Sept 22, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

John F. Ahearne, Chairman
Victor Gilinsky
Joseph M. Hendrie
Peter A. Bradford

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In the Matter of WESTINGHOUSE ELECTRIC CORP. (Export to South Korea)	Application No. XR-133 Docket No. 110-00435

MEMORANDUM AND ORDER

CLI-80-30

For the reasons set forth in the Opinion of Chairman Ahearne and Commissioner Hendrie, the Commission has denied the "Petition for Leave to Intervene and Request for a Hearing" filed by the Center for Development Policy and the Friends of the Korean People challenging the issuance of License Application XR-133. That application covers the export of two reactors to South Korea. The Commission has also determined that License Application XR-133 meets all the applicable export licensing criteria set forth in the Atomic Energy Act of 1954, as amended, and directs the Assistant Director for Export-Import and International Safeguards, Office of International Programs, to issue the license to the Westinghouse Electric

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Corporation. Commissioner Gilinsky concurs in the result. For the reasons set forth in his opinion Commissioner Bradford dissents; his comments are attached. The separate opinon of Chairman Ahearne and Commissioner Hendrie is also attached.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 22d day of September 1980

OPINION OF CHAIRMAN AHEARNE AND COMMISSIONER HENDRIE

I. Background

On January 26, 1979, the Westinghouse Electric Corporation filed application No. XR-133 with the Commission seeking authorization to export two nuclear facilities (KNU-7 and KNU-8) to the Republic of South Korea. The Commission published a notice in the Federal Register of February 28, 1979, announcing receipt of this application and providing members of the public 30 days in which to file a petition seeking leave to intervene or requesting a public hearing. More than a year later on June 13, 1980, a "Petition for Leave to Intervene and Request for Hearing" was filed on behalf of the Center for Development Policy (CDP). On August 1, 1980 the Friends of the Korean People (FKP) filed a motion requesting that the CDP petition be amended to list it as a petitioner. Petitioners suggest that the Commission conduct public hearings, to be focused on eight issues: (1) the adequacy of the physical security measures applied in South Korea to withstand risks posed by civil war or open rebellion; (2) the nature and magnitude of risks and dangers posed by the population density around the reactor site; (3) the threat to U.S. nonproliferation objectives posed by any possible South Korea purchase of reprocessing technology; (4) the likely environmental impact of the proposed reactors and disposition of its spent fuel; (5) dangers to the health and safety of U.S. citizens stationed in South Korea; (6) dangers to the health and safety of South Korean citizens; (7) risks to the effective operation of U.S. military installations in South Korea; and (8) generic safety questions posed by all nuclear power plants and by Westinghouse reactors in particular.

The NRC staff, the State Department (speaking on behalf of the Executive Branch) and the applicant filed responses with the Commission recommending that

the petition be denied. The petitioners filed a reply to those submissions.

The NRC staff [1/] and the Executive Branch [2/] have also submitted documents to the Commission in which they conclude that the South Korean license applications meet all the applicable export licensing criteria and recommending that the Commission order issuance of the licenses. The Executive Branch submission included a "Concise Environmental Review of Korean Nuclear Units 7 and 8" prepared pursuant to E.O. 12114; the staff submission included an "Office of Nuclear Reactor Regulation Staff Evaluation of the Potential Radiological Impact on the Global Commons of the Export of Korean Nuclear Units 7 and 8".

II. The Hearing Request

(a) Timeliness

We would deny the hearing request in part because it is untimely. Under the Commission's regulations 10 CFR 110.82(c)(1), intervention petitions and requests for hearings must be filed within thirty days after the application is noticed in the Federal Register. Petitioners' request comes more than one year late. The regulations provide however that untimely motions may be granted for good cause. In passing upon an untimely hearing request the Commission also considers the availability of other means by which the petitioners interests will be protected or represented by other participants in the hearing, and the extent to which the issues will be broadened or action delayed on the application as a result of granting the hearing request. 10 CFR 110.84(c).

1/ Memorandum to the Commissioners from James R. Shea, Director, Office of International Programs dated July 21, 1980, SECY-80-336 (classified).

2/ Memorandum for James R. Shea from Louis V. Nosenzo, Deputy Assistant Secretary of State, dated May 6, 1980.

Petitioners argue that good cause exists for the late filing in view of the following alleged changes in the circumstances affecting the pending licenses: (a) the recent rebellion in the South Cholla Province raises issues regarding physical security measures to be applied at the facility; (b) recently released population statistics raise questions about site suitability; and (c) that there is press speculation that South Korea is considering the purchase of a reprocessing facility from France. We find these arguments unpersuasive. Before the South Cholla Province disturbances, the South Korean Government had assured the United States that it would provide adequate physical security at all of its nuclear facilities. Pursuant to 10 CFR 110.43 South Korea had informed the United States that its physical security measures at a minimum will be equivalent to those set forth in INFCIRC 225 Rev. 1. 3/ The NRC staff has reviewed the physical security measures applied to South Korean nuclear facilities and has concluded that they meet the requirements set forth in the Atomic Energy Act and the Commission's implementing regulations. 4/

With respect to petitioners' allegations that South Korea may be considering purchasing a reprocessing plant, the Executive Branch has advised the NRC that it is unaware of any information supporting recent press speculation that France has renewed its offer of a reprocessing plant to South Korea.

With respect to the third issue of population density, the Commission stated in its recently issued Philippine export licensing opinion, Westinghouse Electric Corporation, CLI-80-14 and CLI-80-15, 11 NRC 631, 11 NRC 672

3/ Letter from Kyung-Mok Cho, Scientific Attache, Embassy of the Republic of Korea, Washington, D.C., to Vance Hudgins, Assistant Director for Politico-Military Security Affairs, Division of International Security Affairs, U.S. Department of Energy, dated November 21, 1978.

4/ See Section 127(3) of the Atomic Energy Act and 10 CFR 110.43.

(May 6, 1980) that the Commission does not evaluate site suitability issues in reaching its export licensing determinations. Consideration of this matter would broaden the issues to include those beyond the Commission's jurisdiction and could substantially delay action on the application.

In sum, we cannot find that good cause exists for granting the late intervention petition and hearing request. In addition, to grant the petition would broaden the issues and substantially delay action on the application. Therefore, we find the request to be untimely.

(b) Hearing as a Matter of Right

CDP is a project of The International Center, a District of Columbia nonprofit corporation. The functions of CDP are to "[monitor] the flow of resources to developing nations," conduct research and analysis of development policies and their implementation, and disseminate the results to the public and public officials. "Petition for Leave to Intervene and Request for Hearing", p. 2. FKP is a nonprofit charitable and educational corporation, headquartered in Geneva, New York, which publishes a newsletter, "Monthly Review of Korean Affairs," with a circulation of over 4000 throughout the United States. Since neither petitioner asserts it is a membership organization, it must be assumed that the interests petitioners represent are those of the institutions and not the interests of members.

Two basic interests appear to be asserted here by CDP: (1) preserving the common defense and security of the United States and South Korea by protecting the continued operation of U.S. military bases from the risks posed by the proposed nuclear reactors, and (2) assuring that the American public is informed regarding the proposed reactor export. FKP's interests are (1) to promote

friendship between the Korean and American people, and (2) to inform the Korean government and its citizens of the attendant risks and hazards of the proposed project. The NRC Staff, Westinghouse Electric Corporation, and the Department of State have filed answers with the Commission stating that these interests are not sufficient to confer standing upon petitioners.

Any right the petitioners may have to intervene must be based on Section 189a. of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239. That Section provides that the Commission must grant a hearing on the request of any person "whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." The petitioners, to establish a right to intervene, must show they have standing, i.e. an "affected interest."

The Commission, in Edlow International [5/] and later in Exxon Nuclear Co., [6/] addressed extensively the issue of standing in export licensing matters. In Edlow International, the Commission stated that it would rely on judicial precedents in deciding issues of standing to intervene in export license proceedings and that more expansive rules of standing "would be undesirable". 3 NRC at 569, 570. In its most recent important opinion on the subject, the Supreme Court set out its two part test for determining whether a person has standing to obtain judicial review: 1) an "injury in fact" must be alleged, and 2) the claimed injury must be fairly traceable to the challenged agency action. Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72.

5/ On appeal, the court of appeals declined on the ground of mootness to review the Commission's treatment of intervenor standing. Natural Resources Defense Council v. NRC, 580 F.2d 698 (D.C. Cir. 1978).

6/ Edlow International Company, CLI-76-6, 3 NRC 563, Exxon Nuclear Company, Inc. (Ten Applications for Low Enriched Uranium Exports to Euratom Member Nations), CLI-77-24, 6 NRC 525.

In developing the "injury in fact" requirement, the Court has held that an organization's 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 for standing to obtain judicial review. Sierra Club v. Morton, 405 U.S. 727, 739 (1972). The organization seeking relief must allege that it will suffer some threatened or actual injury resulting from the agency action. Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973); Warth v. Seldin, 422 U.S. 490, 499 (1975). Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 40 (1976), made clear that "an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury, required by Article III."

In applying the "injury in fact" test, the Commission has recognized that:

> a claim will not normally be entertained if the 'asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens ....' Warth v. Seldin, 422 U.S. at 499. Thus, even if there is a generalized asserted harm, the Petitioners must still show a distinct and palpable harm to them. Id. at 501. Exxon Nuclear Co., supra, 6 NRC at 531.

The second element of the test for standing is the existence of a causal link between the challenged agency action and the alleged injury. Duke Power Co., 438 U.S. at 72, 74; Exxon Nuclear Co., 6 NRC at 531-532. It is a minimum requirement of Article III that the injury must be fairly traceable to the challenged action, "or put otherwise, that the exercise of the Court's remedial powers would redress the claimed injuries." Duke Power Co., 438 U.S. at 74, citing to Simon, 426 U.S. at 41, 43. The asserted injury must be shown to be "the consequence of the defendents' actions, or that the prospective relief will remove the harm." Id., 426 U.S. at 45, citing Warth, 422 U.S. at

505. The Court's most recent cases have required no more than "a showing that there is a 'substantial likelihood' that the relief requested will redress the injury claimed to satisfy the second prong of the constitutional standing requirement." Duke Power Co., 438 U.S. at 75, note 20.

We find that the petitioners have not asserted the requisite 'affected interest" or "injury in fact" which would entitle them to a hearing as a matter of right. As mentioned earlier, the petitioners have not alleged any injury to members or asserted any affected interest of individual members. As discussed above, the institutional interests of the petitioner organizations must extend beyond a mere generalized or abstract interest in the proceedings to confer standing. The interests asserted here by petitioners fall into three groups, none of which constitutes any threatened or actual injury to petitioners.

Both CDP and FKP assert interests in informing the American and Korean public of the dangers posed by the proposed reactor export. In Edlow International, 3 NRC at 572-574, the Commission found that the institutional interests in disseminating information and educating the public asserted by the petitioners there did not establish a claim of right under Section 189a. of the Atomic Energy Act because it did not constitute an "interest [which] may be affected by the proceeding." The Commission noted that there are many other means for the petitioners to obtain the desired information including examination of the files of NRC's Public Document Room and through requests under the Freedom of Information Act. There was found to be "no causal nexus ... between failure to grant petitioner's request to participate ... and any possible impairment of these organizations' ability to conduct an active and useful educational program for their members or the public." Edlow, 3 NRC at 573-574. The interests asserted by the petitioners here similarly do not constitute "injury in fact".

The second interest asserted by the petitioners is CDP's interest to protect the continued operation of U.S. military bases from the risks posed by the proposed reactors in order to preserve the common defense and security of the United States and South Korea. This interest in the safety of U.S. military and civilian personnel stationed in South Korea does not constitute any "threatened or actual injury-in-fact" to CDP. Furthermore, a private organization's interest in the common defense and security of the U.S. and South Korea is a generalized grievance, based upon the remote threat of an unparticularized harm, and as such is insufficient to confer a right to intervene. Moreover, the Commission held in Westinghouse Electric, supra, that it would not consider impacts on U.S. military interests abroad in making its export licensing determinations. Intervention may not be based on claims pertaining to matters that are beyond the scope of this proceeding. Babcock & Wilcox (Export of a Facility to West Germany), CLI-77-18, 5 NRC 1332, 1348.

A final interest, asserted by petitioner FKP, is that of promoting friendship between the Korean and American people. With respect to this abstract concern or goal the present proceeding does not present the kind of concrete injury, actual or threatened to FKP which would confer standing to intervene in agency proceedings. In conclusion, the petitioners have failed to establish the requisite "interest [which] may be affected by the proceeding," and are not entitled to a hearing as a matter of right under Section 189(a) of the Atomic Energy Act. 7/

7/ Petitioner CDP, in its Consolidated Reply, August 1, 1980, claims that Executive Order 12114 (January 9, 1979) confers CDP standing to intervene to protect its environmental interests (p. 7 of Reply). However, Section 2-5(v) of the Order specifically exempts NRC export licensing decisions from its provisions. See Westinghouse Electric Corporation (Exports to the Philippines), CLI-80-14, 11 NRC 631, 643 (Opinion of Commissioners Kennedy and Hendrie).

Because petitioners have not established the first element of the standing requirement, i.e. establishing injury in fact, the second prong as to whether the relief sought is likely to redress the injury need not be considered here.

(c) Discretionary Hearing

Even though petitioners are not entitled to a hearing as a matter of right the Commission can order a public hearing if it determines that a hearing would be in the public interest and would assist the Commission in making the statutory determinations required by the Atomic Energy Act, 10 CFR 110.84(a). We are unable to make such a determination in this case.

Four of the issues raised by petitioners pertain to matters which the Commission has stated it will not consider in making its export licensing determinations. These are: (1) risks posed by the population density around the reactor site; (2) dangers to U.S. citizens residing in Korea; (3) dangers to the health and safety of Korean citizens; and (4) impacts on U.S. military installations in Korea. 8/ The export licensing process is also an inappropriate forum to consider generic safety questions posed by nuclear power plants, including Westinghouse reactors. Under the Atomic Energy Act, as amended by the Nuclear Non-Proliferation Act of 1978, the Commission in making its export licensing determinations focuses on non-proliferation and safeguards concerns, and not on foreign health and safety matters. 9/

8/ Westinghouse Electric Corporation, CLI-80-15, 11 NRC 672 (May 6, 1980).

9/ Westinghouse Electric Corporation, CLI-80-14, 11 NRC at 646 (Opinion of Commissioners Kennedy and Hendrie); Id. at 663-664 (Opinion of Commissioner Gilinsky).

The other three issues raised by the petitioners -- (1) the adequacy of the physical security measures to be implemented at the reactor site; (2) the threat to U.S. non-proliferation objectives if South Korea were to purchase reprocessing technology; and (3) the likely environmental impacts of the proposed reactors and disposition of its spent fuel upon the global commons and U.S. territory -- pertain to matters which the Commission considers in making its export licensing determinations. However, on the basis of petitioners' submissions in this proceeding, we do not believe that if public hearings were held petitioners are likely to present significant new information or analysis to the Commission. There is no indication in their pleadings that petitioners possess special expertise in the matters they raise, or information not presently available to the Commission. In fact, petitioners request that the Commission make available to them information on the issues they raise and then afford them an opportunity to comment on that information. We have no basis for concluding that such an effort would result in development of significant new insights or a more comprehensive analysis of the issues than that already submitted to the Commission by the NRC staff and the Executive Branch.

In the absence of evidence that a hearing would generate significant new information or analyses, a public hearing would be inconsistent with one of the primary purposes of the Nuclear Non-Proliferation Act -- that United States government agencies act in a manner which will enhance this nation's reputation as a reliable supplier of nuclear materials to nations which adhere to our non-proliferation standards by acting upon export license applications in a timely fashion. 10/ A hearing would delay the Commission's decision by several months.

10/ See Section 2(b) of the Nuclear Non-Proliferation Act, 22 U.S.C. 3201(b).

Therefore, we conclude that a public hearing would not be in the public interest or assist the Commission in making its statutory determinations.

IV. The South Korean Export License Application

Section 127 of the Atomic Energy Act sets forth six specific criteria to be applied to proposed U.S. reactor exports. These criteria require certain nonproliferation and safeguards assurances from the recipient country. It is our view that the South Korean Government has provided the United States adequate assurance that: (1) IAEA safeguards will be applied to the exported equipment; 11/ (2) the reactor and special nuclear material produced through the use of the reactor will not be used for any nuclear explosive device; 12/ (3) that adequate physical security measures will be maintained at the facility; 13/ (4) that the reactor and any special nuclear material produced through the use of the reactor will not be transferred to the jurisdiction of any other nation or group of nations unless the prior approval of the United States has been obtained; 14/ (5) no special nuclear material produced through the use of a U.S. supplied reactor shall be reprocessed or

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11/ South Korea is a Party to the Treaty on the Nonproliferation of Nuclear Weapons (NPT) depositing its instrument of ratification on April 23, 1975. Under Article III(1) of the NPT, all nuclear facilities in South Korea must be placed under IAEA safeguards.

12/ By ratifying the NPT, the Government of South Korea committed itself not to use or develop nuclear explosive devices for any purpose.

13/ As noted supra at p. 3, South Koreans have given the United States the physical security assurances required by 10 CFR 110.43.

14/ This requirement is satisfied by Articles X(3) and VIII(E) of the Agreement for Cooperation between the Government of the United States of America and the Government of Korea Concerning Civil Uses of Atomic Energy which entered into force on March 19, 1973, TIAS 7583 and controls the United States has over reprocessing of U.S. supplied material.

otherwise altered in form or content unless the prior approval of the United States has been obtained; [15] and (6) no sensitive technology shall be exported unless the foregoing five criteria are applied to the export. [16]

Section 128 of the Atomic Energy Act which became fully effective March 10, 1980, imposes the additional requirement that the United States has adequate assurance that IAEA safeguards are being maintained with respect to all nuclear installations in the recipient country. [17] South Korea, by ratifying the NPT, has agreed to place all nuclear installations in that country under IAEA safeguards, satisfying the Section 128 requirement.

The Commission before issuing the license must determine, pursuant to Section 103(d) of the Atomic Energy Act, that the reactor export is not inimical to the common defense and security of the United States or to the health and safety of the public. In the present case both the Executive Branch and NRC staff have expressed the view that this requirement is met. After reviewing those submissions we have concluded that the export would not be inimical to the common defense and security of the United States or to the public health and safety of the United States. In making our judgment we have taken into account recent events in South Korea, including the change of govermental leadership. The effect of a change in a recipient nation's government on the continued effectiveness of non-proliferation assurances required for approval of nuclear export licenses is the kind of

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[15] Article VIII(C) of the Agreement for Cooperation satisfies this requirement.

[16] The proposed export does not involve the transfer of sensitive nuclear technology. Therefore criterion 6 is not applicable here.

[17] This requirement applies only to non-nuclear weapons states as defined in the NPT.

foreign policy issue on which the Commission has consistently deferred to the judgment of Executive Branch agencies. 18/ We find no reason to differ with the view expressed in this proceeding by the Department of State that South Korea's non-proliferation policies have not changed as a result of recent internal political developments.

18/ Westinghouse Electric Corporation (Export of a Reactor to Spain), CLI-76-9, 3 NRC 739, 755, 756 (1976); Babcock and Wilcox (Export of a Reactor to West Germany), CLI-77-18, 5 NRC 1332, 1349 (1977).

DISSENTING OPINION OF COMMISSIONER BRADFORD

For reasons set forth in my Philippine opinion,* I think that a more extensive review is needed to support this result. This conclusion would be true of any reactor export and reflects no special concern with these reactors or this country.

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* Westinghouse Electric Corporation, CLI-80-14, 11 NRC 631, 666 (1980).