

THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

SERVED 03/29/07

Dale E. Klein, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of)
)
CBS CORPORATION)
)
)
(Waltz Mill Facility))
_____)

Docket No. 70-00698

CLI-07-15

MEMORANDUM AND ORDER

I. INTRODUCTION

By this Order, we hold in abeyance a request for a hearing by CBS Corporation (CBS) on the NRC Staff's denial of CBS's¹ application for a declaratory order regarding NRC materials

¹"CBS" in this Memorandum and Order refers to CBS and all its corporate predecessors both prior and subsequent to the execution of the commercial agreement entered into between CBS and Westinghouse in March 1999 at the Waltz Mill site southwest of Pittsburgh (the primary corporate predecessor of CBS was Westinghouse Electric Corporation). However, the "Westinghouse" referred to throughout this Memorandum and Order is Westinghouse Electric Company LLC, the claimant in the commercial dispute and holder of the materials license.

License No. SNM-770, NRC Docket No. 070-00698 or, in the alternative, for an amendment to the license. The declaratory order and alternative license amendment proposals involved efforts by CBS to relax cleanup standards in the materials license held by Westinghouse Electric Company LLC (Westinghouse), not CBS, at an 85-acre site southeast of Pittsburgh, Pennsylvania known as Waltz Mill. The NRC Staff denied CBS's request on August 9, 2006 because CBS is not the holder of the materials license. The Staff concluded that CBS could not properly apply for an amendment to someone else's license.

In the same letter denying CBS's request, the NRC Staff also acknowledged receipt of CBS's "Application to Amend TR-2 Final Decommission Plan, Rev. No. 1 NRC Docket No. 50-22", the decommissioning plan for the retired test reactor facility on the Waltz Mill site. CBS is

CBS Corporation is primarily a media conglomerate that became involved at the Waltz Mill site in December 1997 when Westinghouse Electric Corporation (not the Westinghouse Electric Company LLC currently involved in this dispute) acquired CBS, resulting in Westinghouse Electric Corporation changing its corporate name to CBS Corporation. Prior to the December 1997 corporate name change, both the test reactor license and the materials license had been held by one licensee, Westinghouse Electric Corporation. However, on January 23, 1998, the name on the SNM-770 materials license became "Westinghouse Electric Company, a division of CBS Corporation" until March 1, 1999, when it was changed to Westinghouse Electric Company LLC. The name on the retired test reactor license, effective July 31, 1998, became "CBS Corporation Acting Through Its Westinghouse Electric Company Division" and was shortened to "CBS Corporation" on March 25, 1999 when CBS entered an agreement for the sale of its commercial nuclear business to a consortium composed of British Nuclear Fuels Ltd. and Morris Knudsen Corporation (hereinafter referred to as BNFL). CBS retained the test reactor license; BNFL created a new subsidiary, calling it the Westinghouse Electric Company LLC. (BNFL recently sold its business to Toshiba, effective October 2006. However, the name that has appeared on the NRC materials license since March 1999 is Westinghouse Electric Company LLC).

As a result of restructuring, Viacom, Inc. replaced CBS as the holder of the test reactor license in 2000. Subsequently, Viacom was restructured, with some assets transferred to a new publicly traded entity referred to as the New Viacom, while other assets - including the retired test reactor facility - became part of the new publicly traded entity, CBS. In January of 2006, the NRC received a license amendment request from Viacom to change the name on the test reactor license back to CBS to reflect the restructuring changes. Although the NRC Staff has not taken action on the amendment request, the current submissions from each entity involved in this Waltz Mill dispute identify CBS, not Viacom, as the current Waltz Mill test reactor license holder.

the licensee for the retired test reactor facility at Waltz Mill. The NRC Staff is now reviewing whether CBS's license amendment application regarding its own Decommissioning Plan, which incorporates the cleanup criteria that were approved by NRC and made part of Westinghouse's materials license, is complete and acceptable for docketing.

CBS and Westinghouse are two adversarial licensees embroiled in a commercial dispute at Waltz Mill. The dispute centers on the completion of decommissioning of CBS's retired test reactor facility and the remediation of radiological contamination in other facilities, soils and groundwater at Waltz Mill. The commercial dispute is currently before an American Arbitration Association Panel (Arbitration Panel), consisting of the Honorable Patricia M. Wald, Gerald Charnoff, Esq., and the Honorable Steven S. Honigman.

II. BACKGROUND

For a complete factual background on the complicated procedural history of this commercial dispute that ultimately brought the remediation criteria question before the Arbitration Panel and the Commission, we rely on the Initial Arbitration Opinion and Order issued on September 14, 2004, by the Arbitration Panel, summarized below. See *Initial Arbitration Opinion and Order*, Westinghouse Electric Company LLC, claimant and Viacom (now CBS), Respondent, September 14, 2004 (ML062850506); see also Footnote 1 *supra* for the pertinent history of test reactor and materials license holders at Waltz Mill.

In the 1950s Westinghouse Electric Corporation was licensed by the Atomic Energy Commission (AEC) to build and operate a nuclear test reactor on the Waltz Mill site under an AEC-issued test reactor license, known as the TR-2 license. A test reactor accident significantly contaminated portions of the Waltz Mill site in 1960, resulting in the shutdown of the test reactor in 1962. The next year, the AEC amended the test reactor license to authorize the licensee to possess the test reactor and related radioactive material but not to operate the reactor (a possession only license). In the 1980s Westinghouse Electric Corporation began to

use the Waltz Mill site for its nuclear services business. To do so, Westinghouse Electric Corp. obtained from the NRC the SNM-770 materials license, which authorized it to possess and use radioactive materials at Waltz Mill, except at the reactor facilities covered by the test reactor possession-only license.

Because Waltz Mill still contained significant soil contamination that potentially created offsite groundwater contamination, the NRC placed it on its Site Decommissioning Management Plan in 1990. This placement required Westinghouse Electric Corporation to conduct a series of specific actions, which resulted in Westinghouse Electric Corporation's submitting the SNM-770 Remediation Plan to the NRC to address the remediation of the contaminated soils and the retired facilities covered by the materials license. The SNM-770 Remediation Plan stated that it was not a decommissioning plan because Westinghouse Electric Corporation planned to continue licensed nuclear services operations at the site.

In July 1997, Westinghouse Electric Corporation submitted the TR-2 Decommissioning Plan to the NRC to address the activities necessary in order to terminate the test reactor license, such as removal of the internal contents of the remaining reactor vessel, the reactor vessel, and the biological shield. When that part of the test reactor decommissioning was complete, the residual radioactive material and facilities were to be transferred to the SNM-770 materials license (so that radioactive materials would be under NRC license at all times) before Westinghouse Electric Corporation's test reactor license could be terminated.

Up to this point, both the materials and the test reactor licenses were held by the same owner (the "old" Westinghouse Electric Corporation). A name change occurred in December 1997, when Westinghouse Electric Corporation acquired CBS and changed the name of the corporate entities involved in the Waltz Mill activities and licenses to CBS. (See Footnote 1 *supra* for complete license identification and history). Meanwhile, in early 1998, *before the NRC had approved either the SNM-770 Remediation Plan or the TR-2 Decommissioning Plan*, CBS

(so-called now because when Westinghouse Electric Corporation acquired CBS in late December 1997, Westinghouse changed the name of the corporate entities involved in the Waltz Mill activities and licenses to CBS) decided to sell its Energy Systems Business Unit. In May 1998, CBS began negotiations with a business consortium consisting of British Nuclear Fuels Ltd. and Morrison Knudsen Corporation (hereinafter referred to as BNFL) for the sale of its interests in both the materials and test reactor-licensed facilities at Waltz Mill. Negotiations for the CBS sale of both the materials and test reactor-licensed facilities to BNFL (now Westinghouse Electric Company LLC and hereinafter referred to as "Westinghouse") stalled because Westinghouse was only interested in acquiring the nuclear services business at Waltz Mill, not the test reactor and retired facilities. At first, Westinghouse declined to take the retired test reactor structures, material and equipment because they were not part of the ongoing nuclear services business Westinghouse was primarily interested in acquiring; Westinghouse was evidently reluctant to assume responsibilities for the size, costs, and uncertainties involved with remediating the retired facilities.

But CBS wanted Westinghouse to acquire all of the facilities at Waltz Mill, including facilities covered by the test reactor license. To effect a sale of the Waltz Mill site, CBS attorneys proposed that if Westinghouse agreed to take the entire Waltz Mill site, including the test reactor and other retired facilities, CBS would complete the remediation of the facilities in accord with the test reactor Decommissioning Plan and the SNM-770 Remediation Plan, whatever the remediation conditions turned out to be, once they received NRC approval. During the negotiations, CBS emphasized that the Plans before the NRC had not yet been approved and were not designed to decontaminate the retired facilities to the unrestricted release standard; rather, the Plans proposed a partial remediation: CBS was to decontaminate the facilities to the point where they could be used for future licensed activities under the SNM-770 materials license (to be acquired by Westinghouse), with final decommissioning of these

facilities to be the responsibility of Westinghouse when it ceased licensed activities at the site and sought termination of its SNM-770 materials license.

The Westinghouse attorneys accepted this CBS proposal, saying the proposed compromise got the company “where it needed to go, which was to have the benefit of such parts of Waltz Mill as were involved in the service business, and have the legacy [contamination] taken care of by the predecessor.” See Arbitration Opinion, par. 9, at p. 9. Westinghouse and CBS attorneys ultimately agreed upon compromise language that became paragraph Section 8.1(a) of the Asset Purchase Agreement, an agreement that the parties entered into on June 25, 1998, effective March 22, 1999. At the time of the Agreement CBS had submitted the plans for approval, had hired a remediation contractor to do some preliminary work under specific NRC approvals, and was in communication with the NRC Staff about the ultimate criteria to be used in the remediation. The attorneys on both sides who negotiated the Agreement had no detailed understanding of the Plans or the content of discussions between the NRC Staff and CBS employees at Waltz Mill, other than that the ultimate remediation standard CBS would be required to meet would be whatever NRC approved in the Plans.

Upon execution of the Agreement, CBS applied to the NRC to transfer the SNM-770 materials license to Westinghouse. Included in that application was a letter – the language of which had been negotiated between Westinghouse and CBS – stating that CBS had agreed to remediate the retired Waltz Mill facilities “as may be required by and are in accordance with approvals it is currently seeking” under the SNM-770 Remediation Plan submitted to the NRC. *Id.*, par. 13, at p. 11. The letter asked NRC to rely on CBS both to complete remediation of the retired facilities and to acknowledge that CBS would have the primary responsibility for dealing with NRC about completion of remediation activities involving the retired facilities. The letter said CBS would remain financially responsible for the remediation activities for the retired

facilities until the work was complete and the NRC had approved completion of the plans.

The NRC authorized the transfer of the SNM-770 materials license from CBS to Westinghouse on March 10, 1999, but modified some portions of CBS's proposed terms. The NRC recognized the contractual agreement between the two companies, including CBS's agreement to retain financial responsibility for decommissioning certain facilities associated with the materials license, but said it would hold Westinghouse, as the new materials licensee, "responsible for all requirements and conditions of its license, "including financial responsibility for decommissioning." *Id.*, par. 14, at p. 12. The NRC agreed to keep CBS informed on all decontamination and decommissioning matters related to the materials license now transferred to Westinghouse. CBS and Westinghouse filed the letters of credit and standby trusts with the NRC to provide the requisite financial assurances.

Before the NRC gave final approval to the decommissioning and remediation plans, NRC told CBS that remediation of the retired facilities could be performed safely under the existing SNM-770 materials license as long as CBS provided "specific criteria for these retired areas based upon proposed future use of areas." *Id.*, par. 18, at p. 13. In response to the requested "specific criteria," CBS proposed a partial remediation standard for the retired facilities of "4x" – or four times the amount of radioactive contamination specified in NRC Regulatory Guide 1.86 as acceptable for decommissioning to unrestricted status – before transfer to Westinghouse. CBS's 4x proposal was provided to the NRC in an attachment to a letter dated June 19, 1998, and titled *Submittal of Additional Information to Support Application for Approval of Remediation Plan* (June 19, 1998 letter).² The NRC accepted the remediation

²The Arbitration Panel identified the letter as being dated June 18, 1998, see par. 19, at p. 13; and the attachment to the letter as being dated June 19, 1998, see par. 19, p. 14, and then in the next paragraph dated both the letter and attachment as June 19, 1998. For simplicity's sake, the letter and remediation criteria provided in the attachment to the letter hereinafter will be referred to as the June 19, 1998 criteria, or the June 19, 1998 letter.

criteria set forth in the June 19, 1998 letter as a revision to the criteria in the original SNM-770 Remediation Plan, affirmed those criteria in an August 21, 1998 letter, and accepted them as an approval of the revised section of the Plan. The approval criteria were incorporated into Amendment #21 to the SNM-770 materials license on January 19, 2000.

The partial remediation addressed in the criteria permitted future licensed activity, not decommissioning; decommissioning was to occur at the cessation of all licensed Waltz Mill activities at some future time, when Westinghouse, in accord with commitments in place concerning the test reactor Decommissioning Plan and the materials license Remediation Plan, agreed to decontaminate the site to an unrestricted release criteria under the requirements of the License Termination Rule.³

With commitments in place concerning the TR-2 Decommissioning Plan and the SNM-770 Remediation Plan, CBS undertook extensive remediation of the retired facilities at the site, completing removal of the reactor internals according to the test reactor Decommissioning Plan. But the task of remediating certain structures and equipment of the retired facilities for continued licensed activity – to meet the so-called “4x” standard that CBS had itself proposed for such areas in the attachment to the June 19, 1998 letter and that NRC had approved -- proved more difficult, and more expensive, than anticipated. Despite NRC’s approval of 4x as the cleanup standard to be applied to the retired facility and materials, CBS then took the position that the criteria establishing a “4x” decontamination standard for retired facilities and structures for future licensed use was simply a “goal” and that the proper standard to be applied was ALARA (As Low As Reasonably Achievable), which would permit higher levels of surface contamination to remain in remediated surfaces or equipment within the retired buildings.

In early 2001 CBS halted the remediation efforts, asserting that the June 19, 1998

³See 10 C.F.R. Part 20, subpart E, which is referenced in 10 C.F.R. §50.82(b)(6).

criteria had been met. Westinghouse did not agree. With the parties at an impasse and CBS 's work at a halt, Westinghouse invoked the binding arbitration clause provided in the Asset Purchase Agreement as the means to resolve the parties' dispute about whether CBS had satisfied its remediation obligations under Section 8.1(a) of the Agreement.

III. ISSUES PRESENTED TO THE ARBITRATION PANEL AND THE COMMISSION

Arbitration Panel Opinion

The Arbitration Panel, in its September 14, 2004 Arbitration Opinion (ML062850506), found that the "plain language" of criteria set forth in Section 8.1(a) regarding remediation criteria for surface and equipment decontamination intended for future use was 4x, thus agreeing with Westinghouse and rejecting CBS's interpretation that the standard was ALARA. *Id.*, par. 37, at p. 22. The Panel agreed with Westinghouse that NRC's August 21, 1998 approval of the remediation criteria contained in the Attachment to the June 19, 1998 letter was an "approval" within the meaning of section 8.1(a) of the Agreement. *Id.*, par. 35, at p. 21. These approvals permitted the remediation to begin and made the SNM-770 Remediation Plan, as revised through various documents submitted to the NRC, part of the license in Amendment #21 in January 2000. Thus, CBS was obligated to fulfil its obligations under the June 19, 1998 remediation criteria – obligations requiring CBS to decontaminate all surfaces or equipment in the retired facilities that may be used for future licensed activities under the license to a "4x" standard -- "unless and until the criteria are modified by the NRC or the NRC grants some form of relief from them." *Id.*

Where CBS and Westinghouse are in agreement is that many surfaces in the retired facilities have not yet been remediated to the 4x standard permitting future licensed activity. CBS claims to have spent \$93 million in clean-up efforts where, as cited by NRC inspectors, removal efforts through a process called "scabbling" eliminated some but not all the contamination in the top layers of concrete, resulting in many "as left" conditions falling short of

the 4x standard.

Arbitration Panel's Request to NRC

At the conclusion of its findings on the Asset Purchase Agreement, the Arbitration Panel turned to the NRC Staff for a determination of the regulatory status between the licensees before it assigned economic responsibility to either licensee regarding any breach of remediation obligations in Section 8.1(a) of the Agreement. In doing so, the Arbitration Panel considered, on the one hand, CBS's testimony that the contamination was much deeper in the concrete in some areas than initial characterization studies had shown, and, on the other hand, Westinghouse's expert testimony asserting that the best way to achieve the 4x standard in certain buildings would be to demolish them. In light of the unexpected cleanup data, the Panel was unwilling to hold CBS to remediating all surfaces in the retired facilities to a 4x standard without ensuring this would satisfy NRC requirements. The Arbitration Panel posed two questions to the NRC, seeking NRC guidance ". . . about the scope of the NRC's regulatory requirements – the extent of remediation that is required at this intermediate phase of the SNM-770 license, when the Waltz Mill site continues to be used for licensee activities – and whether that required remediation has been fully performed." *Id.*, par. 52, at p. 27. "The critical point for us is that the NRC has the regulatory responsibility and authority to decide the extent to which the retired facilities should be remediated at this time and what, if any, additional remediation may be deferred until final decommissioning." *Id.*

In a letter to the NRC dated October 8, 2004, the Arbitration Panel asked the NRC to address the following two questions:

- a. Whether the TR-2 Decommissioning Plan has been satisfactorily completed. If not, what further remediation remains to be done; and
- b. Whether the SNM-770 Plan has been satisfactorily completed and, if not, what further remediation remains to be done.

NRC Response to Arbitration Panel

Upon receipt of the Arbitration Panel's request, the NRC Staff allowed both CBS and Westinghouse to make additional written submissions to address their respective positions on the disagreement, and allowed each side to file replies to those submittals. The NRC Staff reviewed the Arbitration Panel's Initial Opinion and Order, the licensees' follow-up submissions, and official NRC records.

The NRC Solicitor John Cordes, in a March 17, 2006 letter to Westinghouse and CBS attorneys, provided the NRC Staff views on the two Arbitration Panel questions. The Staff concluded that CBS's test reactor Decommissioning Plan had not been satisfactorily completed. The Staff said that the CBS Decommissioning Plan approved by the NRC provided that decommissioning of the retired test reactor facility would only be considered complete when the decommissioning requirements described in the Decommissioning Plan for the retired test reactor were met, and residual radioactive material and the retired test reactor structures were transferred to the materials license for further remediation. The Staff said that removal of the reactor components and related equipment and materials required by the Decommissioning Plan had been completed, even though portions of the biological shield remained (which had been an issue between the two licensees), but that the residual radioactive material and the retired test reactor structures and equipment had not been transferred to the materials license for further remediation. Therefore, the Staff said, what is necessary to complete the Decommissioning Plan is: 1) the required documentation for transfer of the remaining residual radioactivity and the retired test reactor facilities to Westinghouse's materials license; and 2) issuance of an amendment to the Westinghouse materials license that transfers residual radioactivity from the retired test reactor structures, materials, and equipment onto that license. To do this, the Staff said, Westinghouse should file a license application to amend its materials license to transfer the retired test reactor structures and, at that time provide an estimate of the types and quantities of radioactive materials. "If necessary, possession limits in the license may

need to be increased to accommodate the increased radioactive material inventory,” the Staff said.

In response to the question whether Westinghouse’s Remediation Plan regarding the materials license had been successfully completed, the NRC Staff evaluated whether the remediation criteria it had previously approved had been met. The NRC Staff response stated that it could not make that determination without more information about the extent of contamination remaining in the retired structures, emphasizing that such information would have to be submitted by Westinghouse, the licensee, in an application to accept the transfer of any residual radioactive material remaining in the retired test reactor facilities to the materials license held by Westinghouse. The Staff said that the application must include an estimate of the types and quantities of radioactive materials so that the quantities could be delineated in the amended materials license.

NRC Staff’s Recommended Path Forward For Licensees

The NRC Staff provided “Path Forward” guidance directly to each licensee, laying out NRC’s procedural and substantive expectations regarding the anticipated Westinghouse license amendment application in a March 17, 2006 letter sent to both CBS and Westinghouse.

The Path Forward stated that because the retired test reactor component and equipment removal required by the CBS Decommissioning Plan were complete, the next regulatory action expected by NRC was receipt of the application from Westinghouse – not CBS – for an amendment to Westinghouse’s materials license for the transfer of any residual radioactive materials remaining in the CBS-licensed retired facilities. Changes, if any, to the remediation criteria could then be made in the context of a license amendment proceeding.

The Path Forward guidance in one part focused on the anticipated materials license amendment application. The guidance pointed out that under the current Westinghouse materials license Remediation Plan, a process existed whereby detailed work procedures for

each remediation activity would be evaluated by the NRC Staff to assess consistency with the generalized remediation methods described in the Plan. The guidance said that if necessary the licensee could seek NRC approval prior to performance of work. To date this approach has resulted in NRC reviews of specific remediation procedures of the soils, groundwater and certain facilities and materials transferred to the materials license. The Staff said this same pre-approval approach would be acceptable for any further remediation of the test reactor facilities and materials transferred to the materials license. The Staff said it would be unnecessary to develop an entirely new Remediation Plan for the materials license if demolition and removal of equipment and buildings were to be proposed as part of the further remediation because such activity would be consistent with the objectives and requirements already approved in the Remediation Plan.

The Path Forward further stated that, among other things, the Westinghouse license amendment application should also include changes, if any, to descriptions of remedial activities in the Remediation Plan, details of specific remedial work procedures to be employed, and proposed changes to any methodologies approved by the NRC in the Remediation Plan. The guidance stated that the “NRC anticipates that the license amendment application would address areas of uncertainty that have been discussed in the Arbitration Panel’s Initial Opinion and Order, such as the future uses of the facilities/structures, the schedule for finishing the decommissioning, and the methods to be employed to complete remediation (e.g., if demolition of buildings and structures will be used).”

The Path Forward also explained the procedures NRC expected to be followed in order for termination of the retired test reactor license to occur. The guidance provided that NRC would terminate CBS’s test reactor license when 1) the amendment to Westinghouse’s materials license is issued, which would ensure that radioactive materials remaining in the retired test reactor facility are controlled under an NRC license at all times; and 2) when NRC’s

license termination requirements for reactors have been satisfied.⁴

CBS Request To NRC To Amend Remediation Criteria

Despite the NRC's Staff's urging that the next regulatory action should emanate from Westinghouse, Westinghouse has not yet applied to the NRC for any action regarding its materials license.

Without waiting for Westinghouse action, CBS submitted two requests simultaneously to the NRC, one of which is the subject of this Order. Each request involves CBS's continuing efforts to seek relief from the remediation criteria as they apply to buildings within the purview of CBS's test reactor license and to the same buildings once they come within the purview of Westinghouse's materials license upon transfer to Westinghouse (if such a transfer occurs).

In its first submission, dated July 12, 2006, CBS, as the retired test reactor licensee, asked that NRC docket its "Application to Amend TR-2 Final Decommissioning Plan, Rev. No. 1 NRC Docket No. 50-22." This submittal seeks to revise the June 19, 1998 building remediation criteria (incorporated into the CBS Decommissioning Plan) in the retired facilities "so that they conform to current NRC practice and policy which encourage a risk-informed approach to nuclear decommissioning and remediation." *Id.* The NRC Staff has acknowledged receipt of

⁴As the Path Forward guidance notes, Westinghouse has agreed to meet the License Termination Rule (LTR) requirements at the Waltz Mill site for all of the residual materials connected with operations (including the materials transferred from the test reactor license) when it seeks termination of its materials license once all activity has ceased at the site. Therefore, in order to terminate the test reactor license and implement Westinghouse's current commitment to meet the LTR at a later time than normally required by NRC regulations, the NRC staff intends to consider an exemption to LTR's requirements, document the exemption in the SER supporting the termination of the test reactor license, and include appropriate conditions in Westinghouse's amended materials license to preserve the commitment. The guidance suggested that the licensees make joint application for the exemption or, in the alternative, CBS should apply for the exemption, with concurrence or a supporting affidavit from Westinghouse regarding its willingness to accept the facility in the condition as left. Attachment to March 17, 2006 letter at p. 6, ML060750730.

this application and is reviewing it for completeness before docketing it.⁵

In its second filing dated the same day, CBS asked Region I, where Waltz Mill is located, to accept for docketing its submission regarding *Westinghouse's* materials license titled "Order Regarding NRC License No. SNM-770, NRC Docket No. 070-00698 or, in the Alternative, for an Amendment to SNM-770." CBS requested that at the conclusion of its requested application proceeding regarding CBS's own license, should NRC grant some or all of its requested changes to the June 19, 1998 remediation criteria as they apply to section 1.2 of CBS's Final Decommissioning Plan, Rev. 2, (which ultimately reference the criteria in the June 19, 1998 letter), then the NRC would issue a "declaratory order" making those changes applicable to the retired facilities covered by Westinghouse's materials license and Remediation Plan as well.

Alternatively, should NRC decline to issue the requested "declaratory order," CBS asked that its letter be treated as an application to amend the June 19, 1998 criteria as incorporated into the materials license to the extent that the criteria define CBS's remediation responsibilities. Under this alternate proposal, CBS requested an exemption under 10 C.F.R. 30.11 from the

⁵In sum, CBS objections to the June 19, 1998 remediation criteria are that the criteria: are based on outdated measurement capabilities unrelated to uniform doses or risks; are too costly and not reasonably achievable, given the condition of the retired facilities; are more restrictive than the ALARA standard currently permitted under Westinghouse's materials license applicable to those areas where radioactivity remained on a surface despite repeated decontamination attempts to remove it; are too restrictive, given that ALARA remediation objectives, along with procedures and engineering controls, would assure the applicable exposure limits relating to occupational exposures are met; are inconsistent with NRC's current risk-informed approach to decommissioning, which already allows dose-based assessments and realistic exposure scenarios that permit contamination in excess of allowable limits under some circumstances; lack merit because the "as is" condition of the retired facilities provide no risk to public health and safety and would not affect the objective of Westinghouse's Remediation Plan to meet the terms of the License Termination Rule regarding the ultimate radiological condition when all activity has ceased at Waltz Mill, and at that time Westinghouse must meet the decommissioning standard of the License Termination Rule. See CBS's "Application for Order Regarding NRC License No. SNM-770, NRC Docket No. 070-00698 or in the Alternative, for an Amendment to SNM-770," pp. 4-7, July 12, 2006; see also CBS's "Application to Amend TR-2 Final Decommissioning Plan, Rev. No. 1, NRC Docket No. 50-22," pp.3-6, July 12, 2006 (ML062140476).

requirements of 10 C.F.R. 30.38 (“Applications for amendment of a license . . . shall specify the respects in which the *licensee* desires its license to be amended and the grounds for the amendment”).

The next day, in a letter dated July 13, 2006, CBS advised NRC’s Executive Director of Operations, Luis D. Reyes, of its July 12 filings. In the letter, CBS acknowledged that “The circumstances where two NRC licensees share decommissioning and remediation responsibilities for the same buildings and areas on the same site is unique in NRC practice and has hindered progress.” CBS requested consideration of the two applications “on their safety merits” and asked for disposition of its docketing requests within thirty days, adding that a negative response to one or both of the requests “would entitle CBS to request further administrative and judicial review under section 189 of the Atomic Energy Act.”

On August 9, 2006, the NRC Staff declined to accept CBS’s application on Westinghouse’s license for docketing because “CBS is not the holder of License No. SNM-770 and, therefore, cannot apply for an amendment to that license.”

CBS responded on August 25, 2006 by filing the Petition For Hearing, now before the Commission, regarding the NRC Staff’s refusal to docket its application with respect to Westinghouse’s materials license. CBS requests a hearing because the “denial of this application directly affects and harms CBS’s interests . . . because it leaves in place remediation criteria for SNM-770 structures that are costly, arbitrary, and unnecessary for safety, thereby harming CBS’s interests as the owner of the site, as the co-licensees on the site, as the obligor under the letter of credit (CBS maintains a letter of credit for \$10,401,000 and a standby trust agreement to support the partial remediation), and as the effective obligor under the SNM-770 Remediation Plan.”

At the heart of its requests, CBS asks that any changes to the June 19, 1998 remediation criteria approved by the NRC Staff for its retired test reactor facility under the license “would

apply equally to CBS's remedial action obligations in regard to structures on the same Site within the scope of Westinghouse's SNM-770 license." The petition essentially restates CBS's arguments presented in its July 12, 2006 application regarding Westinghouse's license, this time stating as "contentions" its requests for a "declaratory order" or, in the alternative, consideration of issuance of an exemption by the NRC Staff permitting NRC to amend a license held by another licensee. CBS stated it would consider withdrawing its hearing request if the NRC Staff decided that any approved changes to the remediation criteria in CBS's parallel application to amend its test reactor license would apply to CBS's remedial obligations with respect to structures covered by Westinghouse's materials license.

Westinghouse Comment on CBS Petition For Hearing

Westinghouse filed "Comments" opposing CBS's hearing request regarding its materials license in a submittal to the NRC on September 19, 2006. Westinghouse asserted that the CBS petition was "without precedent," that no pending proceeding was underway in which CBS could seek intervention, and that CBS had no "standing" to amend the materials license held by Westinghouse because a claim of economic injury was insufficient to meet standing requirements.

CBS responded to the Westinghouse "Comments" on September 25, 2006, arguing that Westinghouse's "Comments" on CBS's petition for a hearing should be struck for failure to follow proper channels to petition for leave to intervene in the CBS proceeding under 10 C.F.R. §2.309; that the NRC Staff's denial of its July 12 Application for an Order or to Amend Westinghouse's license initiated a "proceeding" within the meaning of section 189 a.(1)(A) of the Atomic Energy Act; that CBS had "standing" to request a hearing on Westinghouse's license because of the overlap of licensed responsibilities and shared financial risks at the site; and that CBS, as applicant for a hearing and not an intervenor, need not submit admissible contentions as required under 10 C.F.R. §2.309(f), Westinghouse assertions notwithstanding.

IV. ANALYSIS

This case, at its core, is a commercial contractual dispute between regulated parties. The Commission will not be drawn into such disputes, absent a concern for the public health and safety or the common defense and security, except to carry out its responsibilities to act to enforce its licenses, orders, and regulations.

In its regulatory posture, this case involves two filings by CBS: a CBS application, now under review by the NRC Staff, asking that the NRC amend the CBS license to permit more relaxed cleanup standards than are now allowed under that license; a second CBS application, essentially seeking to have any changes the Commission permits for the retired facilities now under the CBS license to extend as well to those same facilities when they are transferred to Westinghouse and become subject to Westinghouse's materials license, as contemplated by the commercial agreement entered into by the parties. When the parties entered an agreement that the CBS facilities would be cleaned up in accordance with the NRC requirements, both parties understood the criteria were to be approved by NRC at some date following the date the two licensees actually entered the Asset Purchase Agreement. The criteria NRC would find satisfactory for cleaning up the retired facilities were not tied to a specific date or time or standard when the parties signed the commercial agreement. Sometime after signing the agreement, CBS proposed a 4x standard to satisfy an NRC request for "specific criteria." That 4x standard would later prove unfortunate for CBS in that achieving it turned out more costly and difficult than anticipated at the time it was set. Nevertheless, that was the standard put forth to the NRC, which NRC accepted and approved.

Now CBS, in the July 12, 2006 application to amend its own Decommissioning Plan, Rev. No. 1 currently before the Staff, asks NRC to review what criteria should apply to the retired facilities and to relax the 4x cleanup standard to the less stringent ALARA requirement. The Staff is currently conducting a sufficiency review of CBS's request for its own license. The

Staff denied the CBS application for an order regarding the Westinghouse license, causing CBS to then file a "Petition For Hearing" on the denial. CBS's petition essentially couched in "contention" terms the same two approaches (declaratory order or, alternately, license amendment) raised in its earlier request to NRC to relax the cleanup standards in the Westinghouse license, should NRC grant CBS's license amendment request for its own license.

Based upon our review of these facts we harbor substantial doubt whether CBS has filed a request entitling them to a hearing which could result in either the declaratory order or, alternately, the license amendment they seek. However, the Commission need not resolve those issues now. The NRC Staff has pending before it the CBS request to relax the decommissioning criteria for its own license. Staff action may obviate the need for the Commission to address the hearing request presented by CBS for the Westinghouse license. Additionally, the differences between the two licensees in their ongoing commercial dispute may be resolved in binding arbitration before the Arbitration Panel, causing CBS to withdraw its request to amend the Westinghouse license. Therefore, we are holding the hearing request in abeyance. The Commission directs the NRC Staff to notify the Commission when it has issued a decision on CBS's July 12, 2006 application to amend its own TR-2 Final Decommissioning Plan. Once that decision has been rendered, the Commission can revisit the question presented by CBS's application for a declaratory order or, in the alternative, an amendment to Westinghouse's SNM-770 materials license. The Commission also directs attorneys representing CBS and Westinghouse in the commercial dispute before the Arbitration Panel to notify the Commission of any pertinent action by the Panel that could be relevant to a Commission decision on the hearing request.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-cook
Secretary of the Commission

Dated at Rockville, Maryland
this 29th day of March 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
CBS CORPORATION) Docket No. 70-00698
(Waltz Mill Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-07-15) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, or through NRC internal mail.

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Docket No. 70-00698
COMMISSION MEMORANDUM AND ORDER (CLI-07-15)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 29th day of March 2007