DOCKETED USNRC
JUN 14 1979
Office of the Secretary
Docketing & Service
Section

DOCKET NUMBER
EXPORT. IMPORT 11000495

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

NRC PUBLIC DOCUMENT ROOM

In the matter of	)	
	)	Application No. XR-120
WESTINGHOUSE ELECTRIC CORP.	)	Docket No. 50-574
	)	
(Exports to the Philippines)	)	Application No. XCOM 0013
	)	Application No. XSNMO 1471
	)	

Petitioners' Consolidated Reply to Answers of Westinghouse Electric Corp. and the NRC Staff

I. Introduction

The Westinghouse Electric Corp. (Westinghouse) and the staff of the Nuclear Regulatory Commission (NRC) have filed answers in this matter urging the Commission to deny petitioners' status as intervenors and their request for a hearing. As the issues raised by Westinghouse and the NRC staff are in large respect similar, petitioners submit this consolidated reply.

II. Standing to Intervene

Both Westinghouse and the staff argue that petitioners have no standing to participate in these proceedings. As shown below, petitioners have standing under all the applicable tests.

A. The Nuclear Non-Proliferation Act Explicitly Confers Standing to Intervene on All the Petitioners

The Nuclear NonProliferation Act of 1978 ("NNPA") contains an express congressional directive mandating that NRC devise procedures allowing public participation in export licensing decisions. 42 U.S.C. §2155a. Pursuant to this section, NRC issued regulations, 10 C.F.R. §§110.80-110.113 to insure compliance with this congressional policy.

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The legislative history supplies Congress' reasoning for enacting this section:

> [I]t is the intent of the Committee to guarantee to citizens and public interest groups their right to make their views known during the export licensing process.

H.R. Rep No. 95-587, 95th Cong., 1st Sess., at 22 (1977). (The subject of the report H.R. 8638 subsequently was passed as the NNPA.) Congress unmistakably wanted the NRC to allow those who have knowledge, interest, and concerns about nuclear energy to participate in the export process. There can be no doubt that petitioners are representative of those groups which Congress sought to give an opportunity to fully and completely participate in nuclear export proceedings.

The NRC has recognized the congressional directive to allow "citizen and public interest" participation. Recently, to comply with this congressional mandate, the Commission granted intervention and a hearing to a public interest group similar to petitioners. In the Matter of Edlow International Company (an Agent for the Government of India) 8 NRC 675 (1978) (Edlow II). The only possible method to insure wide public participation in nuclear export matters generally and particularly in this case is to allow intervention by petitioners.

B. Petitioners Have Standing to Intervene Under General Administrative Law Principles

The courts have realized the administrative process contemplates participation by wide segments of the interested public. Koniag, Inc., Village of Uyak ("Koniag, Inc.") v. Andrus, 580 F.2d 601 (D.C. Cir. 1978);

Office of Communication of the United Church of Christ ("Church of Christ") v. FCC, 359 F.2d 994 (D.C. Cir. 1966); Scenic Hudson Preservation Conference v. FPC ("Scenic Hudson"), 354 F.2d 608 (2nd Cir. 1965) cert. denied 389 U.S. 941 (1966); National Welfare Rights Organization ("NWRO") v. Finch, 429 F.2d 725 (D.C. Cir. 1970). These cases clearly establish that there is "no basis for importing judicial standing doctrines into the administrative area." Koniag, Inc., 580 F.2d 611 (Bazelon, J. concurring).

The issue under this test is not whether the petitioners have standing under the "case" or "controversy" test of Article III, but rather, whether they will be "aggrieved" within the meaning of the substantive statute, NNPA, and the Administrative Procedure Act ("APA"), 5 U.S.C. §702 by actions of the Commission. Applying this test, there is no question that petitioners have standing to intervene in this matter.

Scenic Hudson and Church of Christ are the seminal cases in the field. Under the test developed in these decisions, direct financial stake is not the only criterion for determining interest in an administrative proceeding. Church of Christ, 359 F.2d at 1000-02; Scenic Hudson, 354 F.2d at 615. "To determine what a party must show to qualify as aggrieved under the regulations, we must look to the scheme intended by the Congress..." (citation omitted). Koniag, Inc., 58 F.2d 606. Given the congressional mandate for public participation and the interests and expertise of petitioners, as well as the imminent danger to them, they fall well within the scheme that Congress sought to achieve in the NNPA.

Strong policy considerations also support petitioners' standing. "A necessary corrollary to this scheme is that the term 'party aggrieved' must be construed generously to achieve the congressional objective that determinations be careful as well as quick." Koniag, Inc., 580 F.2d 606. This "careful determination" of the facts and issues involved in this matter is certainly of great importance to petitioners and the public and will be facilitated by petitioners intervention. See Petition for Leave to Intervene and Request for a Hearing ("Petition") at pp. 5-8.

The need for citizen and public interest participation to insure careful determination of the matters at issue was recognized in Scenic Hudson, 354 F.2d at 615-617 and Church of Christ, 359 F.2d at 1000-1005. Indeed "standing is accorded to persons not for the protection of their private interests but only to vindicate the public interest." Church of Christ, 359 F.2d at 1001. Among other aims, petitioners seek to "vindicate the public interest" in the export of potentially dangerous nuclear technology and material.

"[A]dministrative standing should be determined in light of the functions of an administrative agency, and whether a would-be participant would contribute to fulfilling those functions." Koniag, Inc., 580 F.2d 611 (Bazelon, J., concurring). See also Stewart "The Reformation of American Administrative Law," 88 Harv. L. Rev., 1667 (1975). This "functional" approach was implicitly adopted by the Commission in its own export regulations. 10 C.F.R. §§110.82-.84.

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Petitioners have demonstrated that they will indeed aid the function of the Commission by adding evidence about the potential danger to the health and safety of the public and common defense and security of the United States posed by the reactor export, Petition at pp. 9-16. Additional information, including the International Atomic Energy Agency (IAEA) report[1/] is becoming available to petitioners and others and documents the potential dangers. Petitioners, as intervenors, will utilize this new material in any and all hearings.

The staff, NRC Staff Answer to Petition at pp. 4-5, 8 and 10, and Westinghouse, Answer of Applicant Westinghouse Electric Corporation at pp. 5-7, argue that based on previous NRC decisions,petitioners lack standing in this administrative proceedings. These cases are no longer controlling.

Underpinning the argument of the staff and Westinghouse is the decision In the Matter of Edlow International Company (Agent for the Government of India on Application to Export Special Nuclear material) (Endlow I). 3 NRC 563 (1976). However the Commission adjudicated that case before the passage of the NNPA and its express congressional directive discussed previously. The Commission cannot substitute its own judgment

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1/ Petitioners have reliable evidence which shows that among other occurances the IAEA considers eruption of Mt. Natib on whose slopes the proposed reactor is to be sited, a "credible event." The IAEA also is concerned that there may be a threat of earthquake of greater magnitude than those for which the plant is designed.

about the wisdom of intervention, as demonstrated in Edlow I, but must follow congressional mandates. See Edlow II. The cases following Edlow I, In the Matter of Babcock and Wilcox, 5 NRC 1332 (1977) and In the Matter of Ten Applications for LowEnriched Uranium Exports to Euraton Member Nations, 6 NRC 525 (1977) adopt the explicit reasoning of Edlow I but again were decided before NNPA and thus are of no precedential value and do not govern this proceeding.

The need for an administrative agency to allow intervention in order to develop a full and complete record has long been recognized. Scenic Hudson, 359 F.2d at 612. Petitioners have shown that they view the evidence in a light very different from either Westinghouse or the Staff. It is vital that they participate as a party in order to develop these views in order for the Commission to discharge its duty to "consider(s) all relevant facts." Scenic Hudson, 354 F.2d, at 620.

In addition neither the staff nor Westinghouse proposes or demonstrates alternative methods of presenting the evidence which petitioners are prepared to introduce. Indeed as the court in Church of Christ recognized, administrative agencies need the input of citizens and public interest groups in order to best judge what the public's true interest is. Church of Christ, 359 F.2d at 1003. The staff's and Westinghouse's answers, in failing to address any of the Petition's substantive points, demonstrate the need for this intervention to ensure that all the issues are fully and completely ventilated.

C. Petitioners have Standing Under the Article III Test

Under the current tests developed by the Supreme Court, Association of Data Processing Service Organizations v. Camp, 397 U.S. 150(1970); Sierra Club v. Morton, 405 U.S. 727(1972); United States v. Scrap, 412 U.S. 699(1973), the petitioners possess sufficient interests that may be injured and that these interests are within the zone of interest sought to be protected by Congress. Camp, 397 U.S. 152-53.

The Nuclear Regulatory Commission is charged with determining whether or not a proposed nuclear export is "inimical to the common defense and security or constitutes a unreasonable risk to the public health and safety." 10 C.F.R. §110.44. The interests possessed by petitioners, e.g., preventing the threat of war, desire for a strong and competent armed forces, fear of potential radiation contamination, are certainly within the zone of interest of NNPA and the export of the proposed technology may in fact injure the petitioners.

Petitioners acknowledge that these are standards which are societal in nature. But an injury to all members of society does not prevent a smaller portion of the public from pursuing judicial or administrative actions to halt these injuries. U.S. v. Scrap, 412 U.S. at 686. Certainly Congress in passing NNPA was aware of the of these broad standards and by allowing for public participation implicitly recognized that some member of the community would seek to protect the rights of the rest.

The interests expressed by petitioners are not generalized grievances, e.g., Schlesinger v. Reservists to Stop the War, 417 U.S. 208(1974) but rather are specific and concrete. Indeed, given the present role of the Philippines in protecting the common defense and security, any threat to U.S. bases there will in fact cause injury to petitioners. See Petition at pp. 14-15. All petitioners, CDP, Perlas, and PMEP, have direct stakes in insuring that the Western Pacific is protected and that there is continual unhampered use of both Subic Bay Naval Station and Clark Air Force Base.

All petitioners also have environmental interests within the scope of Executive Order 12114, 44 Fed Reg. 1957 (January 9, 1979) and thus have standing to intervene to insure that these interests will not be injured.[2/] Perlas and PMEP have the possibility of actual harm to their homes and property as well as to the sea and air around them from violation of this Executive Order. Petitioner CDP's own interests may in fact be injured by violation of this Executive Order during the nuclear licensing process, particularly if information required by the Executive Order is not developed or produced in this proceeding.

There are additional environmental concerns raised by petitioners. To the present, there has been no firm statement

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2/ Although petitioners do not agree with Westinghouse and the staff that the Executive Order is not binding on the Commission, it most certainly is binding on the Executive Branch and thus, petitioners have standing in these proceedings to insure compliance by the Executive Branch with this order.

about the disposal of spent fuel from the reactor. See 10 C.F.R. §110.42 (3), (4), (5). If as very well may be the case the spent fuel is to be returned to this country, the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §4321 et seq. will require the production of an environmental impact statement ("EIS"). All petitioners will have a vital stake in the production of this EIS.

If the spent fuel is to be returned to the United States, then there will be substantial domestic effects and the petitioners will undoubtedly have standing to seek judicial review of the procedure to insure compliance with NEPA. Sierra Club v. Coleman, 405 F.Supp. 53 (D.D.C. 1975) vacated on other grounds, sub nom; Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978); Scientists' Institute for Public Information v. AEC, 481 F.2d 1974 (D.C. Cir., 1975); In the Matter of Babcock and Wilcox, 5 NRC at 1342. Therefore, at this point, given the strong probability that petitioners will have standing under NEPA, the petition to intervene should be granted.

As demonstrated, the petitioners have sufficient interest within the zone sought to be protected by Congress in NNPA to meet the Article III "case" and "controversy" test and thus have standing to intervene in this proceeding.

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III. All Proceedings for Export License Applications Should Be Consolidated

The need for consolidating all the license applications is obvious. While there are three pending applications, they are all part and parcel of the same project and are thus, inexorably intertwined. The project should be considered as one unit rather than in a piecemeal fashion.[3/]

Westinghouse argues that failure to give timely consideration to the reactor vessel and component export license applications will jeopardize the United States' reputation as a reliable supplier of nuclear material and equipment. On the contrary, the term "reliable" does not only mean willing to supply, but rather, willing to supply only when the proper conditions are met.

Westinghouse and the NRC staff seek to have the component application considered quickly in order to build momentum for the approval of the other licenses. Approval of the component license will force the Commission into the position of considering whether to stop an ongoing project. The Commission, if it considers the component application separately, will face the argument that it has implicitly approved the other export licenses. This should not be allowed to occur.

3/ This need for complete consideration is even greater in light of NRC's three month moratorium on approval of domestic license applications, see The New York Times May 22, 1979, at p. A16, and the recently introduced legislation, e.g., S. 1178, which provides for a two year moratorium on approvals.

Consolidation of all the proceedings will allow for an organized and structured proceeding in which all the relevant evidence, pro and con, on the entire project can be adduced, thereby allowing the Commission to make an informed judgment about the entire export package.

IV. Timeliness

Westinghouse argues that the petition to intervene in the facility and component applications are untimely. As the NRC staff correctly points out, the additional information by all parties received since then makes the petition completely timely. NRC Staff Answer at p. 6.

While Westinghouse argues that allowing intervention in all the proceedings, although the thirty-day limit for filing petitions had passed in the vessel and component proceedings, will jeopardize the timely consideration of the licenses, the facts do not support this. The initial license application was filed on November 18, 1976 and no decision has been reached as of yet. This delay has not been caused by petitioners, but rather, by the process of gathering data about the project. There is no basis for arguing that intervention will further delay consideration.

Certainly, on balance, there can be no prejudice to the applicant from allowing intervention at this point. The newly available information requires that the petition be considered timely on all issues.

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V. Conclusion

As has been clearly shown, petitioners' intervention in this matter is required under the Nuclear Non-Proliferation Act and the Commission's own regulations. The petition is timely and that, for complete consideration of the entire export package, consolidation is essential.

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Dated: June 4, 1979

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Petitioners' Consolidated Reply to Answers of Westinghouse Electric Corp. and the NRC Staff" were mailed, first-class postage prepaid, to the following individuals this 4th day of June, 1979:

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