Comments of the Slovak Republic as the Party concerned to the Aarhus Convention Compliance Committee´s draft findings and recommendations with regard to communication ACCC/C/2013/89 concerning compliance by Slovakia

First of all the Slovak Republic would like to thank the Aarhus Convention Compliance Committee for preparing its draft findings and recommendations regarding communication ACCC/C/2013/89/Slovakia. The Slovak Republic also welcomes and appreciates the opportunity to consider and possible comment on the draft findings and recommendations pursuant to paragraph 34 of the annex to decision I/7.

The Slovak Republic has no comments on paragraphs 1 to 66, as they describe the sequence, presented evidence and the facts of the entire case since 2013.

The main finding of the Compliance Committee is described in paragraph 98 of the document received. In this paragraph the Committee finds that, by adopting generally applicable binding rules in the area of access to nuclear-related information, namely section 8, paragraph 3 of the Nuclear Act and the Directive on identification and removal of sensitive information from documents to be opened to the public, and by unconditionally refusing access to nuclear-related information in the context of a decision-making procedure subject to article 6 of the Convention, the Slovak Republic (Party concerned) has failed to comply with article 6, paragraph 6 in conjunction with article 4, paragraphs 4 and 6 of the Convention.

We would like to state the following comments on the draft findings and recommendations:

It is true that article 6 of the Aarhus Convention gives the public the right to apply to the competent public authorities for the purposes of review, to provide to the public concerned upon request, if required by national law, free of charge and as soon as possible, access to all information concerning the decision-making process referred to in this article that is available for public participation, without prejudice to the right of the Party to refuse disclosure of certain information pursuant to *article 4 par. 3 and 4*. Without prejudice to the provisions of *article 4*, the relevant information will include at least:

a) description of the site of activity and physical and technical characteristic of the proposed activity including an estimation of expected residues and emissions;
b) description of significant impacts of the proposed activity on the environment;
c) description of measures envisaged to prevent and/or mitigate impacts, including discharged emissions;
d) non-technical summary of the above;
e) an outline of the main alternatives for solution elaborated by the applicant; and

f) the main reports and recommendations that were forwarded to the public authority in accordance with the national law at the time, when the public concerned shall be informed in accordance with paragraph 2.

Paragraph 98 of the ACCC's draft findings refers to article 6 par. 6 of the Aarhus Convention in connection with article 4 par. 4 and 6 of the Aarhus Convention.
Paragraph 4 describes the reasons when a request for information may be rejected. By contrast, paragraph 6 provides that each Party shall ensure that if information that according to article 4 par. 3 c) and par. 4 of the Aarhus Convention cannot be disclosed, that part may be separated without affecting confidentiality of the separated information, the public authority shall make available the remainder of requested environmental information.

These provisions of the Aarhus Convention, according to the draft findings, do not correspond to the provision of section 8 par. 3 of the Atomic Act and the Guideline on identification and removal of sensitive information in the documentation to be disclosed to the public.

Section 8 par. 3 of the Atomic Act provides that the Nuclear Regulatory Authority of the Slovak Republic (hereinafter only as "ÚJD SR") shall decide about granting consent or authorization after verifying that the applicant fulfilled all the conditions set by this Act and the relevant generally binding legal regulations issued on its basis. The Authority proceeds in the proceeding for issuing authorization or license independently from a proceeding of any other administrative authority. Party to the proceeding for issuing license is also natural person or a legal entity, for which this position is granted by a special regulation. **The Authority shall reject those parties to disclose sensitive information according to *Section 3 par. 14 and 15*.**

The very last sentence enables the ÚJD SR to refuse the disclosure of sensitive information. That does not mean that ÚJD SR does not disclose the whole documentation. As an example, we can use the ÚJD SR proceeding after the entry into force of the judgement of the Supreme Court of the Slovak Republic No. k. 5Sžp/21/2012 dated 27 June 2013 annulling the ÚJD SR Decision No. 79/2009 dated 28 April 2009, rejecting the appeal against the ÚJD SR Decision No. 246/2008 dated 14 August 2008 on permitting change to construction before completion of NPP MO 3&4. After the announcement of the re-opening of the case to all the parties (including the non-governmental organization Greenpeace Slovakia), they were informed that the parties have the possibility to familiarize themselves with the documentation, which will not include the sensitive information, from 15 October 2013 until 30 November 2013 in the Information Centre of NPP Mochovce, where the documentation needed for the licensing procedure will be available for inspection. The parties were able to make any comments on the documentation by 30 November 2013, failing to meet this deadline, later opinions will be disregarded. This example shows that ÚJD SR provided the documentation. ÚJD SR reiterates that its only intention for the documentation to be available in the Information Centre at the nuclear power plant was to enable and facilitate access to the documentation for a widest

possible range of parties. This is not just the party Greenpeace Slovakia, but also the surrounding municipalities, whose residents are most affected by the construction of MO 3&4. Since an increased interest was expected from the general public from the municipalities located in the vicinity of MO 3&4, it was more effective to place the licensing documentation closer to potentially higher interest of citizens and at the same time it may be construed as a local investigation under sections 36, 37 and 61 of the Building Act.

The most important example of providing documentation with only blackened sensitive information and one of the **main comment** of the Slovak Republic on ACCC's draft findings is **the procedure after the judgement of the Supreme Court of the Slovak Republic in the case of non-disclosure of the Preliminary Safety Report of NPP Mochovce Units 3&4 Ref. No. 3Sži/22/2014 issued on 9 June 2015 and became valid and enforceable on 6 July 2015. The judgement Ref. No. 3Sži/22/2014 of the Supreme Court of SR confirmed the judgement of the Regional Court of SR Ref. No. 3S/142/2010-2012 issued on 14 May 2013 which was in favour of the plaintiff Greenpeace Slovakia. The Supreme Court´s judgement Ref. No. 3Sži/22/2014 legally obliged ÚJD SR to take the necessary administrative steps to provide once again the documentation of the Preliminary Safety Report of NPP Mochovce Units 3&4 to public and blackened sensitive information only in accordance with the Aarhus Convention and any grounds of refusal to public information has to be interpreted in a restrictive way not as was published in first time.** After the Supreme Court's judgement No. 3Sži/22/2014 ÚJD SR started to take the necessary administrative steps in accordance with the judgement. With a letter of ÚJD SR dated 22 July 2015 administrative procedure was initiated by the administrative authority, as the first act in the announced procedure. The parties were invited to send their opinion on the initiation and the subject of the proceeding by 5 August 2015. ÚJD SR in the given letter invited the parties (Slovenské elektrárne, a.s. and Greenpeace Slovakia) to state whether they continue to insist on their original request for disclosure of the whole Preliminary Safety Report of NPP Mochovce Units 3&4 (hereinafter only as "PSR MO 3&4") after excluding sensitive information to the extent as specified by the Supreme Court. ÚJD SR in the letter also invited the parties to state whether they propose to make available other form or reduced content of PSR MO 3&4? If yes, which method they propose?

By letter dated 24 August 2015 Greenpeace Slovakia withdrew its remonstration and no longer required the disclosure of this document. (All materials on this case, also the judgement of the Supreme Court, are attached as annexes to this main comment in English version). After the final judgement of the Supreme Court, ÚJD SR in July and August 2015 worked on blackening the sensitive information from the required documentation. In contrast, Greenpeace Slovakia responded to the call only after one month after a notice was served. Greenpeace Slovakia at the time of the proceeding had no idea how such blackened documentation would look like and even then only at the second attempt (after ÚJD SR sent a second letter prompting for an opinion) it stated no request and that it withdraws the remonstration.

In this case based on domestic remedy was opportunity for Greenpeace Slovakia to achieve publishing documentation in appropriate way and in accordance with the Aarhus Convention, because ÚJD SR was legally obliged by the Supreme Court´s judgement Ref. No. 3Sži/22/2014 to take the necessary administrative steps.

We can only speculate what the actual interests of the NGO are and what was the reason that NGO did not use the domestic remedy despite the fact that they could.

This main comment would like to explain that the Regional Court of SR procedure Ref. No. 3S/142/2010-2012 was the reason why Greenpeace Slovakia stated in communication ACCC/C/2013/89 that the Slovak Republic is not in compliance with article 6 par. 4 and 6 of the Aarhus Convention without waiting the end of the whole judicial procedure (the judgement of the Supreme Court of SR Ref. No. 3Sži/22/2014), similarly as was in the question of access to justice in the same communication – ending with the judgement of the Supreme Court of the SR Ref. No. k. 5Sžp/21/2012, also in favour of the plaintiff Greenpeace Slovakia.

From this example it is clear that ÚJD SR tries to fully comply with article 6 par. 4 and 6 of the Aarhus Convention and after removing the sensitive information, it submitted the requested document or attempted to submit it to the party.

On the ACCC's draft findings ÚJD SR further states that article 4 par. 4 of the Aarhus Convention specifies those areas, which can be excluded from the provision of information. Because of the removal of sensitive information, provision of section 3 par. 14 and 15 of the Atomic Act was introduced, and as detailing of these provisions, a Guideline on identification and removal of sensitive information in the documents intended for disclosure to the public has been developed and published. It is a document that is binding for the ÚJD SR staff and serves for better orientation to know exactly what is and what is not sensitive information, and what needs to be blacked out, and thus not to disclose to the public from the documentation, which ÚJD SR uses in its decision-making process and to which the other parties are legally entitled to. What can be excluded as sensitive information is treated in general terms in the Atomic Act and subsequently specified in the Guideline, since it was necessary to modify the internal administration account.

In that regard the ACCC pointed out in paragraph 76 that section 3 par. 14 of the Atomic Act requires that public authorities take into account the public interest in withholding information and that the Aarhus Convention requires authorities to do the opposite that is to take into account the public interest in disclosure. ÚJD SR considers that section 3 par. 14 of the Atomic Act clearly specifies information that cannot be disclosed, because its disclosure could help to plan and act with the aim to causing disruption or destruction of a nuclear installation and thus adversely affect public safety and cause ecological or economic harm. ÚJD SR in the given provisions does not see any discrepancy between section 3 par. 14 of the Atomic Act and article 4 par. 4 of the Aarhus Convention. **Paragraph 4 of the Aarhus Convention clearly defines when the information is not to be disclosed. This is a negative definition of**

non-disclosure of information. The same negative definition of non-disclosure of sensitive information is used also in section 3 par. 14 of the Atomic Act.

ÚJD SR in all proceedings and decisions always takes into account first and foremost the public interest. Public interest is also public safety against activities that may disrupt or destroy a nuclear installation and thus to cause serious consequences. In contrast, as the regulatory authority for safety of nuclear installations it protects public interest, which is that nuclear power plants to be operated in such a way that they do not threaten the population or the environment.

For ÚJD SR it is not clear, where in the negative definition of article 4 par. 4 of the Aarhus Convention emphasis is placed on public interest in disclosure of information.

Also paragraph 77 is not entirely true. ÚJD SR in the above mentioned case tries to show that it is in compliance with article 4 par. 6 of the Aarhus Convention. This paragraph requires that the information required, which pursuant to par. 3 c) and par. 4 of the Aarhus Convention is not made available, may be separated without affecting the confidentiality of separated information and the public authority make available the remainder of the required environmental information. By blacking out sensitive information and by making public such documentation it was a complete fulfilment of article 4 par. 6 of the Aarhus Convention. This paragraph is fulfilled also thanks to the Guideline on identification and removal of sensitive information in the documentation to be disclosed to the public, which is the basic document for the identification which information is sensitive and which is not. **Also thanks to this Guideline, after blacking out the sensitive information, it is possible to make available the document to the public. ÚJD SR considers that it is fully in compliance with article 4 par. 6 of the Aarhus Convention. Further, there is no other mechanism how to identify such removal and how to apply it.**

ACCC in several places declares that the reasons for refusal must be interpreted in a restrictive way. The Aarhus Convention provides that restrictions on the access to information shall be interpreted in a restrictive way, but it does not contain details on how to approach the restrictions in practice, either from the content or formal point of view. According to the interpretation of other conventions (Convention on Physical Protection of NM and NI including the Additional Protocol, the Convention for the Suppression of Acts of Nuclear Terrorism), this is up to the discretion of a particular Member State. It is the Member State, which has the given information available, on the other hand has the obligation to decide, whether that information may cause or help to plan or attack a nuclear or other installation. On the one hand it is up to the particular Member State´s responsibility for such information not to make public, and on the other hand, it is the responsibility of the same Member State that the public has all the environmental information, which is allowed under its national and international regulations. In case of any problems the responsibility will be always borne by the Contracting State through acting bodies and in the absence of detailed rules (which is not possible to clearly define in

a generic way to all possible cases) it will be always up to a subjective interpretation of where are the limits of restrictiveness. For the misuse of information, as well as for non-disclosure of information it will be always the Member State that is responsible (in this case the Slovak Republic). Therefore it is correct that the decision on what is restrictive was up to the discretion of the given Member State.

On the Recommendations included under paragraph 99, which follows up to the previous point, which describes the conclusions of ACCC, we would like to state the following:

ÚJD SR, by its procedure in the case stated above fulfilled the article 4 par. 4 of the Aarhus Convention, since the Atomic Act clearly defines in section 3 par. 14 what is sensitive information.

Section 3 par. 14: "*The documentation containing sensitive information is considered documentation, the disclosure of which could be used to plan and carry out actions aimed at causing disruption or destruction of a nuclear installation and thus adversely affect the public safety and cause ecological or economic damage. This documentation shall not be disclosed under special regulation."*

From the example above it is clear that ÚJD SR by its actions also fulfilled article 4 par. 6, if after blacking out the sensitive information submitted the remainder of the document to the party. This procedure fulfilled exactly the article 4 par. 6 of the Aarhus Convention, according to which the information that is not to be disclosed according to par. 4 shall be separated and the remainder of the required information (or document) shall be disclosed by the public authority.

ÚJD SR is currently working on the amendment to the Atomic Act mainly due to the transposition of Directive EU 2014/87/Euratom. On this occasion it will also modify the provisions regarding access to information on nuclear activities, which will precisely govern the transparency, but also the possibility to eliminate information made available according to article 4 par. 4 of the Aarhus Convention.

In the meantime ÚJD SR updated the guideline on blacking out sensitive information from the safety documentation introducing a much more detailed procedure and more restrictive approach in removing sensitive information from the safety documentation of nuclear installations.

Section 3 par. 14 last sentence of the Atomic Act has not been applied for some time in that not the whole safety documentation containing sensitive information would not be disclosed. The Aarhus Convention is applied directly as a preferred international treaty.

<u>If the NGO as a party felt that the blacking out of the safety documentation that was available to it was carried out beyond the extent set out in the Aarhus Convention, it had</u>

the opportunity to bring an action to the court. And it did not use this possibility. In further proceedings after the judgement of the Supreme Court it did not respond to the calls of ÚJD SR and in the final phase did not request the information.

Due to the increasing number of terrorist attacks in Europe in recent years and also in last few days, the aim of which can be also nuclear installations, the Authority considers the extent of non-disclosed documentation for appropriate.

In conclusion we would like to draw attention to the potential conflict between some of the conventions concluded at the UN. For example:

Convention on the Physical Protection of Nuclear Material and Nuclear Facilities (INFCIRC/274) amended by the Amendment to the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities (GOV/INF/2005/10-GC(49)/INF/6) provides in article 2 par. 2:
"*The responsibility for the establishment, implementation and maintenance of a physical protection regime within a State Party rests entirely with that State.*"

Further in this Convention in **a Fundamental principle A** it states:
"*FUNDAMENTAL PRINCIPLE A: Responsibility of the State*
The responsibility for the establishment, implementation and maintenance of a physical protection regime within a State rests entirely with that State."

The above Convention can be in potential conflict with the Aarhus Convention and in the broad interpretation it is almost something impossible by the State to meet both of these Conventions at the same time, but the Slovak Republic always try to meet them both.

We also send the following documents as annexes in ENG and SK version to support our comments:

1. The Supreme Court ´s judgement Ref. No. 3Sži/22/2014 Greenpeace Slovakia vs ÚJD SR
2. Notice of initiation of a new appellate procedure
3. SE statement
4. Further action in the proceedings
5. Greenpeace - Withdrawal of remonstration in the proceeding
6. Call for granting a consent by the other party
7. Statement on the call by the Nuclear Regulatory Authority of SR
8. Decision No. 586/2015
9. Directive on Identification and Removal of Sensitive Information from Documents which are to be Made Available to Public

At the end the Slovak Republic hopes and kindly asks the Compliance Committee to consider and take into account all about mentioned comments before finalizing the findings.