired facilities at Waltz Mill "as may be required by and are in accordance with approvals it is currently seeking" under the SNM-770 Remediation Plan submitted to the NRC. Id. Until the remediation activities "under the Plans are completed with respect to the Retired Facilities and the NRC approves completion of the Plans," the letter continued, "CBS will be financially responsible for such remediation and will provide the decommissioning financial assurances" required by NRC regulations. Id. The letter therefore requested that the NRC (1) rely on CBS to complete the remediation of the retired facilities, and (2) acknowledge that "CBS will have primary responsibility and authority to negotiate with and respond to the NRC"

about the "completion of remediation activities" and "any issues that may arise in connection therewith." *Id.* at 4.

14. On March 10, 1999, the NRC authorized the transfer of the SNM-770 license from CBS to Westinghouse, but with some modifications from the CBS proposal. *Jt. Ex. 113.* Although the NRC recognized that "CBS has a contractual agreement with the buyers to retain financial responsibility for decommissioning and/or decontaminating certain facilities associated" with the SNM-770 license, it stated that it will hold Westinghouse, as the new licensee, "responsible for all requirements and conditions" of its license, "including financial responsibility for decommissioning." *Id.* The NRC agreed, however, to "notify CBS, as well as the licensee, on matters related to decommissioning and/or decontamination" under the SNM-770 license. *Id.*

15. On March 30, 1999, CBS and Westinghouse filed letters of credit and standby trusts agreements with the NRC to provide financial assurance for the inactive and active facilities covered by the SNM-770 license. *Jt. Ex. 114.* Viacom posted a \$10,401,000 letter of credit for the inactive facilities that were the subject of the SNM-770 Remediation Plan, while Westinghouse provided a \$13,650,000 letter of credit for the active facilities.⁴ *Jt. Ex. 120.*

16. Viacom's letter of credit to the NRC is not collateral for its obligation to Westinghouse to complete the remediation work required under the APA. Nothing in the

⁴ The NRC also continues to hold the \$13,948,000 letter of credit that CBS posted in 1996 for the decommissioning of the TR-2 facilities pursuant to the TR-2 license that CBS (now Viacom) continues to hold. *Jt. Ex. 120.* In 2003, Westinghouse increased its letter of credit for the active facilities governed by the SNM-770 license to \$20,093,000 to cover new buildings it constructed at Waltz Mill. *Jt. Ex. 120.*

Standby Trust Agreement or NRC regulations would authorize Westinghouse to draw on the letter of credit that Viacom gave to the NRC. Compagna Testimony, at 189-91.

17. The NRC will only draw on a letter of credit if the licensee is unable or unwilling to complete its obligations under the license. In the very few instances where NRC has done this, the licensee was already in bankruptcy or having significant financial difficulties. Direct Testimony of James Lieberman, at 16-20.

D. NRC Approval of "the Plans" (Issue 3)

18. As the parties anticipated, the NRC did not approve the SNM-770 Remediation Plan in exactly the form proposed by CBS.³ In a letter dated June 10, 1998, the NRC stated that the Plan's proposal to remediate the retired facilities so that they "no longer requir[e] radiation protection controls for high radiation areas or airborne radioactive materials areas" was not sufficient to show that "a reasonable effort has been made to reduce residual contamination to as low as reasonably achievable levels." *Jt. Ex. 67, Letter from Marie Miller to Joseph Nardi (June 10, 1998)*, at 1. The NRC concluded, however, that the remediation of the retired facilities could be performed safely under the existing SNM-770 license if CBS were to "provide specific criteria for these retired areas based upon proposed future use of areas." *Id.*

19. In an Attachment to a letter dated June 18, 1998, CBS responded by proposing the follow criteria:

³ The NRC did approve the TR-2 Plan on September 30, 1998, after receiving supplemental information from CBS in March and July 1998. See *Jt. Ex. 41, NRC Director's Decision*, at 7. The Plan was revised in January 2000 to add a third option for removal of the reactor vessel. *Id.*

a) Criteria Applicable to Inactive Restricted Areas Which May Be Used For Future Licensed Activities Within Buildings That Are Used for Other Principal Licensed Activities

Surfaces or equipment within buildings that are being remediated from inactive (retired) areas to restricted areas which may be used for future use under the license will be decontaminated to levels which do not exceed four times the unrestricted release criteria for total contamination (fixed plus removable) specified in Section 10.6.1(f) of the license application. The criteria for removable contamination will be consistent with the limits specified in Section 10.6.1(f) of the license application.

A reasonable effort shall be made to remove inactive (no potential for future use) contaminated pipes, drain lines, or ductwork within these areas. If complete removal is impractical or a future licensed use is feasible, the interior surfaces will be cleaned to the extent reasonably achievable. The final criteria will be established on a case by case basis, justified using an ALARA approach, and approved by the Radiation Safety Officer and, in certain cases, the Radiation Safety Committee. . . .

These areas will continue to be maintained as restricted areas under the license until released for unrestricted use in accordance with the criteria specified in b) below.

b) Criteria Applicable to Inactive Areas Which Will Not Be Used for Future Licensed Activities

Areas within buildings and separate buildings that are being converted over from inactive (retired) areas to unrestricted areas within the controlled area of the Walt Mill Site will be decontaminated to levels which do not exceed the unrestricted release criteria specified in Section 10.6.1(f) of the license application. . . .

Jt. Ex. 74, Attachment to Letter from Joseph Nardi to Marie Miller (June 19, 1998), at 1.

20. This June 19, 1998 letter and Attachment were drafted by Joe Nardi, CBS's license administrator, with assistance from Wayne Vogel, who was CBS's Radiation Safety Officer at Waltz Mill. Although the letter was sent while CBS and Westinghouse

lawyers were negotiating over the terms of the APA, its contents were not discussed with Westinghouse before it was sent to the NRC. Nardi Testimony, at 260-61.

21. In drafting the June 19, 1998 letter and Attachment on behalf of CBS, Mr. Nardi sought to come up with a straightforward approach that would be accepted without another round of questions from the NRC. Nardi Testimony, at 264. CBS needed NRC approval of the remediation criteria before the end of August, when its contractor would be finished with the preliminary work and would be ready to begin the remediation work at the site. If CBS did not have NRC approval by then, it would have to demobilize the remediation project at "considerable expense." *Id.* at 261-62; see also Testimony of Wayne Vogel, at 415.

22. The SNM-770 license provides specific levels of removable contamination that are permitted on surfaces and equipment in the operational areas of the Waltz Mill site. *Jt. Ex. 61*, at 10-14, 10-15. But for fixed contamination (which is radioactivity that remains on a surface after repeated decontamination attempts have failed to remove it) the SNM-770 license contains an "ALARA" standard, under which fixed contamination is to be "as low as reasonably achievable." *Id.* at 10-16; see also Nardi Testimony, at 266.

23. Although NRC had indicated that the remediation work could be done under the SNM-770 license, Mr. Nardi did not believe that the NRC would accept a generic "ALARA" standard as the standard for remediation of the retired facilities, because the NRC's June 10, 1998 letter had asked CBS to provide "specific criteria." Nardi Testimony, at 269. Thus, Mr. Nardi and Mr. Vogel looked at the characterization reports for the surfaces in the active facilities, which revealed radiation levels on surfaces, after

routine decontamination, that were typically less than "4x", or four times the amount of radiation specified in NRC Regulatory Guide 1.86.⁶ Nardi Testimony, at 271-74.

Moreover, CBS had been able to achieve those radiation levels, "relatively simply. One pass of the scabbling or something else" would generally clean a contaminated surface in the operating facilities to less than 4x *Id.* at 305.

24. Therefore, Mr. Nardi and Mr. Vogel chose the 4x criteria for surfaces in retired facilities that may be used for future licensed activities because, in their view, the 4x criteria could be achieved by CBS without difficulty and would be acceptable to the NRC as consistent with operations under the SNM-770 license. Nardi Testimony, at 305; Vogel Testimony, at 436-37.

25. In contrast, Mr. Nardi and Mr. Vogel were concerned that they would face more difficulty when trying to decontaminate pipes, drain lines and duct work, because these areas were not easily accessible to decontaminate and might be embedded in concrete and thus be difficult to remove. Nardi Testimony, at 307-08; Vogel Testimony, at 413. Therefore, Mr. Nardi and Mr. Vogel believed that separate criteria were necessary to give CBS "some added flexibility" to deal with the pipes, drain lines and duct work. Nardi Testimony, at 307-08. Consequently, they drafted the second paragraph of the (a) criteria of the Attachment to the June 19, 1998 letter to deal with these so-called "penetrations." In particular, they represented that a reasonable attempt would be made to remove inactive, contaminated pipes, drain lines or ductwork, but if

⁶ NRC Regulatory Guide 1.86 contains specific, numerical contamination limits for facilities and equipment that are to be released for unrestricted use, which occurs upon the termination of a NRC license. These contamination limits are incorporated into the SNM-770 license as well. *Jt. Ex. 61*, at 10-15; see also Nardi Testimony, at 294-96.

complete removal is "impractical," the interior surfaces will be cleaned "to the extent reasonably achievable" using an ALARA approach. Ex. 74, Attachment, at 1.

26. In a letter dated August 21, 1998, the NRC responded that the Attachment to CBS's June 19, 1998 letter "provides acceptable criteria for residual contamination, based upon your proposed future uses for the areas." Jt. Ex. 78, Letter from Mark C. Roberts to Joseph Nardi. The NRC letter further explained that these decontamination activities "can be safely performed under the present terms and conditions of your license." *Id.* Although the NRC letter did not approve the SNM-770 Remediation Plan or amend the SNM-770 license, the letter did permit the remediation of the retired facilities to proceed under the license in accordance with the criteria specified in the Attachment to the June 19, 1998 letter. *Id.*

D. The Dispute Over the Remediation at Waltz Mill

27. The dispute involved in this arbitration arose after CBS began the remediation, when it became apparent that many surfaces in the retired areas could not be cleaned to the 4x standard simply by scabbling the surface once or twice, as Mr. Nardi and Mr. Vogel had anticipated. As early as November 1998, Broadus Bowman, the CBS employee responsible for overseeing the remediation of the retired facilities at Waltz Mill, advised Richard Smith, the manager of environmental mediation at CBS, that in some areas it "is requiring/will require additional removal efforts to get under this 4x criteria." Jt. Ex. 89. By late 2000 or early 2001, it became clear to Viacom (which had subsequently purchased CBS) and to Westinghouse (which was acting as Viacom's agent to oversee the remediation work done by several contractors) that there were also

"practical, technical limitations" to meeting 4x in some areas of the retired facilities.

Testimony of Richard Smith, at 1067.

28. At that time, however, Viacom did not go to the NRC, explain the difficulties it was encountering in the remediation, and seek relief from the 4x standard. Viacom claims that it did not do so because it could not reach agreement with Westinghouse about approaching the NRC jointly, and it was uncertain of its authority to go to the NRC unilaterally. Smith Testimony, at 1069-70.

29. Instead, Viacom took the position that the 4x criteria for surfaces of retired facilities that have a potential future licensed use contained in paragraph (a) of the Attachment to the June 19, 1998 letter was simply a goal, and that higher levels of radiation are permitted if an ALARA analysis demonstrates that these higher levels are as low as reasonably achievable. See, e.g., Smith Testimony, at 1109-11; Bowman Testimony, at 968. Westinghouse disagreed, arguing that Viacom needed to do additional work to decontaminate all surfaces in retired facilities with a potential for future licensed use to 4x. Smith Testimony, at 1110-11.

30. Westinghouse also asserted that it would not use these retired facilities for future licensed activities, and, therefore, Viacom had to remediate them to the "1x," or free release, criteria mentioned in paragraph (b) of the Attachment to the June 19, 1998 letter. Smith Testimony, at 1104. In some instances, where there was not a large incremental cost difference between remediating the surface to 4x and to 1x, Viacom instructed the remediation contractor to do the additional work to remediate the surface to 1x. Id.; see also Jt. Ex. 34, Letter from Marlene Jackson to William Wall (Feb. 20, 2001), at 2. But for the remaining areas, Viacom took the position that its commitment

under the APA and the Plans had always been to conduct a partial remediation to bring the facilities to the point where they could be used for future licensed activities, and it was never contemplated that the facilities would be remediated to free release. See Jt. Ex. 35, Letter from William Wall to Marlene Jackson (March 14, 2001) at 2.

31. Unable to come to an accommodation with Westinghouse, Viacom decided to demobilize the remediation team and halt remediation activities in or around late 2001. Smith Testimony, at 1112-13. The NRC Inspection Report, dated April 22, 2004, characterizes this decision as one in which Viacom "suspended" remediation activities. Jt. Ex. 50, NRC Inspection Report, at 5. Significantly, both the NRC and the Parties agree that the "as left" conditions of the test reactor facilities and the retired facilities at Waltz Mill "do not present a threat to the public health and safety or common defense and security." Jt. Ex. 41, NRC Director's Decision, at 12; see also id., at 14.

32. In November 2002, Westinghouse commenced this arbitration proceeding to resolve the parties' dispute about whether Viacom has satisfied its remediation obligations under Section 8.1(a) of the APA.

33. Since that time, Viacom has filed several submissions with the NRC that are pertinent to this dispute:

(1) On October 29, 2002, Viacom petitioned the NRC to terminate the TR-2 license and declare that Viacom's obligations under the TR-2 Decommissioning Plan have been satisfied.⁷ Jt. Ex. 41, NRC Director's Decision, at 2. That petition is currently pending before the NRC. Id. at 18.

⁷ Subsequently, the NRC asked Viacom for additional information about the status of the TR-2 facilities and Viacom responded "with a detailed report on the as left conditions of the TR-2 facilities." Smith Testimony, at 1076. In addition, Westinghouse submitted papers arguing that Viacom has not completed its obligations under the TR-2 Plan,

(2) On March 8, 2004, Viacom submitted reports describing the as-left conditions of the process drain line and the retired facilities covered by the SNM-770 Remediation Plan. Jt. Ex. 48. On April 22, 2004, the NRC responded by saying that these documents were being maintained because they may be useful in a future licensing action or for inspection of Westinghouse's operations under the SNM-770 license.⁸ Jt.

Ex. 49.

III. CONCLUSIONS

34. Although it clearly viewed the August 21, 1998 letter from the NRC as an approval to begin remediation work in accordance with the criteria in the Attachment to the June 18, 1998 letter, Viacom spent much time at the hearing arguing that the criteria in the Attachment to the June 19, 1998 letter were only an "unenforceable commitment" to the NRC, not a binding "NRC requirement," until Westinghouse unilaterally incorporated them into the SNM-770 license by filing them with the license renewal application in 2000. See Viacom's Post-Hearing Memoranda at 4. We are not persuaded that this is true, and, in any event, it is beside the point. The NRC views the criteria in the Attachment to the June 19, 1998 letter as having revised the criteria in the original

because Viacom removed only a portion of the biological shield, while Westinghouse believes that the Plan requires removal of the entire biological shield. Id. Viacom believes that the NRC now has the information it needs to decide the pending petition to terminate the TR-2 license and determine whether Viacom has satisfied its obligations under the TR-2 Decommissioning Plan. Id.

⁸ The NRC also said that additional documents that Viacom submitted concerning the groundwater monitoring program (which is not at issue in this arbitration proceeding) were "interpreted as a request for an amendment for NRC License No. SNM-770." Jt. Ex. 49. But because Westinghouse now holds the SNM-770 license, the NRC said that it would not treat documents submitted by Viacom (a third party) as a request to amend Westinghouse's license. Therefore, the NRC said that it was retaining the information for use in later licensing actions or inspections of Westinghouse's activities under the SNM-770 license. Id.

SNM-770 Remediation Plan, and it views its August 21, 1998 letter approving those criteria as an approval of this revised section of the Plan, which permitted the remediation to begin. See Jt. Ex. 41, NRC Director's Decision, at 6. The NRC also states that it approved the remainder of the Remediation Plan, as revised, in Amendment #21 to the SNM-770 license on January 19, 2000. *Id.* at 6-7. Thus, it appears to us that the SNM-770 Remediation Plan, as revised through various documents including CBS's June 19, 1998 letter to the NRC, became part of the license in Amendment #21 in January 2000, and was thereby approved by the NRC.⁹

35. But even if the June 19, 1998 letter were not incorporated into the license until later, it is clear that the NRC's approval, on August 21, 1998, of the remediation criteria contained in the Attachment to the June 19, 1998 letter was an "approval" within the meaning of Section 8.1(a) of the APA. Thus, under the APA, CBS/Viacom is (and since August 21, 1998 has been) obligated to complete the remediation of the retired facilities in accordance with these criteria, unless and until the criteria are modified by the NRC or the NRC grants some form of relief from them.

36. As explained above, Westinghouse and Viacom have different interpretations of the criteria listed in section (a) of the Attachment to the June 19, 1998 letter. Westinghouse maintains that Viacom is obligated to decontaminate to 4x all surfaces in retired facilities that may be used for future licensed activities, while Viacom maintains that 4x was simply a goal, and that an ALARA analysis can be used to justify higher levels of surface contamination.

⁹ Prior to that time, the criteria would have been a "written commitment" that the NRC would have expected its licensee to honor. Testimony of James Lieberman, June 16, 2004, at 454-55. If a licensee fails to fulfill a commitment, the NRC may issue an order to make the commitment an enforceable requirement. *Id.* at 455.

37. We believe that Westinghouse's interpretation is correct. The plain language of the first paragraph of the (a) criteria in the Attachment states only that surfaces in retired areas that may be used for future licensed activities "will be decontaminated to levels, which do not exceed [4x]." Jt. Ex. 74, Attachment, at 1. The paragraph does not even mention ALARA, much less expressly state that an ALARA analysis will be used in those situations where it proves to be difficult to achieve the 4x criteria.

38. That is in marked contrast to the next paragraph, which describes procedures for dealing with contaminated pipes, drain lines, or ductwork within areas that may be used for future licensed activities. This second paragraph specifically states that the "final criteria" for pipes, drain lines, or ductwork "will be established on a case by case basis, justified using an ALARA approach . . ." Jt. Ex. 74, Attachment, at 1.

39. The specific reference to an ALARA standard in the paragraph dealing with the remediation of pipes, drain lines and ductwork, combined with the absence of any mention of ALARA in the preceding paragraph dealing with surfaces, evidences a clear intent that the ALARA approach is applicable only to pipes, drain lines and ductwork, and not to surfaces within retired areas that may be used for future licensed activities.

40. This interpretation is, moreover, the one that the NRC appears to have adopted. In discussing the remediation criteria applicable to the retired facilities at Waltz Mill, the NRC's most recent Inspection Report states that NRC accepted CBS's "proposed specific, quantified criteria for remediation," which, for "areas where future licensed activities may be conducted," is 4x. Jt. Ex. 50, NRC Inspection Report (April 22, 2004), at 4.

41. Viacom's counter argument -- that Richard Smith, the CBS employee who authorized the submission of the June 18, 1998 letter and Attachment to the NRC, did so on the understanding that the 4x criteria was simply a goal and ALARA could be used to justify higher levels of surface contamination (Smith Testimony, at 1048, 1066) -- is beside the point and in addition appears to be inconsistent with the NRC's use of the ALARA concept. The plain language of the Attachment is different from Mr. Smith's understanding, and it is the plain language, which NRC approved, that is controlling. See, e.g., Klein's Moving & Storage, Inc. v. Westport Ins. Corp., 766 N.Y.S.2d 495, 196 Misc. 2d 735 (2003) (contract should be interpreted according to its plain language). Moreover, Jim Lieberman, the former Director of Enforcement for the NRC, explained that ALARA is used to determine whether it is feasible to reduce the level of radioactivity below that specified in a NRC-approved plan. Lieberman Direct at 5. It is not used "to allow a regulated party, without prior NRC review, to be able to increase dose levels or relax cleanup criteria from previously approved levels based on the party's notion of what might be ALARA."¹⁰ Id. at 9.

42. Viacom and Westinghouse agree that many surfaces in the retired facilities have not been remediated to 4x, although Viacom claims to have spent about \$93 million on the remediation project. Smith Testimony, at 1122-23. That is confirmed by the NRC Inspection Report. Although the NRC inspector recognized that "scabbling efforts removed substantial amounts of contamination in the top layers of concrete," he

¹⁰ Viacom's expert likewise testified that although there are circumstances under which the NRC may allow a licensee to use an ALARA analysis to exceed the contamination levels specified in a license or NRC regulation, "there has to be communication up front on any issue in a license," and a licensee is not free to decide, for itself, how to interpret the license. Testimony of Dr. Michael T. Ryan, June 17, 2004, at 594.

nevertheless concluded that the "as left" conditions for many of the areas do not meet the 4x criteria. Jt. Ex. 50, at 6, 9.

43. At this point, Westinghouse requests this Panel to declare that Viacom has breached its remediation obligations in Section 8.1(a) the APA and to hold a hearing to determine the damages that Westinghouse is due. Westinghouse alleges that it is entitled to a monetary award equal to the amount of money that Westinghouse would have to spend if it were to remediate all of the retired facilities to 4x or to 1x in the case of those facilities for which Westinghouse now claims to have no future licensed use.

44. We do not address the question whether Viacom breached its remediation obligations at this time, because a finding as to whether or not a breach has occurred would not affect the conclusions set forth in this Initial Arbitration Opinion and Order.

45. At this point in the proceedings, however, we find that Viacom has not remediated all of the retired facilities to 4x, as required by the NRC approved criteria in the Attachment to the June 18, 1998 letter. We also note that we do not condone Viacom's evident decision to take matters into its own hands by unilaterally determining that it did not have to decontaminate the surfaces to 4x but could stop when it believed the surfaces were decontaminated to an ALARA standard that, as discussed above (*supra* at ¶¶ 37-39), was not contained in the criteria that Viacom (then CBS) had proposed and the NRC had approved. As the experts from both parties testified at the hearing, a regulated party cannot resolve for itself, without NRC approval, such questions concerning compliance with NRC requirements. See *supra* at ¶ 41 & n. 10.

46. At this point in the proceeding, however, we are not prepared to hold that Viacom must pay Westinghouse the sum of money necessary to remediate all surfaces in

the retired facilities at Waltz Mill to 4x, or to 1x in the case of those facilities for which Westinghouse now claims to have no future licensed use. As an initial matter, we are not persuaded that Viacom is obligated under the APA to remediate the retired facilities to 1x (the free release criteria) instead of to 4x. As explained above (supra at ¶ 8), during negotiations over the APA, CBS repeatedly told Westinghouse that the SNM-770 Remediation Plan pending before the NRC was not a decommissioning plan, but rather was a plan to remediate the retired facilities to a level where they could be used for future licensed activities. CBS made these same representations to the NRC in early 1999, after the APA was signed and the NRC had approved the remediation criteria in the Attachment to the June 19, 1998 letter. See Jt. Ex. 20, Letter from A. Joseph Nardi to Mark C. Roberts (Aug. 12, 1998), Attachment at WEC 016533-34; Jt. Ex. 29, at 299, 302 (comments of Joseph Nardi at NRC Public Workshop). Moreover, after the sale closed and Westinghouse took control of the Waltz Mill site in March 1999, Westinghouse initially told the NRC that its plan for the retired facilities was to "reduce radiation and contamination levels for continued licensed use." Jt. Ex. 80, at WEC 015705. If Westinghouse now wants to change its mind and declare that some of these facilities have no future licensed use, it may do so, but under the APA, Viacom is not responsible for remediating these facilities to 1x.

47. Nor are we inclined to hold a hearing at this time to determine the cost of remediating all of the surfaces in the retired facilities to 4x, because it appears that additional NRC approvals would be needed to conduct such further remediation, and we do not know what those approvals would permit or require. The testimony presented at the hearing reveals that some surfaces in the retired facilities cannot be decontaminated to

4x using methods permitted by the SNM-770 license, and, therefore, the remediation cannot be completed in the manner proposed by CBS and approved by the NRC.

48. When CBS proposed the 4x criteria to the NRC, all of the professionals involved with the remediation project believed that it was possible to remediate the surfaces in the retired facilities to 4x using the techniques that CBS planned to use in the remediation project. See Nardi Testimony, at 305; Vogel Testimony, at 436-37; Smith Testimony, at 1192. Moreover, the NRC, in its August 21, 1998 approval of these criteria, stated that the remediation was to be done pursuant to the license. Jt. Ex. 78.

49. As the remediation progressed, however, it became apparent that the contamination was much deeper in the concrete in some areas than the initial characterization studies had shown. See Nardi Testimony, at 305-06; Smith Testimony, at 1196-97. Based on this new information, Westinghouse's remediation experts now recommend that the best way to achieve the 4x criteria in some buildings would be to demolish the buildings.¹¹ Nardi Testimony, at 393. But Westinghouse concedes that this cannot be done under the existing SNM-770 license. Id. Viacom likewise contends that for at least some of the retired facilities, there are structural and other technical reasons why it is not practical to achieve 4x. Smith Testimony, at 1202-03.

50. Thus, at this point, we are not prepared to hold that Viacom must pay Westinghouse the cost of remediating all surfaces in the retired facilities to 4x. As Viacom points out in its post-hearing memoranda, this could result in a situation in which

¹¹ These expert reports were not presented to the Panel during the hearing, but the witnesses did refer to the reports in general terms. And Counsel stated that "Westinghouse's position is that the most efficient and economic approach to the 4x criteria would involve some demolition that might require an amendment to the Plans, one or both of the Plans, with respect to methodology." Tr. at 1100.

Viacom pays Westinghouse to complete a remediation project that the NRC does not require, or even permit, to be completed.

51. But we are likewise not prepared to hold that Viacom has already done enough remediation, when the NRC could disagree and order Westinghouse, as the licensee, to perform additional work to remediate these facilities to 4x; a specified level closer to 4x than they currently are; or possibly, in certain cases, a level justified by an ALARA analysis if the NRC were to determine that such an ALARA approach were proper.

52. Instead, we believe that in order to proceed with this arbitration and enable this Panel to fashion an appropriate remedy for the Parties' commercial dispute, it is necessary to obtain guidance from the NRC about the scope of the NRC's regulatory requirements – the extent of remediation that is required at this intermediate phase of the SNM-770 license, when the Waltz Mill site continues to be used for licensed activities – and whether that required remediation has been fully performed. The critical point for us is that the NRC has the regulatory responsibility and authority to decide the extent to which the retired facilities should be remediated at this time, and what, if any, additional remediation may be deferred until final decommissioning.

53. The NRC Director's Decision, Jt. Ex. 41, clearly indicates that we should look to the NRC for such guidance before proceeding further. As the Director's Decision notes, Westinghouse and Viacom have chosen arbitration as the dispute resolution process to "resolve the parties' dispute as to their respective responsibilities for completing decommissioning of the WTR in accordance with the approved decommissioning plans." Jt. Ex. 41, at 12. Hence, the Director's Decision concludes,

"NRC has assurance that its requirements will be met and that the required transfer will take place in due course. NRC retains the final responsibility and authority over the WTR and the Waltz Mill Service Center because it will approve the licensing actions that follow the implementation of the decisions of the arbitration panel." *Id.* It is thus for the NRC to define the substance of the NRC's requirements and determine whether they have been met, while it is the responsibility of this Panel to assign economic responsibility to the Parties for performing according to the substantive requirements spelled out by the NRC.

54. The Staff Response to Comments on Proposed Director's Decision on Viacom 2.206 Petition Concerning the Waltz Mill Service Center, Madison, Pa., Jt. Ex. 42, makes the same point. In the words of the Staff Response, "NRC staff cannot and has not delegated its duties to the arbitration panel, as the NRC retains the responsibility and authority to approve the licensing actions and ensure that its regulatory requirements continue to be met." Jt. Ex. 42, at 12.

55. Moreover, we find that the parties, in entering into the APA, agreed that they would divide their respective liabilities along the lines drawn by the NRC, with CBS/Viacom being responsible for the partial remediation of facilities to a standard determined by the NRC to be consistent with their future licensed use, and BNFL/Westinghouse being responsible for the final decommissioning upon termination of the SNM-770 license. As explained above, both BNFL and CBS recognized that NRC might draw the line at a level of remediation more exacting and costly, or less, than they desired, but, as Mr. Rodgers testified for BNFL, they ultimately "agreed to accept the level of remediation that the NRC approved." Rodgers Testimony, at 153.

56. Our decision to request rulings from the NRC is not made lightly, because we recognize that the parties agreed, in Section 8.8 of the APA, to arbitrate "[a]ny dispute as to the scope of the work or the type of Remedial Action . . . or the matters concerning the Waltz Mill Service Center described in [Section 8.1(a) of the APA]." Jt. Ex. 17, at 117. As Westinghouse notes, this arbitration clause plainly covers disputes about the scope of a remedial action to be taken by a party pursuant to its obligation under the APA. We would not hesitate to assign responsibility for a scope of work or remedial action required by the NRC. However, the difficulty that confronts us is that unexpected data produced during the remediation process has made it clear that at least some of the surfaces cannot be remediated to the standard approved by the NRC (that is, to 4x using techniques permitted under the license), and we are not confident that our resolution of the parties' disputes about the ALARA analyses that Viacom prepared to justify the as-left condition of both surfaces and penetrations in the retired facilities, without further guidance from the NRC, would properly enforce the rights and obligations that the Parties bargained for in the APA.

57. As Westinghouse's counsel noted at the hearing, "the structures [at Waltz Mill] are still contaminated, and so far as the NRC is concerned, the contamination remaining in those structures covered by the SNM-770 license is the responsibility of the NRC licensee, Westinghouse." Tr. at 1257. Thus, even if this Panel were to hold that an ALARA analysis for a particular penetration were adequate, or that an ALARA approach justified no further remediation work for surfaces at this time, that would not insulate Westinghouse from potential liability to the NRC. But it was precisely because Westinghouse did not want the NRC to look to Westinghouse to remediate what

Westinghouse viewed as the "legacy contamination" at Waltz Mill that CBS/Viacom agreed, in Section 8.1(a) of the APA, "to continue to be obligor with respect to responsibility and liability for implementing the Plans" and to "so advise the NRC." Jt. Ex. 17, at 110.

58. In addition, Viacom continues to provide the NRC with financial assurance for completion of the remediation of the retired facilities under the SNM-770 license, and only the NRC has authority to release (or draw on) that financial assurance. See supra at ¶¶ 15-16. A holding by this Panel that Viacom has completed its remediation obligations under the SNM-770 Plan (or would complete its obligations upon payment of a specified damage award to compensate Westinghouse for work the Panel finds Viacom has erroneously failed to do) would not be binding on the NRC, and thus the NRC could refuse to release Viacom from its financial assurance until additional work is done.

59. In agreeing that CBS/Viacom would be the obligor and would provide financial assurance to the NRC for the completion of the remediation of the retired facilities under the SNM-770 Plan, the parties to the APA necessarily understood that the NRC would determine when CBS/Viacom had completed the required remediation work required by the Plans. That is confirmed by the sentence in Section 8.1(a) requiring Westinghouse to afford CBS/Viacom access to the Waltz Mill site "until such time as the Plans have been completed and NRC has approved completion of the Plans." Jt. Ex. 17, at 111.

60. In light of the nature of the dispute over the remediation criteria and the fact that the parties recognized that the NRC, in its regulatory capacity, will have to approve completion of the Plans, we believe it appropriate to seek guidance from the NRC before

we issue any final relief in this arbitration proceeding. In this regard, we note that Section 8.1(a) of the APA gave CBS/Viacom "the responsibility and sole and exclusive authority to negotiate with and respond to the NRC . . . with respect to any issues which may arise during implementation of the Plans," Jt. Ex. 17, at 110. Westinghouse has the right to "review and provide CBS with written comments in a reasonable time prior to transmission of plans, reports and submissions to the NRC," while CBS/Viacom has to "review and in good faith consider" Westinghouse's comments. *Id.* But we also note that the NRC has indicated that it will accept requests for license amendments only from its licensee, Westinghouse. *See supra* at n.8.

61. Therefore, to avoid any confusion, disagreements, or procedural delay in seeking the necessary guidance from the NRC, we gave the Parties an opportunity to comment on the Order that we proposed to issue as part of this Initial Arbitration Opinion and Order.

62. Both Parties filed letters to the Panel, dated September 10, 2004, advising that neither Party requested any revision or change to the Panel's proposed Order.

IV. Order

For the foregoing reasons, we hereby Order that:

1. The parties shall forthwith *jointly* file with the NRC a copy of this Initial Arbitration Opinion and Order; and
2. The parties shall forthwith *jointly* request that the NRC answer the following questions:

- a. Whether the TR-2 Plan has been satisfactorily completed. If not, what further remediation remains to be done; and
- b. Whether the SNM-770 Plan has been satisfactorily completed. If not, what further remediation remains to be done.

3. In seeking answers by the NRC to the foregoing questions, the Parties shall present their respective arguments and evidence to the NRC in accordance with procedural rules in existence or to be established by the NRC which ensure that both Parties have an equal opportunity to be fully heard by the NRC.¹² Copies of such submissions shall be provided to the Panel.

4. The Panel recognizes that the answers by the NRC to the foregoing questions will be rendered by the NRC in the procedural form that the NRC deems appropriate. The Panel respectfully requests that the NRC answer the questions as soon as practical.

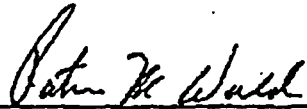
5. Upon the issuance of answers by the NRC to the foregoing questions, the Parties shall forthwith advise the Panel of those answers. At that time, the Panel shall consult with the Parties concerning the issues that may then require arbitration.¹³ The

¹² Some version of this procedure appears to have been followed in the inspection process (where the inspector noted that both Viacom and Westinghouse submitted documentation concerning the radiological status of the Waltz Mill site, Jt. Ex. 50, at 1) and in the proceedings on Viacom's petition to terminate the TR-2 license, which is now pending before the NRC (see *supra* at ¶ 33).

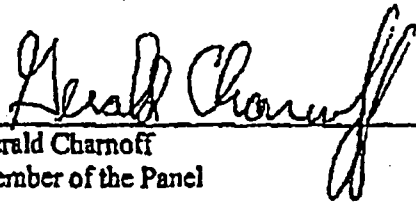
¹³ These issues may include further consideration of the respective financial responsibilities of the Parties in the event that the NRC determines that any of the retired facilities must be remediated to the "free release" criterion at this time, rather than at the time that the SNM-770 license is terminated.

Panel retains jurisdiction over this arbitration for the purposes of this Order and such possible further arbitration proceedings.

SO ORDERED this 14th day of September, 2004.



Patricia M. Wald
Chair of the Panel



Gerald Charnoff
Member of the Panel

Steven S. Honigman
Member of the Panel

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