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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:
Kenneth C. Rogers
Forrest J. Remick
E. Gail de Planque

In the Matter of WESTINGHOUSE ELECTRIC CORPORATION (Nuclear Fuel Export License For Czech Republic--Temelin Nuclear Power Plants	Docket No. 11004699 Application No. XSNM02785

MEMORANDUM AND ORDER
CLI-94-07

I. INTRODUCTION

By today's Memorandum and Order, we[1] deny the petition jointly filed by the Natural Resources Defense Council, Friends of the Earth, Hnuti Duha, and Global 2000 ("NRDC"), as well as those of Greenpeace Austria and Oberösterreichische Plattform gegen Atomgefahr ("OPGA"), for leave to intervene and for a hearing on the license application filed by Westinghouse Electric Corporation ("Westinghouse" or "applicant") to export nuclear fuel to the Czech Republic for use in the nuclear facility at Temelin. As petitioners themselves concede, their petitions were not timely filed, and we have not found good cause or any other justification to warrant overlooking their lateness. Moreover,

[1]Chairman Selin recused himself from participating in this matter in a Memorandum he issued on April 26, 1994.

petitioners lack standing and therefore have not established any right to a hearing. Finally, a discretionary hearing would not be in the public interest.

II. BACKGROUND

Petitioners are challenging the proposed export of the first reactor fuel load for the Temelin reactors. Temelin Units 1 and 2 are nuclear power reactors in the advanced stages of construction of the VVER-1000 type designed in the former Soviet Union. The project is located in South Bohemia, approximately 60 miles south of the Czech capital, Prague, and within 125 miles of the Austrian capital, Vienna.

On December 1, 1993, Westinghouse filed an application for a license to export 342,000 kilograms of low-enriched uranium for use as fuel in the two nuclear reactors.[2] A copy of Westinghouse's fuel export application, designated as License Application No. XSNM02785, was placed in the Commission's Public Document Room on December 20, 1993. Pursuant to 10 C.F.R. § 110.82(c)(2), intervention and hearing petitions upon the application were due within 15 days thereafter.

On March 17, 1994, NRDC filed a petition to intervene and request for hearing on Westinghouse's fuel export application.[3] NRDC asserts that it seeks intervention because "the public

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[2] Previously, the Commission had issued two other licenses to Westinghouse, XCOM1078 and XCOM1082, authorizing the export of components for the Temelin reactors.

[3] "Petition for Intervention and Request for Hearing of the Natural Resources Defense Council, Friends of the Earth, Hnuti Duha, and Global 2000," dated March 17, 1994.

interest requires a hearing on the health, safety and environmental effects of the export of nuclear fuel to Temelin." NRDC Pet. at 6. Thereafter, the Commission received two undated petitions to intervene and requests for hearing incorporating by reference the NRDC petition, one from Greenpeace Austria on April 18, 1994 and the second from OPGA on April 29, 1994. Westinghouse filed timely answers to the petitions of the NRDC, Greenpeace Austria, and OPGA on April 20, April 25, and May 2, 1994, respectively. We received no reply from any of the petitioners to Westinghouse's answers.

III. TIMELINESS OF THE PETITIONS FOR LATE INTERVENTION

The Commission's regulations provide, in pertinent part, that hearing requests on applications to export nuclear fuel are to be filed within fifteen days after the application is placed in the Commission's Public Document Room. 10 C.F.R. § 110.82(c)(2). Here, intervention petitions and hearing requests regarding Westinghouse's fuel export licensing application were due on January 4, 1994. The petitions to intervene and hearing requests filed by NRDC, Greenpeace Austria, and OPGA are untimely, as they were not received until March 17, 1994, April 18, 1994, and April 29, 1994, respectively.

United States nonproliferation policy, which is set forth in the Nuclear Non-Proliferation Act of 1978 ("NNPA"), requires the Commission to act in a timely manner on export license applications to countries which meet our nonproliferation

requirements.[4] Indeed, Congress viewed timely action on export license applications as fundamental to achieving the nonproliferation goals underlying the NNPA. As Judge Wilkey noted in National Resources Defense Council, Inc. v. NRC, 647 F.2d 1345, 1360 (D.C. Cir. 1981) (quoting statement of House floor manager, 123 Cong.Rec. H9831 (daily ed. Sept. 22, 1977)):

> [The] NNPA was intended in part to remedy prior 'uncertainty as to what the U.S. nuclear export standards are' by 'establish[ing] consistent and effective criteria for the licensing of all U.S. exports and...procedures for prompt consideration of export applications [to] enhance our position as a reliable supplier of nuclear fuel to nations which share our antiproliferation policies.'

See also Westinghouse Electric Corp. (Export to South Korea), CLI-80-30, 12 NRC 253, 261 (1980). In light of this mandate, the Commission is reluctant to grant late hearing requests on export license applications.

10 C.F.R. 110.84(c) of the Commission's regulations sets forth the framework governing consideration of late-filed petitions in export license proceedings. Under that regulation, untimely hearing requests may be denied unless good cause for failure to file on time is established. In reviewing untimely requests, the Commission will also consider: (1) the availability of other means by which the petitioner's interest, if any, will

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[4] See, e.g., section 2(b) of the NNPA, 22 U.S.C. 3201 et. seq. and Section 126b.(1) of the Atomic Energy Act (AEA). See also AEA Section 126b.(2) (requiring Commission to specify in rules adopted under the NNPA that it shall "immediately initiate review of any [export] application," and generally providing for Executive Branch decision if the Commission fails to complete action on export application within 120 days).

be protected or represented by other participants in a hearing; and (2) the extent to which the issues will be broadened or action on the application delayed. The regulation further provides that the Commission will not act upon a hearing request until it has received the Executive Branch's views on the merits of the underlying application.

The factors considered by the Commission in acting upon untimely intervention and hearing requests in the export licensing context do not differ significantly from those considered in the domestic licensing context. Compare 10 C.F.R. § 2.714(a)(1)(i) - (v) (domestic licensing) with 10 C.F.R. § 110.84(c)(1) - (2) (export licensing). However, because of the NNPA mandate discussed above, it is particularly important that petitioners in the export licensing context demonstrate that the pertinent factors weigh in favor of granting an untimely petition.

We turn now to the first and principal test for late intervention: whether a petitioner has demonstrated "good cause" for filing late. In addressing the good cause factor, a petitioner must explain not only why it failed to file within the time required, but also why it did not file as soon thereafter as possible. See, e.g., State of New Jersey, CLI 93-25, 38 NRC 289, 295 (1993). Here, the untimely petitions to intervene fall well short of showing good cause.

Indeed, NRDC provided no explanation whatsoever why their petition was not or could not have been filed by January 4.

Greenpeace Austria and OPGA (who filed short, virtually identical petitions incorporating by reference the NRDC petition) noted only that they "did not learn until mid-March of 1994 that the Commission had received the instant export application from Westinghouse." Petitions at 2. Even if these petitioners did not learn about Westinghouse's application "until mid-March," they made no effort whatsoever to explain why, upon learning of Westinghouse's application, they waited over a month to file their very perfunctory petitions.

In these circumstances, the petitions fail the "good cause" test for late intervention. There is no reason apparent to us, and certainly no reason is offered in the petitions, why petitioners waited two months or more to request a hearing, in the face of an NRC regulation imposing a 15-day deadline and in view of a statutory scheme urging promptness on the agency.

Lacking a demonstration of good cause for lateness, a petitioner is bound to make a compelling showing that the remaining factors nevertheless weigh in favor of granting the late intervention and hearing request. See, e.g., State of New Jersey, CLI-93-25, 38 NRC at 296; Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610 (1988), aff'd sub nom, Citizens for Fair Utility Regulation v. NRC, 898 F.2d 51, 54 (5th Cir. 1990). As noted above, in the export licensing context the two remaining factors are: (1) the availability of other means by which the petitioner's interest, if any, will be protected or represented

by other participants in a hearing; and (2) the extent to which the issues will be broadened or action on the application delayed.

While we recognize that no one will represent the petitioners' perspective if the hearing requests are denied, this in itself is insufficient for us to excuse their untimeliness. See, e.g., State of New Jersey, CLI-93-25, 38 NRC at 296 (in totality of the surrounding circumstances, weight given to the "other means" factor is slight). Indeed, excusing untimeliness for every petitioner who meets only this factor would effectively negate any standards for untimely intervention in cases such as this where no one else has requested a hearing, since a late-filing petitioner could always maintain that there will be no hearing to protect its interest if intervention is denied.

We turn now to the final factor -- i.e., the potential for delay of action on the application. As previously noted, in light of the NNPA's directive for timely decisions on export license applications, this is an important factor in the Commission's analysis of late-filed petitions on such applications.

In attempting to justify why granting the late intervention and hearing request would not delay action on Westinghouse's application, petitioners rely heavily on the Commission's lack of authority to act on an export license application before it

receives the views of the Executive Branch.[5] Their main argument is in fact that the delay in filing the hearing requests did not prejudice anyone because the Commission had not yet received Executive Branch views. However, the Executive Branch notified the Commission by letter dated March 21, 1994 (i.e., just three days after the filing of the NRDC petition and before the filing of the petitions of Greenpeace Austria and OPGA) of its conclusion that Westinghouse's license application meets all of the applicable AEA export licensing criteria, and recommended that the Commission issue the requested export license to Westinghouse. Absent receipt of the untimely hearing petitions, the Commission would have acted on the application by late March 1994. Moreover, holding a hearing at this point, with the Executive Branch recommendation in our hand for two months would undoubtedly "broaden" the issues and substantially "delay" the Commission's final decision on the fuel export application.

In their only other defense of their untimely filings, petitioners refer us to Westinghouse Electric Corp. (Exports to the Philippines), CLI-80-14, 11 NRC 631 (1980) ("Westinghouse/Philippines"). That decision, however, nowhere

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[5] Section 126 of the AEA provides, inter alia, that no "license may be issued by the Nuclear Regulatory Commission...for the export of any production or utilization facility, or any source material or special nuclear material...until...the Commission has been notified by the Secretary of State that it is the judgment of the Executive Branch that the proposed export or exemption will not be inimical to the common defense and security, or that any export in the category to which the proposed export belongs would not be inimical to the common defense and security because it lacks significance for nuclear explosive purposes."

addresses the "timely filing" requirement. Petitioners assert that in Westinghouse/Philippines the Commission had entertained an intervention petition filed "29 months after the filing of the initial [reactor] export application...." and after the Executive Branch had already commented on the reactor export application. NRDC Pet. at 5.

Petitioners have apparently misunderstood the timeframes involved in the Westinghouse/Philippines export proceeding. Specifically, while it is true in Westinghouse/Philippines that the Executive Branch had already submitted its preliminary views to the Commission regarding the reactor export application when the late intervention petition was filed, the Commission had not yet, contrary to petitioners' implication, received the Executive Branch's final views on the reactor export application at the time the late intervention petition was filed. Rather, the Executive Branch's final views were not received by the Commission until approximately six months after the filing of the late intervention petition. See 11 NRC at 632-34. Thus, in contrast to the instant request from NRDC, the potential for delay involved in granting the Westinghouse/Philippines late-filed petition was much less.[6]

Finally, while the circumstances of the Westinghouse/Philippines case may have justified a grant of late intervention, the Commission has made clear elsewhere that it

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[6] The other petitioners here stand on an even weaker footing since their petitions were not filed until after the Executive Branch's views had been received.

looks with particular disfavor upon untimely filed petitions in the export licensing context. See Westinghouse Electric Corp. (South Korea), CLI-80-30, 12 NRC at 256-57 (denying as untimely a late intervention and hearing request filed after the Executive Branch's views had been received). Where, as here, there has been no showing of good cause for the untimeliness of an intervention or hearing request, the Commission concludes that denial of the request is the appropriate action.

IV. STANDING

In addition to finding, as described in the previous section of this memorandum, that petitioners' hearing request must be dismissed as untimely, we find that petitioners lack standing. As they frankly acknowledge, the relief they seek is to prevent the Temelin nuclear plant from going into operation. This is simply not a remedy that the Commission is empowered to grant, nor is it even a goal that would be advanced significantly by a Commission decision to deny the fuel export now before us. Petitioners therefore fail the test of "redressability," which, as a line of Supreme Court cases makes clear, is an essential element of standing.[7] See, e.g., Allen v. Wright, 468 U.S. 737 (1984); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). The Commission, throughout its history, has applied judicial standing tests to its export licensing

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[7] Petitioners may also lack standing on other grounds. However, in view of our finding on "redressability", we need not explore other aspects of standing.

proceedings. Edlow International Company, CLI-76-6, 3 NRC 563, 569-570 (1976).

The standing doctrine's requirement that petitioners not only allege actual injury, "fairly traceable" to the defendants' actions, but also show that this injury would likely be "redressed" if petitioners obtain the relief requested, is grounded in the provision in Article III of the Constitution that limits jurisdiction to "cases and controversies." See Lujan v. Defenders of Wildlife, ___ U.S. ____, 112 S.Ct. 2130, 2136 (1992). Standing is not a mere legal technicality, it is in fact an essential element in determining whether there is any legitimate role for a court or an agency adjudicatory body in dealing with a particular grievance. See generally Edlow International Co., CLI-76-6, 3 NRC at 568-572. Where the injury alleged does not stem directly from the challenged governmental action, but instead involves predicting the actions of third parties not before the court, the difficulty of showing redressability is particularly great. See Allen v. Wright, supra, 468 U.S. at 759.

Applying the redressability test to the petitions before us, we must ask whether denial of the particular fuel export license application now before the NRC would be likely to prevent operation of the Temelin plant and thus avert the harm that petitioners allege. The answer is that there is no reason to believe that denial of this license would have any effect whatsoever on whether Temelin goes into operation. It is

petitioners' burden to demonstrate that the relief they seek will likely redress their grievance, Temelin's operation. Petitioners have not made the slightest effort to meet that burden. See Lujan v. Defenders of Wildlife, ___U.S. ___, 112 S. Ct. at 2136-37.

The matter before us, it should be emphasized, is an export license application for nuclear fuel, not for a reactor. Such fuel is not a United States monopoly. If it were, it might be possible to argue that NRC denial of fuel exports would block the operation of Temelin. But that is not the case. In reality, a number of nations export nuclear fuel which could be used in the Temelin reactor.[8] See e.g. "Fuel Review 1993", Nuclear Engineering International, September 1993, at 18-24.

The decision to complete the Temelin reactor and operate it, using nuclear fuel obtained on the international market, was and is entirely in the hands of another sovereign nation, the Czech Republic. The NRC has no authority to approve or disapprove Temelin's operation. The Czech Government, which has expended large sums to construct the plant, has made clear that it is committed to operating it, and it is the Commission's view that withholding of nuclear fuel export licenses by the NRC would not prevent it from doing so. Accordingly, petitioners have failed

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[8] It might conceivably be argued that a United States decision not to export fuel to Temelin would assist the petitioners in persuading every other country that exports nuclear fuel to follow suit. Such a result is too speculative, and dependent on the unpredictable actions of numerous third parties, to suffice as a basis for meeting the test of redressability.

to demonstrate that the injury they claim will be redressed by the NRC action they seek, and therefore they lack standing.

A recent Supreme Court case, Lujan v. Defenders of Wildlife, supra, discussed the redressability aspect of standing in a factual setting similar to ours. There, members of an environmental group asserted that a project in Sri Lanka, funded in part by the Agency for International Development, would jeopardize endangered species of particular importance to members of the group. A four-justice plurality of the Court, relying on prior Supreme Court cases, found that the environmental group had failed to meet the test of redressability.[9] AID, the Justices observed, provided less than 10% of the funding of the project, and the environmental plaintiffs had "produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated." 112 S.Ct. at 2142. The plurality added that "it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve." Id. In other words, the alleged harm, if it occurred, would not be the result of U.S. action but rather of the Sri Lankan Government's decision to undertake the project,

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[9] Three Justices disagreed with the plurality on the issue of redressability. Two others, having decided on other grounds that the plaintiffs lacked standing, did not reach the redressability issue.

and plaintiffs had failed to show that Sri Lanka would abandon the project if U.S. support were denied.[10]

The same analysis applies here. The Czech Republic, not the NRC, has the authority to decide whether to operate Temelin. If public hearings were held that led to an American decision not to export fuel to Temelin, operation of the reactor would not be prevented. The decision whether to operate the reactors is a decision that only an independent third party, the Czech Republic, can make.

V. DISCRETIONARY HEARING

The Commission's regulations provide that, if petitioners are not entitled to a hearing under Section 189a. of the Atomic Energy Act as a matter of right because of a lack of standing, the Commission will nevertheless consider whether such a hearing would be in the public interest and assist the Commission in making the statutory determinations required by the AEA. 10 C.F.R. § 110.84(a)(1). Regarding this discretionary hearing provision, the Commission has made clear that:

> [i]n 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.

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[10] In a footnote, also possibly relevant to the present case, the Justices added that evidence suggested that the U.S. role in the project would be to mitigate the feared harm to wildlife, "which means that termination of AID funding would exacerbate respondent's claimed injury." Id., n. 6.

Westinghouse Electric Corp.(South Korea), CLI-80-30, 12 NRC at 261.

Here, petitioners assert that they are requesting a hearing in light of their "recent" discovery of certain documents regarding the Temelin project which purportedly "raise substantial questions about whether the Temelin plant is being or can be upgraded to meet generally-recognized safety standards." NRDC Pet. at 6. Petitioners state that "these and related documents" have been "analyzed at length" by "Technical Advisors to the Special Delegation of the Austrian Government to the United States," and refer us to a series of attachments to their pleading consisting of letters and documentation previously filed with the Export-Import Bank of the United States in a loan proceeding concerning the Temelin project. The only remaining "evidence" referenced in petitioners' submissions consists of various press statements and magazine article references which purportedly also raise concerns about the safety of the Temelin plant.

Even assuming that the health and safety-related issues raised by petitioners are matters which the Commission considers in making its export licensing determinations, [11] we cannot conclude from petitioners' submissions that they would offer anything in a hearing that will generate significant new information or insight about Westinghouse's current fuel export

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[11] Petitioners themselves acknowledge, however, that this is contrary to longstanding precedent. See generally Westinghouse Electric Corp. (Philippines), CLI-80-14, supra.

application.[12] On the contrary, the submissions reflect that petitioners would not offer any information or documentation in a hearing that is not already readily available to the Commission. In particular, the so-called "new evidence" that provides the framework for petitioners' hearing request consists of documents prepared by third parties that have already been in the public domain for some time -- namely, three reports regarding the Temelin project issued by the International Atomic Energy Agency dating back to 1990 and 1992, and a 1992 audit report of the Temelin site issued by Halliburton NUS, an independent contractor. Moreover, given the redressability problem discussed above, it is far from clear that any new information that would be produced at a hearing would result in the remedy petitioners seek--prevention of operation.

In sum, we conclude that a public hearing would not be in the public interest or assist the Commission in making its statutory determinations. It would only further delay the decisionmaking process without any clear public benefit and undermine this country's role as a reliable supplier of nuclear materials to countries which do not pose nonproliferation risks.

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[12] Again, we note the documents cited by petitioners address safe operation of the Temelin reactors, rather than issues bearing on the fuel export application pending before the Commission.

VI. CONCLUSION

For the reasons outlined earlier in this decision, we have decided this case on two independent procedural grounds, finding both a lack of timeliness and a lack of standing. We therefore do not reach the merits of their substantive claims. We thus have no occasion to decide whether, as petitioners claim, operating the Temelin plant poses grave hazards or, on the contrary, as the supporters of the Temelin project maintain, represents a major step in averting hazards in Eastern Europe through the use of technology purchased from the United States to upgrade to acceptable levels the safety and environmental acceptability of nuclear reactors in the former Soviet bloc. These are important questions, but they are not appropriate for an adjudicatory decision by this Commission, in the context of ruling on this application for a license to export nuclear fuel.

It is so ORDERED.

For the Commission

John C. Hoyle
Acting Secretary of the
Commission

Dated at Rockville, Maryland,
this 9th day of June, 1994.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of WESTINGHOUSE ELECTRIC CORPORATION (Nuclear Fuel Export License For Czech Republic - Temelin Nuclear...)	Docket No.(s) 110-04699

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM M&O (CLI-94-7)--6/9/94 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
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