UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of WESTINGHOUSE ELECTRIC CORP. (Exports to South Korea)	Application No. XR-133 Docket No. 11000435

RESPONSE OF THE DEPARTMENT OF STATE
TO PETITION OF THE CENTER FOR
DEVELOPMENT POLICY FOR LEAVE
TO INTERVENE AND REQUEST FOR HEARING

On June 13, 1980, the Center for Development Policy (CDP) petitioned the Nuclear Regulatory Commission (NRC) for leave to intervene and for a public hearing in the captioned export licensing proceeding. Section 304(b)(2) of the Nuclear Non-Proliferation Act of 1978 (NNPA) provides for public participation only "when the Commission finds that such participation will be in the public interest and will assist the Commission in making the statutory determinations required by the 1954 Act." The Department of State, for reasons set forth below, does not believe that the CDP has met this standard. Therefore, we believe this petition should be denied. Moreover, because the petition was submitted later than required by Commission regulations, it is not timely.

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I. Neither Intervention Nor a Hearing Would Assist the Commission in Making Its Statutory Determinations

The Center for Development Policy raises six matters about which it wishes to present information to the Commission: (1) civil disturbances in South Cholla province and the alleged threat of civil war or open rebellion; (2) population density at the reactor sites; (3) rumors that South Korea may again be considering purchase of a spent fuel reprocessing plant; (4) environmental and safety questions raised by nuclear reactors in general; (5) alleged danger to the health and safety of U.S. citizens living in or near military bases in South Korea, and (6) alleged danger to the effective operation of those bases.[1/] The CDP believes that these matters, and the information that it will present about them, warrants a delay of at least 90 days to prepare for a public hearing (and, by inference, the additional time needed to conduct the hearings and consider the material presented) before the Commission should take further action on the export licenses.[2/] As will be shown, however, the Executive Branch possesses and, to the extent these topics are within the Commission's export licensing jurisdiction, has already supplied the Commission with the most reliable and up to date information available on each of these topics. Any delay in licensing proceedings in order to permit petitioner to present additional information on these matters would be clearly an

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1/ Petition for Leave to Intervene and Request for Hearing, at 12, 13 (hereinafter cited as Petition).

2/ Petition at 15.

unproductive use of time and damaging to U.S. foreign policy interests.

A. Civil Disturbance and the Threat of Open Rebellion

Petitioner claims that the "grip of the current South Korean regime" appears to be weakening as evidenced by rioting in South Cholla province during the last week of May.[3/] Pointing to the June 2, 1980, issue of Newsweek magazine, petitioner argues that the South Korean forces' inability to protect their military armory at Naju from siege foreshadows a similar weakness in regard to the nuclear power plants.[4/] Petitioner, therefore, "suggests" that the NRC have "adequate assurances" that South Korea could protect its nuclear plants in time of "rebellion or civil war."[5/]

Petitioner apparently wishes to call the Commission's attention to a special need for obtaining effective guarantees of physical security from the Korean Government before issuing the licenses. In fact, the Korean Government has already provided assurances concerning physical security to the United States that meet the requirements set forth in 10 CFR 110.43,[6/] and thus, in accordance with section 127(3)

3/ Petition at 7.

4/ Id.

5/ Id.

6/ Executive Branch Export License Application Analysis, submitted under cover of letter from Louis V. Nosenzo to NRC on May 6, 1980, at 5 (hereinafter "Export License Application Analysis").

of the Atomic Energy Act, physical security must be deemed adequate.

Section 304(d) of the NNPA provides:

> ". . . the Commission shall, in consultation with the Secretary of State, Secretary of Energy, the Secretary of Defense, and the Director, promulgate (and may from time to time amend) regulations establishing the levels of physical security which in its judgment are no less strict than those established by any international guidelines to which the United States subscribes, and which in its judgment will provide adequate protection to facilities and material referred to in paragraph (3) of section 127 of the 1954 Act, taking into consideration variations in risks to security as appropriate."

Such regulations were established on May 19, 1978, in 10 CFR 110.42 and 110.43.[7/] Section 127(3) of the Atomic Energy Act provides: "Following the effective date of any regulations promulgated by the Commission pursuant to section 304(d) of the Nuclear Non-Proliferation Act of 1978, physical security measures shall be deemed adequate if such measures provide a level of protection equivalent

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7/ 10 CFR 110.42 states:

"[A]dequate physical security measures will be maintained with respect to such facilities or material proposed to be exported, and to any special nuclear material used in or produced through the use thereof. Physical security measures will be deemed adequate if such measures provide a level of protection equivalent to that set forth in section 110.423 [sic]."

Section 110.43 establishes International Atomic Energy Agency publication INFCIRC/225/REV.1 as the standard for adequate physical security.

to that required by the applicable regulations."[8/] (Emphasis added.)

The statutory language permits no room for discretion. If the physical security measures applied by the foreign government meet the Commission's criteria, the physical security criteria must be deemed met. Since the South Korean Government has provided the United States with written assurances that physical security measures equivalent to those established in INFCIRC/225/REV.1 will be maintained with respect to the proposed plants,[9/] it has met the criterion promulgated by the Commission in 10 CFR. 110.43. For the purposes of licensing the export, physical security must therefore be deemed adequate. Since this is the case, there is no information on this point that petitioner could produce which would assist the Commission in making its statutory determination.

8/ Foreign policy requirements dictate the need to establish and adhere to clear and predictable standards in order that foreign nations may perceive the United States as a reliable country with which to deal. This was the Congressional intent when section 304(d) of the NNPA and 127(3) of the Atomic Energy Act were passed. See remarks of Senator McClure, 124 Cong. Rec. S2451 (daily ed. Feb. 27, 1978), CRS Leg. Hist. of the NNPA, at 600.

9/ Export License Application Analysis at 5.

Furthermore, the Executive Branch has assessed the physical security measures currently maintained by the Government of South Korea and found them adequate for the equipment covered by this license application.[10/] In addition, South Korean governmental authority has been firmly re-established in South Cholla province, and even at the height of the one-week long disturbance, city utilities operated without interruption. Nuclear power is not a controversial issue in South Korea, and, after conducting a special review following the riots, the Executive Branch concluded that South Korean authorities have full capability to provide adequate physical security for all nuclear material in the country, including the reactors proposed for export.

Petitioners appear to be suggesting a review by the NRC of internal political developments in Korea. We believe such an inquiry is beyond the export licensing jurisdiction of the Commission. Congress clearly did not contemplate such a result in enacting section 126(a)(2) of the Atomic Energy Act. As a matter of constitutional law, considerations of such a nature are within the exclusive jurisdiction of the Executive

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10/ Id. at 6.

Branch,[11] which will continue to provide the Commission with required information concerning the situation in South Korea. We do not believe petitioner would be in a position to provide information that is any more reliable or up-to-date. Indeed, the Courts have recognized that the Executive Branch has unique access to information concerning events in foreign countries.[12]

B. Population Density

Petitioner asserts that the proposed reactors would be located in such a "densely populated region" that the Commission must consider "the nature and magnitude of risks and dangers posed by the population density around the reactor's site."[13] It is unclear how petitioner believes this information relates to the statutory criteria governing the issuing of export licenses, unless it be in respect to the "health and safety of South Korean citizens."[14] It is clear from the legislative history of the NNPA, and past NRC decisions, however, that the "public" whose "health

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11/ See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936); Goldwater v. Carter, ___ F.2d ___ (1979), vacated ___ U.S. ___; Chicago Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948).

12/ Chicago Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, at 111 (1948).

13/ Petition at 7, 12.

14/ Petition at 13.

and safety" is to be considered under section 103(d) is the American public, and that the Commission does not possess the jurisdiction to consider the health and safety effects on foreign citizens of a foreign government's decision.[15/]

Nonetheless, in accordance with E.O. 12114 and the Department's implementing procedures, 44 Fed. Reg. 65560 et seq., the State Department prepared a concise environmental review of the proposed nuclear projects, and transmitted this document to the Commission. In this concise environmental review, current and projected population densities at the reactor sites are analyzed. Although the data reveal that these densities are above the current United States guideline values by about 20 percent, the IAEA has not set criteria for population density.[16/] The Korean siting decision, thus, does not conflict with any internationally established standard. Moreover, population densities at these Korean reactor sites are not inconsistent with population densities for reactor sitings in other countries. We believe this is a matter within the discretionary jurisdiction of the Korean, not the United States, Government.

The Korean Government has undertaken extensive safety evaluations of the proposed projects. As explained in the

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15/ Edlow International Company, 3 NRC 563, 582 (1976); Babcock & Wilcox, 5 NRC 1332, 1340 (1977); Westinghouse Electric Corp., CLI-80-14 and CLI-80-15, 2 Nuclear Regulatory Reporter (CCH) ¶¶30,475-476 (1980); see also 10 CRF 110.2(ii).

16/ Department of State, Concise Environmental Review, Korean Nuclear Units 7 and 8 at 18, 19 (March 1980).

concise environmental review, the Korean Ministry of Science and Technology (MOST), the Nuclear Regulatory Bureau (NRB), Korean Atomic Energy Research Institute (KAERI), the Korean Atomic Energy Commission (AEC), and the Korean Advisory Committee on Reactor Safety (ACRS) are all involved in the implementation of regulatory requirements. Preliminary Safety Analysis Reports (PSARS) are prepared for each proposed nuclear site, and must be approved by the NRC prior to Korean licensing. To ensure thorough assessment of health and safety factors, the NRB contracts with the KAERI and ACRS to review the PSAR. After construction, a Final Safety Analysis Report must be approved by the KAERI and ACRS before the AEC can issue an operating permit. This careful licensing process has been applied to all reactors in Korea, and evidences the Korean Government's deep concern for reactor safety.

Not only is the health and safety of the Korean public beyond the scope of NRC statutory authority to review in an export licensing proceeding, but it has clearly already been fully considered by the Korean Government. We believe petitioners are not in any position to assist the Commission in making its statutory determinations on this matter.

C. Reprocessing Facilities

A third issue raised by petitioner is certain news reports that South Korea may be considering the purchase of nuclear reprocessing technology from France, which would facilitate the extraction of plutonium from spent fuel and the clandestine development of nuclear weapons. Petitioner

asks what "assurance" the Commission has that such developments will not occur.[17/]

The receipt of such an assurance, however, is not among the non-proliferation criteria set forth in sections 127 and 128 of the Atomic Energy Act. Indeed, sections 127(5) and 131 b. of the Act contemplate certain conditions and procedures under which, in limited circumstances, the United States may approve reprocessing. Section 127(6) establishes conditions which would have to be met for an export of reprocessing technology from the United States. While it is not the policy of the U.S. to export such technology, and while U.S. approvals are severely restricted, the acquisition of reprocessing technology is not a statutorily authorized ground for denial by the Commission of an export license.

Section 129 of the Atomic Energy Act requires termination of nuclear exports to a non-nuclear weapons state if the President finds it is "engaged in activities involving source or special nuclear material and having direct significance for the manufacture or acquisition of nuclear explosive devices" and to any nation if the President finds that it has "entered into an agreement . . . for the transfer of reprocessing equipment, materials, or technology to the sovereign control of a non-nuclear weapon state," provided he has not waived the application of these provisions under the statutory procedure provided in the section. The President has made no such finding. It is the duty of the

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17/ Petition at 11.

Department of State, under section 2(d) of Executive Order 12058, to provide the President timely information and recommendations with regard to these matters. While the Department also provides the Commission information on these matters, in the absence of any such Presidential finding, the Commission may not deny an export license on the basis of these provisions. Moreover, Korea is a party to the Treaty on the Non-Proliferation of Nuclear Weapons and has therefore committed itself not to develop or manufacture nuclear explosive devices for any purpose and to accept IAEA safeguards on all nuclear activities.

To the extent the Commission wishes further factual information concerning news reports, it is the function of the Executive Branch to provide it. The Department has provided the Commission briefings and other information and will continue to do so. The information available to the Executive Branch is obtained both through diplomatic and intelligence channels, and we do not believe that the petitioner is in any position to provide the Commission information either more extensive or more reliable.

D. Generic Environmental and Safety Questions Raised by Use of Nuclear Reactors

Petitioner asserts that the Commission should examine environmental and safety questions related to nuclear power in general before licensing the export of these two reactors. However, to the extent these questions relate to impacts within Korea, they are not within the Commission's jurisdiction. To the extent they concern the global commons

or the United States, they have already been addressed to the extent appropriate in an export licensing proceeding.

As the Commission has repeatedly held, an export license proceeding is not the appropriate place to discuss the environmental effects of nuclear reactors within the recipient country.[18] Such matters are entirely beyond the scope of NRC jurisdiction,[19] and the NRC is required to "deny a request or petition that pertains solely to matters outside its jurisdiction."[20] Although the Commission is required to consider effects on the "health and safety of the public", that public has been determined to be the American public.[21] As already noted, the Korean Government is taking all steps it deems appropriate to protect the health and safety of its citizens from the risks associated with the civil uses of nuclear power.

18/ Westinghouse Electric Corp., CLI-80-14 and CLI-80-15, 2 Nuclear Regulatory Reporter (CCH) ¶¶30,475-476 (1980); Babcock & Wilcox, 5 NRC 1332 (1977); Edlow International Co., 3 NRC 563 (1976).

19/ Id.

20/ 10 CFR 110.84(e).

21/ Edlow International Company, 3 NRC 563 (1976); Babcock & Wilcox 5 NRC 1332 (1977); Westinghouse Electric Corp., CLI-80-14 and CLI-80-15, 2 Nuclear Regulatory Reporter (CCH), ¶¶30,475-476 (1980).

The effects of nuclear exports on the United States and global commons have been considered in the Final Environmental Statement on the United States Nuclear Power Export Activities (ERDA-1542) of April 1976. ERDA-1542 concluded that the level of projected United States nuclear power export activities through the year 2000 should not entail significant and unacceptable adverse environmental impacts to the United States and global commons.[22] The concise environmental review prepared by the Executive Branch reaches a similar conclusion of no adverse impacts on the United States or global commons from operation of the proposed Korean reactors.[23] In Westinghouse Electric Corp., the Commission relied on ERDA-1542, the Philippine concise environmental review and other existing documents in reaching its conclusion that impacts on the U.S. and global commons from the reactor export would not be unacceptably adverse nor rise to a level of magnitude warranting denial of the export license.[24]

22/ Energy Research and Development Administration, Final Environmental Statement, U.S. Nuclear Power Export Activities (ERDA-1542) at 1-38, 2-59 (April 1976).

23/ Concise environmental review at 20.

24/ CLI-80-14 and CLI-80-15, 2 Nuclear Regulation Reporter (CCH) ¶¶30,475 at 30,475.11 and 30,476.

Since these issues, to the extent they are within the Commission's jurisdiction, have been addressed recently and disposed of on a generic basis, we do not believe that petitioner would assist the Commission in reaching any statutorily required determinations here.

E. Danger to Health and Safety of United States Citizens Living In or Near Military Bases in South Korea

Petitioner also questions the impact of operation of the proposed reactors on the more than 30,000 U.S. civilian and military personnel stationed in South Korea, particularly those serving on the "five U.S. bases within 50 miles" of the project sites, and on the operation of those bases.[25/] There are 2,974 U.S. military personnel stationed within 50 miles of the proposed sites, and the nearest installation is 22 miles away. This information was known to the Executive Branch when it prepared the concise environmental review and reached the conclusion that "no special foreign policy considerations" existed.[26/]

25/ Petition at 13.

26/ Export License Application Analysis at 11.

The Commission has recently decided not to review the issue of export impacts on overseas U.S. bases. In Westinghouse Electric Corporation, the Commission decided not to review the impacts of foreign-operated reactors on U.S. military bases, but to defer to the Executive Branch's assessments and recommendations regarding this issue.[27] Since the Commission has decided not itself to review impacts on U.S. military bases abroad, there is no information petitioner can provide that is relevant to any Commission determination here.[28] Even if such matters were considered by the Commission, we do not believe that petitioner would be in a position to provide the Commission information either more extensive or reliable than the Executive Branch.

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[27] CLI-80-14 and CLI-80-15, 2 Nuclear Regulation Reporter (CCH) ¶30,475.06 (1980).

[28] See also discussion at notes 19-21.

II. Neither Intervention Nor Public Hearing Would Promote the Public Interest

Section 304(b)(2) of the NNPA provides that, in addition to finding that public participation would assist the Commission in making its statutory determinations, the Commission must also find that such participation would be in the public interest. Because of the damaging consequences to the foreign policy and non-proliferation objectives of the United States both from further delay in this export licensing proceeding and from possibly acrimonious public debate on issues irrelevant to the Commission's decision which basically concern the internal politics of a foreign nation, the Department of State believes that public participation here would not be in the public interest.

The public interest must of necessity include the interest of the United States Government in achieving its critical nuclear non-proliferation objectives. Congress has found that "the proliferation of nuclear explosive devices or the direct capability to manufacture or otherwise acquire such devices poses a grave threat to the security interests of the United States and to continued international progress toward world peace." 29/ A key element of the national policy adopted by Congress to

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29/ NNPA §2.

address this threat was to condition exports on assurances that strict non-proliferation criteria would be met. Such a policy can only succeed so long as the United States is perceived as a reliable nuclear supplier to countries that meet those criteria. For this reason, the Congress stated as a United States policy "to confirm the reliability of the United States in meeting its commitments to supply nuclear reactors and fuel to nations which adhere to effective non-proliferation policies, by establishing procedures to facilitate the timely processing of requests for subsequent arrangements and export licenses." 30/ (Emphasis added.) To accomplish this purpose, the Congress directed that the Commission "shall, on a timely basis, authorize the export of nuclear materials and equipment when all the applicable statutory requirements are met." 31/ (Emphasis added.)

30/ NNPA §2(b).

31/ NNPA §101; AEA § 126 b.(1).

In order to facilitate the timely processing of export licenses while promoting the attainment of non-proliferation objectives, explicit export criteria were established in sections 127 and 128 of the NNPA. Export licensing proceedings are not the proper place to air general foreign policy grievances, discuss the internal politics of recipient countries, or consider the "generic safety questions posed by all nuclear power plants." 32/ Clearly it is not in the public interest to delay an export licensing proceeding to a country which meets all the non-proliferation criteria, while petitioner presents information about issues not relevant to the statutory critera. The criteria are established in order that the licensing process may be as predictable and expeditious as possible. Any further delay once the "applicable statutory requirements are met" would be adverse to the public interest since it would undermine attainment of U.S. non-proliferation objectives. Not only South Korea, but other countries as well, may well lose faith in the United States as a predictable supplier should intervention be allowed. Instead of advancing United States

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32/ Petition at 13.

interests, such unnecessary delay would seriously hinder progress in achieving them.

III. The Petition to Intervene and Request for Public Hearing is Not Timely

Because of the need to assure prospective recipient countries that adhere to effective non-proliferation policies of the United States' ability reliably to supply nuclear items, the Congress mandated expeditious procedures for the processing of export licenses. Thus, the NNPA refers to the need for "timely processing of requests" 33/ and the "timely basis" 34/ on which the Commission shall act in authorizing export licenses. In keeping with this mandate for expeditious review, the Commission established time limits for the filing of petitions for leave to intervene and requests for hearings. Accordingly, 10 CRF § 110.82(c) states that "hearing requests and intervention petitions will be consider d timely only of filed not later than. . .thirty days after notice of receipt in the Federal Register." (Emphasis added.)

33/ NNPA § 2(b).

34/ NNPA § 101; AEA § 126 b.(1).

The Commission published notice in the Federal Register of receipt of Westinghouse Electric Corporation's application for nuclear export licenses to South Korea on February 29, 1979.[35] Petitioner did not file its petition to intervene and request for hearing until June 13, 1980. Petitioner's request is therefore over 14 months delinquent. Such tardy petitions cannot be allowed without damaging foreign perceptions of the United States' ability promptly to process export licenses. There must be a cut-off point after which petitions are not accepted, and clearly petitioner in this instance has overstepped such bounds by a wide margin.

Section 110.84(c) of 10 CFR grants the Commission discretion to deny untimely petitions unless "good cause for failure to file in time is established." In reviewing untimely petitions, section 110.84(c)(2) directs the Commission to consider the "extent to which the issues will be broadened or action on the application delayed."

Petitioner's sole excuse for failure to file on time is the "seriousness of three recent events" which cast "new light" on the applications.[36] Petitioner believes the disturbances in South Cholla province, the population statistics released by the State Department, and the news reports of South Korea's intent to purchase a reprocessing plant are changed circumstances newly warranting intervention. The

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[35] 44 Fed. Reg. 11,282 (1979).

[36] Petition at 6.

Commission should not allow any portion of this argument to justify a 14 month delay in filing.

The rioting in South Cholla province is not a matter within NRC export licensing jurisdiction. Moreover, we note that while South Korea has experienced repeated outbreaks of civil protest over the years, it has in the past been able to maintain control and restore order. The population statistics "released" by the State Department are contained in the concise environmental review prepared by the Executive Branch. There is nothing "new" in these figures; demographic statistics are continuously available from the proper sources. The sources relied on by petitioner as indicating an intent on the part of South Korea to purchase reprocessing facilities are each dated earlier than March 16, 1979.[37/] Thus, petitioner knew of these news reports within time to file a timely petition. The fear that France "again offered" South Korea reprocessing technology in April 1980 adds nothing new and should not be allowed to reopen the licensing proceedings to public hearing.

These purported new events clearly do not warrant waiving the time limit for petitions to intervene and requests for hearing. Clearly petitioner had its opportunity to seek intervention in 1979 and should not now be permitted further to delay an

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37/ Petition at 9.

already lagging proceeding. We believe any additional delay in this proceeding would seriously complicate United States relations with South Korea and hamper United States non-proliferation efforts.

IV. Petitioner Does Not Possess a Right to a Hearing

The Commission has discretion to afford a hearing to petitioner only if it finds that the statutory standards for a public hearing set by section 304(b)(2) of the Nuclear Non-Proliferation Act are met. Section 304(c) provides that the procedures established by the Commission to implement section 304(b)(2) shall constitute the exclusive basis for hearings in nuclear export licensing proceedings. Such procedures were promolgated in 10 CFR 110.80-126.

Petitioner cannot be "entitled" to a hearing. Section 304(c) of the Nuclear Non-Proliferation Act eliminated any such right in a nuclear export licensing proceeding based on section 189 a. of the Atomic Energy Act, and established that the exclusive basis for hearings in such a proceeding is the Commission procedures established pursuant to section 304(b). This section was intended to eliminate the need for complex standing arguments in export licensing proceedings, and instead establish by statute one simple criterion -- whether, in the Commission's judgment, public participation would be in the public interest, and assist the Commission in making its statutory determinations. The United States Court of Appeals

for the District of Columbia recognized this fact when it held that the precedential value of NRC orders on rights of persons to intervene had been eliminated, and that new NRC procedures would control hearing rights in future cases.[38] If assertions of interest continued to provide "standing" for hearings, the Court of Appeals would not have discarded all the NRC precedents on this issue.

Despite this legal situation, petitioner asserts, as a basis for obtaining a hearing under section 189 a., an "interest affected" by the licensing proceedings.[39] Even if this standard still applied, we do not believe petitioner has any such interest. The Commission, in its previous decisions, has consistently recognized the applicability in the administrative context of judicial rules on standing,[40] and petitioner has no such standing.

38/ Natural Resources Defense Council, Inc., v. United States Nuclear Regulatory Commission, 580 F.2d 698, 700 (1978).

39/ We note that under 10 CFR 110.34(b), petitioner may state any "interest" that is alleged to be affected by the export licensing proceeding. In view of the provisions of sections 304(b) and (c) of the NNPA, such interests are only relevant to the Commission's decision of whether to permit public participation if they bear on the issue of whether the participation would assist the Commission in making its statutory determinations and be in the public interest. However, it is difficult to conceive of a case in which an "interest" is "affected" but participation in the proceeding would not assist the Commission in making its statutory determination and be in the public interest. Such is clearly not the case here.

40/ See Edlow International Company, 3 NRC 563, at 569-70 (1979)

In its petition, CDP apparently asserts two kinds of interests which it claims afford it the right to intervention in the licensing proceedings: (1) protection of United States citizens stationed in the United States air force and army bases in Korea from the risks posed by the proposed nuclear reactors; (2) vindication of the American public's right to information regarding the proposed export.[41/]

A. Petitioner's General Institutional Interest Does Not Afford It the Right to a Hearing

Petitioner apparently claims to be representing the general interest of the American public to be informed about the Korean export license proceedings. In Sierra Club v. Morton, 405 U.S. 727 (1972), the Supreme Court addressed a simi[illegible]m. In a now famous passage, the Supreme Court found that the Sierra Club did not possess standing because "[A] mere interest in a problem, no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA (Administrative Procedure Act)."[42/] In the matter now before the Commission, petitioner seeks to

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41/ Petition at 2-6

42/ 405 US at 739.

invoke the formal administrative process of adjudication to gather and disseminate information regarding the proposed nuclear export license application.[43/] As the Commission responded in Edlow International Company, "Congress has provided expanded public access to information through the Freedom of Information Act, not through the adjudicatory hearing provisions of the Administrative Procedure Act."[44/] Denying the Sierra Club's claim to institutional standing, the NRC concluded that "petitioners must establish their standing in terms of the final result of the proceeding in which they wish to intervene -- grant or denial of the export license."[45/] Clearly, then, petitioner in the instant matter cannot claim standing from an asserted interest in vindicating the general public's right to information.

B. Petitioner's Claim to Represent United States Overseas Personnel Must Fail

Petitioner also asserts an interest in the safety of United States military and civilian personnel stationed in

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43/ Petition at 4, 15

44/ 3 NRC at 573.

45/ Id.

Korea who might be affected by an accident at either of the proposed nuclear reactors.[46] This is similar to, albeit it weaker than, the alternative interest asserted by petitioners in Edlow. In Edlow, the Sierra Club claimed that members of its organization living in India could be affected by mishaps at the proposed Tarapur nuclear power plant.[47] Discussing this issue, the Commission explained that a licensing proceeding "is not the proper forum for raising issues concerning the safe operation of a nuclear power plant operated by a sovereign foreign government, outside the territorial jurisdiction of this country and distant from our borders."[48] Citing the Supreme Court's denial of standing in Worth v. Seldin, 422 U.S. 490 (1975), the Commission found that Sierra Club lacked standing because it asserted "no more than a hypothetical and speculative 'generalized grievance' shared in every respect by the entire domestic population of the country."[49]

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[46] Petition at 4.

[47] 3 NRC at 574.

[48] 3 NRC at 575.

[49] 3 NRC at 576.

Petitioner here does not even have as much claim to standing as the Sierra Club in Edlow. There, the assertion by overseas members failed as a "hypothetical and speculative 'generalized grievance'". Here, the CDP does not claim that any of its members live in or near Korea. The CDP's interest in the safety of U.S. military and civilian personnel stationed in Korea is gratuitous.

V. Licensing Proceedings Cannot Accommodate Adjudicatory Hearings

Should the Commission nevertheless decide to allow a public hearing, the Executive Branch believes the appropriate format would be through submissions of written pleadings only, on an expedited basis. The petitioner's request for a trial type hearing "in which petitioner and all other interested parties will be able to present evidence and cross-examine adverse witnesses"[50/] would be most inappropriate in an export licensing proceeding, contrary to statutory intent and the Commission's regulations, and not in keeping with the public interest.[51/]

50/ Petition at 15.

51/ The procedures which the Commission may employ in a public hearing are set forth in 10 CRF 110, subparts i-k. The Commission's procedures provide for written or legislative type oral hearings, or a combination of the two. Both the law and the Commission's own procedures provide that these procedures constitute the "exclusive basis" for hearings in nuclear export licensing proceedings. NNPA § 304(b)(2); (footnote 51/ continued on next page)

VI. Conclusion

The law provides that the Commission may permit public participation where this will assist it in reaching its statutorily mandated determinations and be in the public interest. In the Department's view, for the reasons stated above, petitioner cannot so assist the Commission, and permitting this public participation would be adverse to the public interest. Moreover, petitioner does not have any "interest that may be affected" in this proceeding. The Department believes the request for public participation should be denied.

Ronald Bettauer

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Department of State

July 14, 1980

(Footnote 51/ continued from previous page)

10 CRF 110.80. The choice open to the Commission, if it determines to conduct a hearing on the substantive aspects of the instant petition, is thus to hold either a written hearing or a legislative type oral hearing or a combination of the two. A written hearing on an expedited schedule would be the most preferable format. Any substantive issues presented are primarily of a technical nature, which could most usefully be addressed in a written manner. The Department believes that oral argument would not provide the Commission information that could not be communicated equally well in writing. We believe oral argument would further exacerbate the undesirable consequences to United States foreign relations and non-proliferation policy of permitting this intervention or granting any hearing at all. (Cf. Edlow International Company, 3 NRC at 589-90.)

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NUCLEAR REGULATORY COMMISSION

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Certificate of Service

I hereby certify that copies of the "Response of the Department of State to Petition of the Center for Development Policy for Leave to Intervene and Request for Hearing" have been served on the following persons by deposit in the United States mail (first class), postage prepaid, or by messenger delivery, this 14th day of July 1980:

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