Dienethal v. NRC, No. 99-1132 (D.C. Cir., decided January 21, 2000)

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 99-1132** **September Term, 1999**

Edwin D. Dienethal,
Petitioner

v.

U.S. Nuclear Regulatory Commission and
United States of America,
Respondents

Commonwealth Edison Company,
Intervenor



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On Petition for Review of an Order of the
Nuclear Regulatory Commission

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Before: WILLIAMS, RANDOLPH and TATEL, *Circuit Judges*.

## JUDGMENT

This cause came to be heard on a petition for review of an order of the Nuclear Regulatory Commission, and it was briefed and argued by counsel. While the issues presented occasion no need for a published opinion, they have been accorded full consideration by the Court. See D.C. Cir. Rule 36(b). There is no reversible error in the procedural reasons on which the Commission relies, and they are sufficient to justify the Commission's decision. It is hereby

ORDERED and ADJUDGED that the petition for review is denied.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41(a)(1).

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: Ea Brown

Deputy Clerk

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

National Whistleblower Center v. NRC, Nos. 99-1002 & 99-1043
(D.C. Cir., rehearing granted November 22, 1999)

**NATIONAL WHISTLEBLOWER CENTER, Petitioner,**
**v.**
**NUCLEAR REGULATORY COMMISSION and United States of America, Respondents.**
**Baltimore Gas and Electric Company, Intervenor.**

**Nos. 99-1002, 99-1043.**

United States Court of Appeals,
District of Columbia Circuit.

Nov. 22, 1999.

Before: EDWARDS, Chief Judge, and WILLIAMS, Circuit Judge.

A concurring statement of Chief Judge HARRY T. EDWARDS is attached.

ORDER

PER CURIAM:

It is ORDERED, by the Court, on its own motion, that the majority opinion and the judgment filed herein on November 12, 1999, be, and the same hereby are, vacated.

A future order will schedule further briefing and rehearing after a member of the Court is randomly selected to replace former Circuit Judge WALD as the third member of the panel.

HARRY T. EDWARDS, Chief Judge, concurring:

I concur in the Order vacating the opinion and judgment issued on November 12, 1999, because, in retrospect, I fear that the original (now vacated) majority opinion fails to address some critical issues in this case. These issues were not the focus of the arguments during the first hearing before the court, so it is unsurprising that they were lost in our haste to issue an opinion before our colleague, Judge Wald, departed from the court. However, in my view, the issues are too important to ignore once uncovered; thus, I feel that this case must be reheard.

The now vacated majority opinion is founded on the view that petitioners were prejudiced by the Commission's abrogation of a substantive rule. After considering this matter further, I find that there is *1272 good reason to believe that we were mistaken in assuming that the Commission acted pursuant to a substantive, as opposed to a procedural, rule.

On August 5, 1998, the Commission published a statement of Policy on Conduct of Adjudicatory Proceedings ("Policy") in which it stated that licensing boards should grant extensions of time "only when warranted by unavoidable and extreme circumstances." 63 Fed.Reg. 41,872, 41,874 (Aug. 5, 1998). The Commission subsequently invoked this new rule in an order referring a petition filed by the National Whistleblower Center ("Center") to the Atomic Safety and Licensing Board, stating that extensions of time should only be granted if the petitioner can demonstrate "unavoidable and extreme circumstances." Order Referring Petition for Intervention and Request for Hearing to Atomic Safety and Licensing Board Panel, CLI 98-14, reprinted in Joint Appendix ("J.A.") 23, 28 (Aug. 19, 1998).

There can be no doubt that the Commission's August 5, 1998, Policy adopted a new standard to govern requests for extensions of time in proceedings of the sort here at issue. It also seems clear that the new standard was intended to modify the standards previously enunciated in 10 C.F.R. § 2.711(a) and § 2.714(b)(1). And it is undisputed that the Center had notice of the new standard for granting extensions of time. The Center additionally understood the thrust of the Policy, for they objected to the new standard on the ground that it was contrary to the "good cause" standard contained in 10 C.F.R. § 2.711(a). See Memorandum and Order, CLI 98-15 (Aug. 26, 1998) reprinted in J.A. 60 (characterizing the Center's objections to the new standard as articulated in the Commission's Aug. 19, 1998 referral order).

Given that the Commission adopted a new standard to be applied in cases of this sort and that the Center had notice of the new standard before the advent of the procedures here in dispute, it matters a great deal whether the standard is viewed as a new "substantive" or "procedural" rule. If, as appears to be the case, the new standard is a procedural rule, then it is exempt from the requirements of notice and comment under the Administrative Procedure Act, 5 U.S.C. § 553(b)(A). See JEM Broad. Co. v. FEC, 22 F.3d 320 (D.C.Cir.1994).

It is no answer to say that the Commission was wrong to construe "good cause" as "unavoidable and extreme circumstances." If this is a procedural rule, and if it does not transcend the bounds of due process or violate some clear statutory mandate, then the

Commission is entitled to define "good cause" as it sees fit. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). Given that latitude, it would be an oxymoron to say that "unavoidable and extreme circumstances" is outside the realm of acceptable understandings of "good cause."

These issues were not properly aired during the first round of briefs and arguments before this court. We would be remiss, I think, to issue the mandate in this case without considering the questions that are now apparent. I do not believe that the Commission has waived the right to argue the procedural/substantive issue, because the agency could not have reasonably anticipated the position reached in the first majority opinion. In short, the case must be reheard, with a proper focus on the issues at hand.

END OF DOCUMENT

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 99-1002** **September Term, 1999**

National Whistleblower Center,
Petitioner

v.

Nuclear Regulatory Commission and United States of America,
Respondents

Baltimore Gas and Electric Company,
Intervenor

Consolidated with 99-1043



**BEFORE:** Edwards, Chief Judge, Williams and Sentelle*, Circuit Judges

## ORDER

It is ORDERED that oral argument herein will be heard at 10:00 AM on Wednesday, January 26, 2000. It is

FURTHER ORDERED that petitioner and respondents shall file simultaneous supplemental briefs of no more than twenty pages and do so at or before noon on Friday, January 21, 2000. Intervenor may file a supplemental brief of no more than ten pages at the same time. If the petitioner and respondents, but not intervenor, so desire, they may file simultaneous supplemental reply briefs of no more than five pages at or before noon on Tuesday, January 25, 2000. The supplemental briefs shall address the following questions:

(1) Did the Commission's *Policy on Conduct of Adjudicatory Proceedings*, 63 Fed. Reg. 41,872, 41,874 (August. 5, 1998) constitute a change to an existing substantive or procedural rule?

(2) Did the Commission's time limits, and its insistence on them to the degree that it did, prejudice petitioner's ability to file timely contentions that could satisfy the

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 99-1002** **September Term, 1999**

Commission's substantive standards? In this regard, the parties should include discussion of (a) the "areas of concern" identified by petitioner in the Status Report filed October 1, 1998 and (b) the role of the staff Requests for Additional Information in petitioner's October 1, 1998 Motion to Vacate, and in the Commission's standards for admissibility of contentions.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: Robert A. Bonner
Robert A. Bonner
Deputy Clerk

*Circuit Judge Sentelle has been drawn by lot to replace former Circuit Judge Wald as the third member of this panel.

Grand Canyon Trust v. NRC, No. 99-70922
(9th Cir., order denying motion to dismiss issued January 28, 2000)

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JAN 28 2000

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

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|---|---|
| GRAND CANYON TRUST; et al,<br><br>Petitioners,<br><br>v.<br><br>NUCLEAR REGULATORY COMMISSION; UNITED STATES OF AMERICA,<br><br>Respondents. | No. 99-70922<br><br>Agency No. 40-3453<br>Nuclear Regulatory Commission<br><br>ORDER |

Before: Peter L. Shaw, Appellate Commissioner

The Nuclear Regulatory Commission has added the United States of America as a respondent pursuant to 28 U.S.C. § 2344. The Clerk shall amend the docket to reflect the above caption.

Respondents' motion to dismiss the appeal for lack of jurisdiction is denied without prejudice to renewing the arguments in the answering brief. *See National Indus. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1262 (9th Cir. 1982) (merits panel can consider appellate jurisdiction despite earlier denial of motion to dismiss).

Respondents' answering brief is due February 28, 2000; petitioners' optional reply brief is due within 14 days after service of the answering brief.

Peter L. Shaw
General Order 6.3(e)

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John F. Cordes, Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

lp
99-70922

Eastern Navajo Dine v. NRC, Nos. 99-1190, 99-1194, 99-1195 & 99-1196
(D.C. Cir., sanctions order issued Nov. 24, 1999)

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 99-1190** **September Term, 1999**

Eastern Navajo Dine Against Uranium Mining and Southwest Research and Information Center,
Petitioners

v.

Nuclear Regulatory Commission and United States of America,
Respondents



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Hydro Resources, Inc.,
Intervenor

And cases 99-1194, 99-1195 and 99-1196

**BEFORE:** Silberman, Henderson, and Tatel, Circuit Judges

**ORDER**

Upon consideration of the court's order to show cause, filed September 27, 1999, and the response thereto, it is

**ORDERED** that the order to show cause be discharged. It is

**FURTHER ORDERED**, on the court's own motion, that sanctions be imposed. Counsel's justifications for filing the clearly premature petitions for review are wholly without merit. See Garden Broadcasting Ltd. Partnership v. FCC, 996 F.2d 386, 396 (D.C. Cir. 1993) (sanctionable conduct consists of "making objectively groundless legal arguments in briefs filed in this court") (internal quotation omitted); cf. Reliance Insur. Co. v. Sweeney Corp., 792 F.2d 1137 (D.C. Cir. 1986) (per curiam) ("Appellate courts have the undisputed power to sanction a party who brings a frivolous appeal. . . . An appeal is considered frivolous when its disposition is obvious, and the legal arguments are wholly without merit."). Counsel for petitioners shall pay sanctions to respondents in the amount of respondents' reasonable costs and attorney's fees incurred in filing the motion to dismiss. See D.C. Cir. Rule 38; South Star Communications, Inc. v. FCC, 949 F.2d 450, 452 (D.C. Cir. 1991) (per curiam) (directing attorney to pay sanctions to agency, pursuant to Rule 38, for frivolous appeal). Respondents are directed to submit documentation supporting their fees and costs within 30 days of the date of this order.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 99-1190** **September Term, 1999**

Counsel for petitioners is directed to file any response within 14 days of the date respondents' documentation is filed.

**Per Curiam**

LHS

KLH

MJ

Envirocare of Utah v. NRC, No. 99-1294
(D.C. Circuit, order of dismissal issued Nov. 26, 1999)

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 99-1294** **September Term, 1999**

Envirocare of Utah, Inc.,
Petitioner

v.

Nuclear Regulatory Commission and United States of America,
Respondents



## ORDER

Upon consideration of respondent's motion for leave to file a motion to dismiss, it is

ORDERED that the motion be granted. The Clerk is directed to file the lodged document.

FOR THE COURT:
Mark J. Langer, Clerk

BY: Robert A Bonner
Robert A. Bonner
Deputy Clerk

Westinghouse Electric Co. v. United States, No. 99-1015C
(U.S. Court of Federal Claims, filed Dec. 23, 1999)

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

| | | |
|---|---|---|
| Westinghouse Electric Company, | ) | 99-1015C |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. _____ |
| United States of America, United States Department of Energy, and Nuclear Regulatory Commission, | ) | FILED DEC 23 1999 |
| Defendants. | ) | |

## COMPLAINT

NOW COMES Plaintiff Westinghouse Electric Company, by and through its undersigned attorneys, Babst, Calland, Clements & Zomnir, P.C., and files this Complaint against Defendants the United States of America ("United States"), the United States Department of Energy, and the Nuclear Regulatory Commission (collectively the "Defendants").

## Parties

1. Westinghouse Electric Company, LLC is a Delaware Limited Liability Company with its principal place of business located at 4350 Northern Pike, Monroeville, Pennsylvania 15146.

2. Westinghouse Electric Company, LLC ("WEC") is the successor-in-interest to Westinghouse Electric Corporation ("Westinghouse") with respect to the matters at issue in this Complaint.

3. WEC presently owns and operates the Specialty Metals Plant at Blairsville, Pennsylvania ("Blairsville").

4. The Atomic Energy Commission ("AEC") was an independent agency of the United States government that maintained the materials and responsibility for operating all aspects of the United States' atomic energy/nuclear program from 1946 to 1974.

5. Defendants the Department of Energy ("DOE") and the Nuclear Regulaory Commission ("NRC") are executive departments and agencies of the United States, and are successors to the AEC, which is in turn the successor to the Manhattan District of the United States Army Corps of Engineers, which had responsibility for the development of the United States' nuclear program in the 1940s. The Unites States acted in the matters alleged herein through the DOE, NRC, and its predecessors, which operated the Blairsville facility and by contract, agreement, or otherwise arranged for the disposal or treatment of hazardous substances owned or possessed by the defendants at the Blairsville facility which was owned by Westinghouse.

6. The AEC, NRC, and DOE were and are agencies of the United States.

## Jurisdiction and Venue

7. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1491, 28 U.S.C. § 1331, and 42 U.S.C. § 9613(b). In addition, the Declaratory Judgment Act, 28 U.S.C. § 2201 and 42 U.S.C. § 9613(g)(2), authorize this Court to grant declaratory relief.

8. Venue lies in this Court pursuant to 28 U.S.C. § 1491.

## Facts

### A. The United States Government and Atomic Energy

9. The development of atomic/nuclear technology in the United States can be traced directly to World War II. Although key atomic/nuclear advances occurred prior to the war years (1939-1945), the Manhattan Project, the United States' project to build the atomic bomb, served as the medium through which significant American nuclear technologies developed.

10. The atomic energy policies of the United States were the creation of the Manhattan Engineering District, which acted as the administrative unit to the Manhattan Project.

11. The Atomic Energy Act of 1946 created the AEC. The AEC was the successor to the Manhattan Engineer District and assumed responsibility for management of the United States' nuclear program.

12. The Atomic Energy Act of 1954, successor to the 1946 Act, ended exclusive government use of the atom. This Act instructed the AEC to issue licenses to private companies to build commercial nuclear-power stations.

13. The AEC continued to operate until 1974. In that year, the Energy Reorganization Act of 1974 abolished the AEC and replaced it with two new agencies: the NRC, to regulate the nuclear power industry, and the Energy Research and Development Administration ("ERDA"), to manage the nuclear weapon, naval reactor, and energy development programs. The NRC and the ERDA were the successors to the AEC.

14. The Department of Energy Organization Act created the DOE on October 1, 1977. The DOE is the successor to the ERDA, and the AEC.

15. The Defendants acted with regard to the matters alleged herein through the AEC and its predecessors. The United States operated the Blairsville facility and/or by contract, agreement, or otherwise arranged for the disposal or treatment of hazardous substances owned or possessed by the United States. The United States, through the AEC, further contracted with Westinghouse and agreed to reimburse Westinghouse for, and indemnify and hold Westinghouse harmless against, the costs and damages sought by WEC in this matter.

## B. The Contractual Relationship Between Westinghouse and the United States

16. Westinghouse entered into Contract AT-11-1-GEN-14 (the "original Contract" or the "Contract") with the United States, acting through the AEC, on July 15, 1949. However, the Contract retroactively took effect on December 10, 1948.

17. A true and correct copy of the original Contract is attached and incorporated as Exhibit "A."

18. The initial term of the Contract was through June 30, 1953. The Contract term was continually renewed and the Contract, as supplemented, remained in effect through at least 1973.

19. The Contract was amended by Supplements on numerous occasions during the relevant time period. These Supplements significantly increased the scope of work to be performed by Westinghouse.

20. The Contract was initially supplemented 39 times. After 38 Supplements, Westinghouse and the AEC restated the Contract in comprehensive Supplement No. 39, dated July 1, 1957. A true and correct copy of Supplement No. 39 is attached and incorporated as Exhibit "B."

21. Supplement No. 39 was then supplemented on 32 occasions. Once again, Westinghouse and the AEC restated the Contract in comprehensive Supplement 40, dated July 28, 1960. A true and correct copy of Supplement No. 40 is attached and incorporated as Exhibit "C." (The Contract, Supplement No. 39, and Supplement No. 40 shall collectively be referenced herein as the "AEC Contracts").

22. One of the stated purposes of the Contract was the production, "within the shortest practicable time," of a "nuclear power plant which would fulfill the Navy Department's requirements for the propulsion of a submarine" (a project/prototype known as "Mark I"). Exhibit "A," p. 1.

23. The Contract offered broad terms, stating that Westinghouse and the AEC would work together in a "spirit of partnership and friendly cooperation with a maximum of effort and common sense in achieving their common objectives." Exhibit "A," p. 2.

24. The Contract allowed Westinghouse to utilize any of the facilities of divisions and departments of Westinghouse, aside from any specifically mentioned in the Contract. Such inter-company arrangements did not require AEC approval. Exhibit "A," p. 7.

25. The Contract lead to the creation of the Bettis Atomic Research Laboratory ("Bettis") by Westinghouse. The Contract recognized that Westinghouse purchased the "Bettis Airport site, near Pittsburgh," and leased it to the AEC "for the conduct of work under this assignment." Exhibit "A," p. 4.

26. By 1953, the AEC had transferred almost all work relating to nuclear powered submarines to Bettis, the laboratory that the AEC established near Pittsburgh exclusively for the navy project.

27. Hyman G. Rickover ("Rickover") was at the center of the AEC/Westinghouse relationship. Rickover held dual positions as an official with the AEC and as the head of the Navy's nuclear propulsion program. He also maintained a high level of personal control over all elements of the development program.

28. Rickover used the AEC Contracts to exercise absolute control over Bettis and any other Westinghouse facilities, including Blairsville, that performed work pursuant to the Contract. Aggressively and painstakingly, he set about establishing his personal management of the work. He wanted to know, down to the last detail, what was happening, and he had representatives at Bettis and at other Westinghouse facilities, including Blairsville, who would report to him on the day-to-day activities they were observing. At any sign of trouble Rickover would personally go to his laboratories--sometimes unannounced--to straighten things out. Rickover himself managed both the small details and the large decisions, such as budget and policy decisions, and insisted that his staff be prepared to review every technical decision by Westinghouse.

C. **Blairsville**

29. Blairsville began operations in 1955, approximately six years after the execution of the original Contract between the AEC and Westinghouse.

30. Uranium related-fuel work under the AEC Contracts at Blairsville began in March 1956, and the manufacture of fuel elements under the AEC Contracts ended at Blairsville in early 1961.

31. In early 1961, the uranium fuel operations conducted under the AEC Contracts were transferred from Blairsville to another Westinghouse facility.

32. Fuel manufacturing operations were conducted at Blairsville using enriched, depleted, and natural uranium in both metal and oxide forms. The activities at Blairsville included the use of highly enriched uranium for the creation of nuclear power systems for the Navy ("Navy fuel program") and low enriched uranium for commercial atomic power plants.

33. Navy fuel program activities were performed pursuant to AEC Contracts.

34. The commercial activities were performed under Special Nuclear Material License SNM-37 issued by the AEC (the "License").

35. In addition, Blairsville conducted research and development work relating to fuel elements using depleted uranium.

36. The uranium fuels section of the plant occupied approximately 15,000 square feet. The Navy-related work occurred in an area of the facility separate and apart from the commercial grade uranium work.

37. The waste management area for radioactive/uranium-related waste sits one eighth mile from the main building, and at the time of the Navy-related work, was completely enclosed by an eight foot high chain-link fence with a locked gate. This fenced-in waste management area, referred to as the "Cow Palace," was established for the purposes of storing and preparing for shipment low-level radioactive materials generated in the uranium processing area.

38. On or about February 13, 1956, Westinghouse submitted its Application for License to receive, retain, process, and transmit natural uranium, enriched uranium, and their oxides ("Application for License"). The Application for License outlines the types of naval and commercial activities that were intended for Blairsville. A true and correct copy of the Application for License is attached and incorporated as Exhibit "D."

39. On March 26, 1956, Lyall Johnson, Chief of the Licensing Branch of the Division of Civilian Application of the AEC, notified Westinghouse that the Westinghouse Blairsville work pursuant to the AEC contract would be exempted from the licensing requirement.

40. The Application for License designated the Blairsville Metals Plant as a facility for the large-scale production of plate-type and oxide-type fuel elements.

41. The special nuclear materials for which Westinghouse sought the license were used in the following activities:

(a) The manufacture of enriched uranium alloy plate-type fuel elements for naval-type reactors;

(b) The manufacture of natural uranium alloy fuel elements for naval-type reactors;

(c) The manufacture of enriched uranium alloy seed elements for industrial power reactors such as that at Shippingport, PA;

(d) The manufacture of blanket elements for industrial-type reactors;

(e) The manufacture of natural uranium oxide pellet-type fuel elements; and

(f) The manufacture of enriched uranium oxide pellet-type fuel elements.

42. It is averred upon information and belief that each of the foregoing activities were undertaken at Blairsville during the period from March of 1956 through early 1961.

43. All nuclear material processed at Blairsville came from the AEC, and title remained with the AEC, and all finished products, scrap material, and recoverable wastes were returned to the AEC upon completion of the work.

44. The key material processed in the plate-type operation was uranium 235 (93-97% isotope). This material took the form of one-eighth inch metal cubes.

45. Westinghouse estimated that it would need a six month supply of working stock of the uranium while operations occurred at Blairsville.

**D. The Process**

46. From the moment uranium came into the Blairsville plant until it left, either as an end-product for the Navy fuel program or as waste, Blairsville monitored it closely and subjected it and all in contact with it to formal handling/operating policies.

47. When "raw" uranium arrived at Blairsville, an employee recorded vital statistics about the uranium and placed it into a vault until it was needed in the production process.

48. Upon removal from the vault at the start of the production process, the uranium would be triple-melted, and then placed in jacketed steel tubes.

49. At this point, the uranium-filled jacketed steel tubes were placed in an oven and forged. The Navy fuel program had its own forge at the Blairsville facility, located in the Navy fuel area and separate from the general plant forge.

50. After forging and rolling, the steel jackets, which would be contaminated, were removed before the uranium went into a milling machine.

51. From the milling machine, two pieces of zircalloy were used to encase the uranium.

52. The final step was to roll bond the zircalloy-uranium to achieve the end-product--the individual fuel rods--which were shipped to another Westinghouse facility and arranged in clusters to create the tall, square pillar-like fuel cells that went into a nuclear reactor.

## E. Decontamination and Disposal Policies and Practices

53. Blairsville also had specific processes for decontamination of personnel and disposal of contaminated materials. Employees were required to submit to testing for radiation levels (urinalysis, blood tests, X-rays; they also wore film badges that measured their exposure to radiation). Additionally, employees at Blairsville were required to change into special clothing before entering the area and to shower and change clothes upon entering or leaving the uranium-related work areas. The clothing that employees wore in the Fuel Elements section was laundered regularly in an on-site laundry.

54. Blairsville had several written documents that outlined its waste disposal policy, including the Contaminated Waste Disposal Memorandum, a true and correct copy of which is attached hereto as Exhibit "E," and an Application for Low Level Radioactive Waste Material by Incineration, a true and correct copy of which is attached hereto as Exhibit "F."

55. The government approved, reviewed, and/or had knowledge of this policy.

56. Radioactive scrap was placed in standard containers--55 gallon, 30 gallon, or 5 gallon drums with lids; fiberboard drums were used for contaminated paper.

57. Each section or department manager was to separate the contaminated scrap into the standard containers, and then notify the contaminated waste disposal section for removal of the containers.

58. The contaminated waste disposal section would take the contaminated scrap to the contaminated waste disposal area in the closed containers.

59. Along with removing the containers, the contaminated waste disposal section had responsibility for notifying the Health Physics group to check the waste's radiation level, so that appropriate precautions could be taken in handling and disposing of the contaminated waste.

60. Contaminated burnable waste was to be separated from regular burnable waste, because intermingling of the wastes would create an extra burden on the disposal group, who would have to attempt to separate the contaminated material from the regular material after burning.

61. The residue resulting from the combustion of radioactive wastes went into containers which were then stored within the fenced contaminated waste disposal area. From that point, the final disposition of the residue depended on the feasibility of recovering uranium, with three possibilities existing:

(a) Shipment of the residue to the AEC for uranium recovery;

(b) Shipment of the residue to an outside contractor for recovery of the uranium; and

(c) Ocean burial of the material through a licensed contractor.

62. Blairsville went through a facility-wide decontamination process when the AEC Contracts activity shifted to another Westinghouse facility in 1961.

63. All of the usable equipment was cleaned, wrapped in plastic, and transferred to the Atomic Fuel Department at another Westinghouse facility, after removal of loose contamination and after being wrapped in plastic. The transferred equipment consisted of water hold up tanks, rolling mills, a press, storage racks, hoods, milling machines, furnaces, delpark filter apparatus, exhaust fans, duct work, and conduit.

64. All non-usable contaminated material that was not combustible and could not be decontaminated (wall material, metal containers, furnace brick, hand tools, and some other miscellaneous equipment) was shipped to Oak Ridge for burial.

65. All non-usable material which was not contaminated (concrete blocks, sheet metal, transite, etc.) was disposed of on-site.

66. All contaminated combustible material was incinerated and the ash was shipped to Oak Ridge.

67. The entire nuclear fuel area was vacuumed and washed down, from ceiling to floor, and the walls, after being isolated by means of plastic barriers, were removed brick by brick.

68. The floor went through decontamination, as scrub downs sandwiched the paint removal process. Additionally, hot spots were etched with acid, sumps were filled with concrete, and trouble spot concrete was removed and disposed of in accordance with the disposal policy.

69. In October of 1961, the AEC conducted a compliance inspection following the transfer of all nuclear material and associated equipment and decontamination of the facility. The AEC concluded that the extent of radioactive contamination at the Blairsville facility was "insignificant." A true and correct report of the AEC compliance inspection is attached and incorporated as Exhibit "G."

70. Thereafter, the decontaminated areas of the facility were returned to use as general production and manufacturing areas.

71. Each of the activities outlined above was done at the direction of, under the control of, and with the knowledge of, the AEC.

## F. The Contamination

72. Several years ago, Westinghouse conducted a survey of certain areas of the floor around the Gage Lab at the Blairsville Plant. During this survey, Westinghouse employees discovered a metal plate on the floor with radiation approximately twice that of background readings.

73. Removal of the plate revealed an abandoned sump that had been filled with concrete. Direct radiation readings were taken of the various materials in the abandoned sump. Gamma spectrometry measurements indicated that the radioactive material present was low-enriched uranium.

74. The sump and its contents was remediated on or about December 28-29, 1993.

75. As a result of encountering the low-enriched uranium in the abandoned sump, WEC conducted further radiological investigations of the Blairsville facility.

76. These additional investigations revealed the presence of both low-enriched and highly-enriched uranium materials at Blairsville.

77. While cost estimates at Blairsville are not yet complete, investigation and remediation costs related to the Contract are expected to be in the millions of dollars.

## Count I--Contractual Reimbursement

78. The averments of Paragraphs 1 through 77 are incorporated by reference as if fully set forth herein.

79. The Contract contains a cost reimbursement provision at Article X, which provides that Westinghouse can recover "all costs incurred in the course of performing the work under the contract." Exhibit "A," p. 9.

80. The Contract also specifies that Westinghouse and the government would develop a guide to reimbursement.

81. Appendix D to the original Contract, entitled "Guide for Reimbursement of Costs" ("Reimbursement Guide"), represents the policy that the AEC and Westinghouse developed in order to provide for the reimbursement of costs under the Contract. The Reimbursement Guide provides an itemized list of expenditures that Westinghouse could recover from the government. Generally, the Reimbursement Guide seeks to offer Westinghouse reimbursement for costs associated with performing the tasks under the Contract. Specifically, the Guide allows for reimbursement of legal/professional fees from persons/firms outside of Westinghouse incurred under the Contract (Item #12) and the costs of correcting and/or repairing material and/or workmanship related to work under this Contract (Item #17). Exhibit "A," Appendix D, pp. 2, 4.

82. The costs related to the investigative and remedial activities at Blairsville that WEC has incurred, or will incur, are reimbursable costs under the AEC Contracts. Further, the legal and professional costs incurred, and to be incurred, by WEC are reimbursable costs under the AEC Contracts.

83. The Defendants have breached the AEC Contracts by failing to reimburse WEC for the investigative, remedial, legal and professional costs incurred, and to be incurred, at Blairsville in accordance with the AEC Contracts.

## Count II--Contractual Indemnification

84. The averments of Paragraphs 1 through 83 are incorporated by reference as if fully set forth herein.

85. The Contract contains the following indemnity clause:

> . . .Westinghouse shall not be liable and the Government shall indemnify and hold Westinghouse harmless against any delay, failure, loss or damage . . . and any expenses in connection therewith (including expenses of litigation,) . . . sustained by Westinghouse arising out of or connected with the work . . . Westinghouse and the Commission shall jointly develop procedures for handling all such claims.

Exhibit "A," p. 13.

86. Article XIV of the Contract further provides that:

> No obligations are imposed upon the Government by this Article . . . where the Government shall establish that the delay, failure, loss, expense or damage sustained by Westinghouse or claimed against it was caused directly by bad faith or willful misconduct on the part of some corporate officer or officers of Westinghouse, or on the part of any other representative having general supervision or direction of the work under this contract or on the part of the Manager of its Bettis Atomic Power Division.

Exhibit "A," p. 14.

87. Finally, Article XIV of the Original Contract states that:

> The liability of the Government under this Article . . . shall not be subject to dollar limitation . . . , and shall survive completion of this contract, and termination of this contract. . . . To the extent that funds for payments by the Government under this Article are not available to the Commission for purposes of this contract, such payments will be subject to the availability of funds from the Commission, Congress, or other sources.

Exhibit "A," p. 14.

88. Pursuant to the AEC Contracts, Defendants owe a duty to WEC to indemnify and hold it harmless against the investigative remedial, legal, expert, and other professional costs incurred, and to be incurred, with respect to the afore described activities at Blairsville.

89. Defendants have breached the AEC Contracts by failing to indemnify WEC for, and hold WEC harmless against, the investigative, remedial, legal, expert, and other professional costs incurred, and to be incurred, at Blairsville.

## Count III--CERCLA SECTION 107(a)

90. The averments of Paragraphs 1 through 89 are incorporated by reference as if fully set forth herein.

91. Westinghouse, WEC, DOE, NRC, and the United States are "persons" as that term is used in § 107(a) of the federal Comprehensive Environmental Response, Compensation, and Liability Act, as amended, ("CERCLA"), 42 U.S.C. § 9607(a), and as defined in CERCLA § 101(21), 42 U.S.C. § 9601(21).

92. The Blairsville facility is a "facility" as that term is used in CERCLA § 107(a), 42 U.S.C. § 9607(a), and as defined in CERCLA § 101(9), 42 U.S.C. § 9601(9).

93. Releases or threatened releases of hazardous substances into the environment have occurred at the Blairsville facility within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(22).

94. Westinghouse, and later WEC, have undertaken, and are currently undertaking, response actions with respect to Blairsville in response to the releases or threatened releases of hazardous substances, and have incurred and are incurring necessary costs of response consistent with the NCP.

95. Each of the Defendants is liable under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), as persons who at the time of disposal of any hazardous substance operated a facility at which hazardous substances were disposed of.

96. Each of the Defendants is liable under Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), as a person who by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances.

97. The response costs which Westinghouse and WEC have incurred to date, and will continue to incur in the future, are necessary and will be consistent with the applicable federal National Oil and Hazardous Substances Pollution Contingency Plan, as codified at 40 C.F.R. Part 300 ("NCP").

98. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 6907(a), each of the Defendants is liable to Plaintiff for any necessary costs of response incurred by Westinghouse and WEC consistent with the NCP in connection with the Blairsville facility.

99. Copies of this Complaint will be provided to the Attorney General of the United States and to the Administrator of the Environmental Protection Agency, in accordance with the requirements of CERCLA § 113(l), 42 U.S.C. § 9613(l).

100. The DOE, NRC, and the United States are liable to WEC for the response costs that Westinghouse and WEC have incurred, and for the future response costs to be incurred, with regard to the Blairsville facility, pursuant to CERCLA § 107(a), 42 U.S.C. § 9607(a).

## COUNT IV - CERCLA SECTION 113(f)

101. The averments of Paragraphs 1-100 are incorporated by reference as if fully set forth herein.

102. Pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 6913(f), WEC is entitled to contribution from the Defendants in connection with the response costs incurred, and to be incurred, at the Blairsville facility, and all response costs incurred by WEC or for which WEC is deemed liable should be allocated using such equitable factors as the Court determines are appropriate.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff Westinghouse Electric Company, LLC respectfully requests that this Honorable Court grant the following relief:

A. Judgement for damages, including reasonable attorney and expert fees and expenses, on Counts I and II of the Complaint;

B. Entering a declaratory judgment against Defendants declaring, adjudging, and decreeing that the defendants shall reimburse WEC for, and indemnify WEC against, all investigative, remedial, professional, and legal costs incurred, and to be incurred, at the Blairsville facility related to the activities herein described;

C. Ordering Defendants to pay all necessary costs of response incurred by WEC at the Blairsville facilities consistent with the NCP;

D. Entering a declaratory judgment pursuant to Section 113(g)(2) of CERCLA, 42

U.S.C. § 9613(g)(2), against Defendants declaring, adjudging, and decreeing that the defendants are liable to WEC for response costs or damages at the Blairsville facility, such judgment to be binding on any subsequent action or actions to recover further response costs or damages;

E. In the alternative, allocating among WEC and Defendants all response costs incurred at or with respect to the Blairsville facility, pursuant to 42 U.S.C. § 113(f)(1);

F. Awarding interest and costs of suit; and

G. Awarding such other and further relief as the Court may deem just and proper.

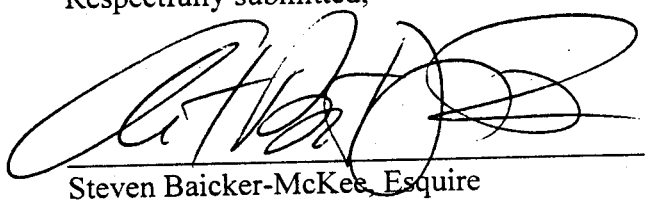
U.S.C. § 9613(g)(2), against Defendants declaring, adjudging, and decreeing that the defendants are liable to WEC for response costs or damages at the Blairsville facility, such judgment to be binding on any subsequent action or actions to recover further response costs or damages;

E. In the alternative, allocating among WEC and Defendants all response costs incurred at or with respect to the Blairsville facility, pursuant to 42 U.S.C. § 113(f)(1);

F. Awarding interest and costs of suit; and

G. Awarding such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Steven Baicker-McKee, Esquire
Joseph P. Pohl III, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center, 8th Floor
Pittsburgh, PA 15222
(412) 394-5400

Of Counsel:

Albert Bates, Jr. IV, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center, 8th Floor
Pittsburgh, PA 15222
(412) 394-5400