

February 1, 1979

UNITED STATES
NUCLEAR REGULATORY COMMISSION

SECY-78-596C

INFORMATION REPORT

For: The Commissioners

From: James R. Shea, Director
Office of International Programs

Thru: Executive Director for Operations *TAR for LUG.*

Subject: ADDITIONAL VIEWS ON PROPOSED LICENSE TO EXPORT LEU
TO INDIA (XSNM-1222)

Purpose: To provide the Commission with additional staff views
on the subject export.

Discussion: SECY-78-596 and 78-596A (January 26) provided the basic staff analysis and conclusions regarding this proposed export. I indicated in SECY-78-596A that some IP staff might wish to submit additional views on this application. On January 30 G. Oplinger of IP submitted an additional statement regarding his view that the information currently available to the NRC does not adequately support a finding that Criteria 1, 2, 4, and 5 of Section 127 of the Atomic Energy Act, or their equivalent, are met and that accordingly the application should be referred to the President for further consideration. He also noted that the main outlines of his reasoning are contained in "Draft 2" of SECY-78-596A of January 22. I would also like to submit the attached additional statement further elaborating on the basis for my view that the relevant statutory provisions are sufficiently met for this application and the export should therefore be approved.

J. R. Shea
James R. Shea, Director
Office of International Programs

Enclosure:
Views of JRShea on
XSNM-1222

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PROPOSED LICENSE TO EXPORT LEU TO INDIA
(APPLICATION XSNM-1222)

Additional Views of James R. Shea

Prospective Application of Criteria

While there is no clear legislative or Congressional direction on prospective application of the criteria, I believe, for reasons stated in SECY-78-596 and 596A, that the statutory criteria should be applied prospectively for all export applications. This would, in my view, provide for consistent treatment of such applications and permit taking into account future developments that could negate the criteria, especially in the case of, for example, Criterion 5 (reprocessing approvals), which seems inherently to involve prospective application. In using the term "prospective" I am considering several years into the future, not perpetuity, as a reasonable period for application of the criteria.

At this point it is necessary to determine whether or not "based on a reasonable judgment of the assurances provided and other information available to the Federal Government..." the Commission can find that each of the Section 127 criteria or their equivalent is met. The "other information available" wording would, in my view, allow a broad range of factors relevant to the criteria to be taken into account. SECY-78-596 and 78-596A detail the basic factors, both positive and negative, affecting the consideration of each of the criteria. These factors, in my view, include (1) the basic governmental assurances; (2) additional information bearing on these assurances, such as (a) any formal representations by the cooperating government to the U.S. Government modifying these assurances; (b) statements by officials of the recipient government bearing on the assurances; or (c) other evidence that the criteria are unlikely to be met in the future; and (3) the fact that Congress provided explicitly in the NNPA for a maximum two year "grace period" for negotiation of full-scope safeguards arrangements during which time, according to the Senate report on the Act, the Phase 1 export criteria were not to cause an immediate moratorium on U.S. exports to countries then engaging in nuclear cooperation with the U.S., India being one of these countries.

These factors apply in varying degrees to each of the Section 127 Criteria for this export and weighting them and arriving at an overall determination regarding the criteria is a complex matter involving substantial individual judgment. There are valid reasons to be concerned about the future endurance of commitments regarding the proposed export, stemming from uncertainties about whether the negotiations to obtain full-scope safeguards commitments from the Indian government will succeed by the March 10, 1980 cutoff date for further U.S. fuel shipments and indications from Congress that an extension of this date would be unlikely. However, no evidence has been presented at this point that these negotiations, with still over a year to go, will definitely not succeed by this date or that sufficient progress would not be made to justify an extension of the negotiation period. Ups and downs in the probability of success could well occur in this time as they have in the past and I believe one should seek to avoid ascribing undue weight to such transitory aspects in the determinations and to seek to avoid prejudging these negotiations in export actions.

In any case, as noted below, even if supply were to come to an end it is not at all clear that violation of any present commitments by the Indian government will be sure to follow. An extended period after March 10, 1980 would be likely to ensue before U.S. supply to India could be considered to have terminated. Satisfactory arrangements could then be made regarding remaining U.S. spent fuel that would avoid possible violation of Criteria 1 and 5, the criteria with the most uncertainty attached to them. Presumably the U.S. Government would make every effort to ensure that such violations did not come about.

Following on these general observations I would like to review briefly the highlights of the factual evidence and arguments and how they lead to conclusions on satisfaction of the Section 127 Criteria, even considering the possibility that the Agreement for Cooperation might lapse.

I believe that Criterion 3 is satisfied and Criterion 6 is not relevant. As regards Criterion 4, in addition to the basic governmental assurance, there is no evidence of Indian intentions to retransfer US-origin material without U.S. approval, even assuming a lapse of the US/India Agreement for Cooperation.

As regards Criterion 2, I believe that the Indian acceptance (noted on page 6 of SECY-78-596A) of the U.S. understanding that the SNM made available for, used or produced at Tarapur will be used solely for the needs of that station (except as otherwise agreed by the two governments), together with lack of any firm indications, after considering all factors, that the Indians might use U.S.-provided nuclear material (or, alternatively, non-U.S.-provided material used in Tarapur) for nuclear explosives, provides an adequate basis for considering Criterion 2 as being satisfied, even assuming a lapse in the agreement.

As regards Criterion 1, the continued application by the Indians of safeguards to this export, and to prior U.S. exports, hinges on several factors. Assuming Indian unwillingness to accept full-scope safeguards after March 10, 1980, as mandated in Section 128, thereby triggering an automatic cutoff of further U.S. supplies, India may well consider its agreement with the U.S. to have terminated, along with the relevant assurances. It does not automatically follow, however, that IAEA safeguards on previously supplied U.S. material or the reactor itself will also be abolished at that time. With U.S. supplies cut off, India may turn to another supplier nation for its fuel needs, unless it shuts down the reactor or determines that it is able to meet all its fuel needs from domestic resources (which may include the reprocessing of spent fuel inventories already stored in the reactor storage pools). This latter eventuality is doubtful.

In the first eventuality a reasonable argument can be made that, as parties to the Supplier Guidelines, would-be supplier states would insist on the maintenance of adequate safeguards for their proposed exports. Even if India does not turn to a foreign supplier, there is a good chance, as supported by the Canadian experience, that India would opt to keep TAPS and its fuel under IAEA safeguards. While these contentions cannot be proven at this point, I believe that there is sufficient merit in them to provide a reasonable confidence that Criterion 1 would be satisfied should India decide to abrogate its agreement with the U.S. after March 1980, even without the "grace period" factor noted above, which I believe further supports a positive finding for this criterion.

The case concerning Criterion 5 is somewhat more involved and hinges in large measure on the eventual outcome of U.S. negotiations with India. Both fuel currently in India and that to be provided under this export would have to be considered. The concerns that this criterion may not be met are based to a large extent on the statements of Prime Minister Desai (as detailed in SECY-78-596 and 78-596A) which indicate that India would be free to reprocess if the U.S. terminates fuel supply and the U.S./India agreement lapses (there are no residual control rights in the agreement). However, even if the agreement lapses, an Indian decision to reprocess without U.S. approval could be considered as a final "worst case" option which was not likely to occur if other more acceptable options were available. The U.S. might be able, for example, to accomplish one of the objectives detailed on page 5 of SECY-78-596A if this contingency developed.

Recognizing the uncertainties that lead to a close judgment call, I believe it is still possible to find that Criterion 5 is adequately met. Inclusion of the "grace period" factor further supports a positive finding for this criterion.

In addition to the above considerations, it should be noted that no information has been brought forward to date by those who conclude some of the criteria are not met which indicates conclusively that it is clear India would not (in contrast to might not) comply with one or more of the export criteria. If such information were to develop, it would, in my view, be grounds for finding that these criteria were not met, whether during the present "grace period" or thereafter.

In light of the above, I believe in a finding that the Section 127 Criteria are met. In addition, I believe that the export should be found not inimical to the common defense and security for various reasons, including the fact that it would contribute only marginally to India's proliferation potential in the post-1985 time period, as compared to the proliferation potential inherent in the spent fuel stockpiles currently present at Tarapur, while serving U.S. overall nonproliferation objectives by helping to ensure continuation of negotiations toward achieving full-scope safeguards and other commitments.