GENERAL ELECTRIC

NUCLEAR ENERGY

BUSINESS GROUP

GENERAL ELECTRIC COMPANY, 175 CURTNER AVE., SAN JOSE, CALIFORNIA 95125

November 13, 1979

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

Attention: Samuel J. Chilk, Secretary

Re: Westinghouse Electric Corp. (Exports to the Philippines)
Docket No. 110-0495 Application Nos. XRO-120 and Application No. XCOM-0013

Dear Mr. Chilk:

Enclosed are the comments of General Electric Company concerning the scope of the Nuclear Regulatory Commission's foreign, health, safety and environmental jurisdiction and the procedures which the Commission should use to govern further proceedings concerning certain Westinghouse export license applications. The NRC requested comments on these issues in a notice published in the Federal Register on October 25, 1979 (44 F.R. 61475, 61476) in connection with the above-captioned proceeding.

Respectfully submitted,

T. R. Dankmeyer
Group Counsel

TRD:rk

Enclosure

1466 116

7912030 071

November 13, 1979

GENERAL ELECTRIC COMPANY
NUCLEAR ENERGY GROUP

COMMENTS RESPONDING TO NRC NOTICE REGARDING
EXPORT LICENSING CONSIDERATION OF EXTRATERRITORIAL IMPACTS

By notice published in the Federal Register on October 25, 1979 (44 F.R. 61475-76), NRC requested comments concerning the scope of the Commission's foreign health, safety and environmental jurisdiction and what procedures the Commission should adopt to govern further proceedings, if any, regarding pending Philippine export license applications (Docket No. 110-0495) and other proceedings of this type. While the General Electric Company has no specific interest in the subject proceeding, it does have an interest, as an exporter of nuclear facilities and materials, in the proper resolution of certain of the jurisdictional and procedural questions posed from the standpoint of their generic applicability. It is within this context that General Electric submits the comments set forth below.

As background for our views, we would urge the Commission to bear in mind certain paramount legal and public policy considerations.

- Extraterritorial application of domestic legislation should not be lightly presumed; for sound reasons, it has long been held to follow only from a clearly expressed intent of the Congress.*/

---

*/ Foley Brothers, Inc. v. Filardo, 336 U.S. 281 (1949); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Reyes v. Secretary of HEW, 476 F.2d 210 (D.C. Cir. 1973).

- This precept applies with special force where an extension abroad of U.S. law would intrude on the social policy and decisionmaking responsibilities of a foreign government for matters within its own territorial jurisdiction; intrusion there treads on sensitive areas of national sovereignty and raises serious foreign policy considerations.
- And, finally, an already burdened nuclear export process should not be further encumbered -- to the detriment of the country's non-proliferation goals -- by the addition of export criteria and attendant procedures not mandated by the Congress.

These factors argue persuasively for jurisdictional limitations on the Commission's role in this area and for the companion need for restraint in imposing added procedural burdens on the export licensing process.

A. Atomic Energy Act of 1954, as amended

The Congress has specified that, if all applicable statutory requirements have been met, NRC must issue a requested export license. AEA, as amended, § 126b(1). The new export licensing criteria in sections 127 and 128 of the AEA, added by the Nuclear Non-Proliferation Act of 1978 (NNPA), and the licensing requirement that an export be in accord with the applicable Agreement for Cooperation are clearly not relevant to the

questions posed here by the NRC notice. The AEA contains two other export licensing criteria, which we believe to be the focus of the issues stated in the Commission's notice. These are the "common defense and security" and "public health and safety" criteria, applicable by reason of section 103 of the AEA. Accordingly, unless foreign health, safety and environmental considerations of proposed exports fall within the scope of the common defense and security or public health and safety criteria, NRC is without jurisdictional authority under the AEA to examine those considerations.

NRC has consistently held that "the health and safety impact in foreign nations of exported nuclear facilities and materials is outside the jurisdiction of the Commission". Matter of Babcock and Wilcox, 5 NRC 1332, 1353 (1977); Matter of Westinghouse Electric Corp., 3 NRC 739, 754 (1976); Matter of Edlow International Co., 3 NRC 563, 582-583 (1976). While the cited decisions antedate the Nuclear Non-Proliferation Act of 1978 (NNPA), nothing in the provisions of the NNPA alters the scope of NRC jurisdiction in this respect or otherwise leads to a result contrary to that reached in the Commission's pre-NNPA decisions.

The presence of Americans abroad does not alter the jurisdictional constraints on NRC. Nor does it undermine the sound policy reasons supporting those constraints. NRC use of

the public health and safety criterion as a basis for authorization of a facility export because of the presence of American citizens abroad could play havoc with U.S. foreign and (in the case of U.S. military base populations overseas) defense policy. The exercise of NRC authority in this respect should not be used to force a country to choose between a U.S.-origin nuclear reactor and a U.S. base.

In its status of forces agreements with foreign countries in which American military personnel are stationed, the U.S., as a matter of course, subjects those personnel to the domestic civil jurisdiction of the host country. Nothing in those agreements reserves to the U.S. the right to impose its social (health and safety) standards upon the host country.

There is, moreover, no warrant for the Commission's undertaking an assessment of the health and safety or other environmental effects of a nuclear facility export under the guise of the "common defense and security" licensing criterion. In terms of practicability alone, NRC would have to engage in a high degree of speculation to determine in what manner or degree an exported facility might, in this respect, have an adverse effect upon U.S. common defense and security. The jurisdictional limitations are, in any event, well established. The national security criterion in the AEA, when applied to nuclear export licensing by NRC, is clearly designed to address only safeguards and related

non-proliferation concerns.*/ Agency licensing practice has consistently followed that course, with the knowledge and acquiescence of the Congress and the cognizant oversight committees. Nothing in the legislative history of the AEA or the NNPA even suggests that Congress intended NRC to speculate about what the impacts on U.S. military alliances and relations with other countries would be if there were an accident involving a U.S.-supplied nuclear facility. And, we submit, the clearest sort of Congressional expression would be called for to involve NRC as a decisionmaker on such matters, since to do so would impinge on a significant aspect of the defense and foreign policy functions of the Executive Branch.

Accordingly, there is no basis in the AEA, or in the NNPA, for NRC to undertake an examination of the possible health, safety or other environmental consequences in a foreign country of a nuclear facility to be exported for location there.

B. National Environmental Policy Act of 1969 (NEPA)

NEPA requires a detailed environmental review of all major federal actions "significantly affecting the quality of the human environment". In Edlow International Co., supra, the Commission said of NEPA, "[e]ven if it were assumed that international impacts must be considered ... impacts internal to

---

*/ See, for example, the eight questions relating to common defense and security posed by NRC to the Executive Branch in Matter of Babcock and Wilcox, 5 NRC 1332, 1351-52 (1977).

a foreign nation need not be". 3 NRC at 585. No court has ever found NEPA to have extraterritorial reach. See Babcock and Wilcox, supra, 5 NRC at 1341-43. Since Babcock and Wilcox was handed down in 1977, there has been no change in the case law, statutory law, or applicable regulations from which one could conclude that NEPA applies to possible environmental impacts on foreign soil.

In Babcock and Wilcox, supra, NRC held, in the words of Commissioner Gilinsky (concurring), that "NEPA does prescribe consideration of the non-U.S. impacts of nuclear export licensing decisions insofar as these may affect the global environment". Id., 5 NRC at 1355. However, a generic environmental impact statement prepared on the subject has concluded that the impacts of U.S. nuclear exports on the global commons are not significant. Final Environmental Impact Statement on U.S. Nuclear Power Export Activities, ERDA-1542 (April 1976). Therefore, in keeping with well accepted NEPA doctrine, there is no occasion for a case-by-case environmental review of nuclear facility exports as respects impacts on the global commons.

From a jurisdi[illegible]ional standpoint, we submit that the legal presumption against extraterritoriality absent a specific Congressional indication to the contrary is fully applicable here. The Congress has, in fact, scrupulously avoided any

inference that NEPA applies to nuclear export licensing.*/ In October 1978, Congress strongly demonstrated its intention that no agency commence environmental review of nuclear exports until Congress had an opportunity to review the actions of the Executive Branch to achieve multilateral cooperation to protect the environment. The 1978 Amendments to the Export-Import Bank Act include the following provision:

> "No environmental rule, regulation, or procedure shall become effective with regard to exports subject to the provisions of 22 U.S.C. 3201 et seq., the Nuclear Non-Proliferation Act of 1978, until such time as the President has reported to Congress on the progress achieved pursuant to Sec. 407 of the Act (42 U.S.C. 2153c) entitled "Protection of the Environment" which requires the President to seek to provide, in agreements required under the Act, for cooperation between the parties in protecting the environment from radioactive, chemical, or thermal contamination arising from peaceful nuclear activities.**/

The report called for by this provision has not as yet been submitted to the Congress, although its delivery is reportedly imminent. Other considerations aside (see below), until that report is delivered, it will be contrary to this specific statutory proscription for the Commission to institute any procedures

---

*/ See, e.g., the colloquy between Senators Glenn and McClure confirming the complete neutrality of the then-pending NNPA on NEPA's applicability. 124 Cong. Rec'd. S. 1453 (February 7, 1978).

**/ Sec. 1913, P.L. 95-630 (November 10, 1978).

regarding review of the environmental impacts of nuclear exports. And, even after the report is delivered, the clear import or the statutory language is that agencies should not rush to assert export review responsibilities in this area but should allow ample opportunity for bilateral or multilateral accommodation of environmental concerns.

The public policy reasons for this Congressional admonition were adverted to at the outset of these comments -- national governments view decisionmaking affecting their domestic environment as matters of exclusive sovereign responsibility which they have full competence to make within the framework of their own political structures and social values. Other governments can be expected to view with considerable displeasure any attempt by the U.S. to inject its environmental or health and safety values or its procedures into matters which they view as domestic in nature and in governmental responsibility.*/

For the foregoing legal and policy reasons, we urge the Commission to affirm that NEPA does not require a review of the possible environmental impacts of a proposed nuclear export on foreign territory.

---

*/ In Matter of Babcock and Wilcox, supra, the State Department advised the Commission that "any U.S. attempt to make site-specific assessments of environmental impacts within the territory of another country would have major, adverse political consequences". (5 NRC at 1344) The Commission itself noted in that decision that the Federal Republic of Germany had informed the State Department that it opposed "any efforts by the United States to superimpose a further environmental review on [its] internal nuclear reactor licensing process". (5 NRC at 1345)

C. Executive Order 12114

On January 4, 1979, the President issued Executive Order 12114, "Environmental Effects Abroad of Major Federal Actions". It directed federal agencies to establish procedures to evaluate the environmental impacts outside the United States of certain of their activities, including authorizing the export of nuclear reactors. The Order required the preparation of a multilateral or bilateral study or concise review of environmental issues involved in nuclear facility exports and the use of the results of those documents "in making decisions regarding such actions". § 1-1, E.O. 12114.

The Order, we can assume here, was binding upon the Executive Branch agencies which must review a reactor export license application before NRC may act upon it. The White House Fact Sheet accompanying the Executive Order designated the State Department as the lead agency to develop unified procedures for the environmental reviews of nuclear exports required by the Order. The State Department has just made these procedures public today, but we have not yet had an opportunity to review them.

We submit that compliance with those procedures by the Executive Branch in preparation of its pre-licensing judgment to NRC completely fulfills the mandate of the Executive Order. The Order itself states that it "represents the United

States Government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of [NEPA] with respect to the environment outside the United States ...." Sec. 1-1. The Order also permits agencies which take sequential actions on a project to avoid preparing serial environmental review documents. Sec. 2-4(b). Accordingly, even if the Order applied to NRC's export licensing functions (see below), there would be no need for the Commission to duplicate work which the Executive Branch agencies had already done.

As a matter of law, however, E.O. 12114 is not applicable to NRC export licensing decisions. The plain language of § 126b(1) of the AEA precludes the application of any licensing criterion not mandated by statute. Section 126c sets forth the sole means by which additional licensing criteria may be created -- by joint resolution of the Congress. The President cannot, by Executive Order, either require or authorize NRC to apply an extraterritorial health, safety or environmental criterion in its export licensing determinations.

Indeed, since NRC is an independent regulatory agency rather than a part of the Executive Branch, Executive Orders cannot alter its substantive quasi-legislative or quasi-judicial decisionmaking in any way. NRC legal counsel have recognized that limitation. In SECY-79-305 (May 1, 1979), the General Counsel and Executive Legal Director addressed NRC compliance with CEQ NEPA regulations and stated:

> "NRC can be bound by CEQ's NEPA regulations as a matter of law insofar as those regulations are solely procedural or ministerial in nature. NRC cannot be bound as a matter of law by those portions of CEQ's NEPA regulations which have a substantive impact on the way in which the Commission performs its regulatory functions." (Id. at 17-18)

The fundamental difference between the CEQ regulations and E.O. 12114 is that the requirement for NRC preparation of an environmental review document has a statutory basis in NEPA and some of the CEQ NEPA regulations were procedural in that they instructed NRC how to proceed to fulfill its NEPA responsibilities. Such is not the case with respect to E.O. 12114 and its substantive directions. With respect to an independent regulatory agency such as NRC, all of E.O. 12114 is substantive because there is no underlying statutory mandate for its preparing foreign environmental impact review documents. Accordingly, E.O. 12114 is wholly without force or effect upon NRC's nuclear export licensing determinations.

CONCLUSION

The General Electric Company strongly supports responsible and effective action to enhance informed consideration by foreign governments of the public health, safety and environmental aspects of planned nuclear power projects. Jurisdictional considerations aside, however, we do not believe that an export licensing proceeding is the proper means for achieving that aim.

What is called for is aggressive pursuit of cooperation with recipient nations, and the upgrading and more extensive use of the safety capabilities of the IAEA and other multinational means of cooperative action. NEPA itself provides in Sec. 102(2)(F) that, to the extent "appropriate" and "consistent with the foreign policy of the United States", federal agencies are to encourage and support cooperation with other nations designed to anticipate and deal with environmental problems. This same theme, voluntary cooperation, was sounded specifically in the context of nuclear exports in Section 407 of the NNPA, as discussed earlier.

We have grave concerns that unilateral action in this sphere will be resented as inappropriate from the standpoint of national sovereignty and will prove counter-productive from the standpoint of reestablishing U.S. reliability of supply. These concerns are underscored by the undisguised foreign resentment at certain unilateral aspects of the NNPA. Imposition of yet additional unilateral requirements by the U.S. -- and the fashioning of further procedural hurdles with all of their attendant uncertainty and delay -- will only impede constructive U.S. participation in international nuclear commerce, with significant adverse impacts not only on U.S. trade but on U.S. non-proliferation goals as well.

Nor is resort to unilateral fiat required in this area. NRC already participates in and supports many international initiatives designed to advance cooperation in environmental, health and safety matters. These include both bilateral arrangements with individual countries and multilateral activities through the IAEA, the Nuclear Energy Agency and the International Energy Agency of the OECD. Under the auspices of these organizations, nuclear plant safety missions have been sent to several countries to aid local officials in their making siting and safety decisions regarding proposed nuclear facilities.

We believe that when a foreign country indicates its desire to receive technical advice and information regarding the potential health, safety or environmental impacts of a proposed facility, NRC should make every effort to provide it or assure that it is available from other competent sources. Cooperative action in these matters provides the most sensible -- and most fruitful -- means to deal constructively with shared environmental concerns in the international community.

We appreciate the opportunity afforded by the Commission to submit our views on these important legal and national policy issues.