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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:
Ivan Selin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gail de Planque

JAN 19 1994

In the Matter of	)	
	)	
TRANSNUCLEAR, INC.	)	Docket No. 11004649
	)	
(Export of 93.15% Enriched Uranium)	)	License No. XSNM02748
	)	

MEMORANDUM AND ORDER

CLI-94-01

I. INTRODUCTION

The Nuclear Control Institute ("NCI") filed a Petition for Leave to Intervene and Request for Hearing on an application from Transnuclear, Inc. ("Transnuclear") for a license to export 280 kilograms of high-enriched uranium ("HEU") in the form of mixed uranium and thorium carbide, as unirradiated fuel fabricated for the Fort St. Vrain reactor, to COGEMA in France to be processed for recovery of the uranium and thorium. For the reasons stated in this Memorandum and Order, we deny the Petition for Leave to Intervene and Request for Hearing.

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II. BACKGROUND

Transnuclear filed an application, dated May 5, 1993, for a license to export 280 kilograms of HEU containing 260.9 kilograms of uranium-235 (93.15% enriched) and 2481 kilograms of thorium, in the form of mixed uranium and thorium carbide, as unirradiated fuel fabricated for the Fort St. Vrain reactor,[1] to COGEMA in France to be processed for recovery of the uranium and thorium.[2] On June 24, 1993, NCI filed a Petition for Leave to Intervene and Request for Hearing on the Transnuclear license application. NCI asserts that it is a nonprofit, educational corporation based in the District of Columbia, and engages in disseminating information to the public concerning the risks associated with the use of nuclear materials and technology. Petition at 1-2.

NCI seeks intervention to argue that (1) the proposed export, if authorized, would be inimical to the common defense and security of the United States, (2) approval of the proposed export would be contrary to Section 134 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2160d (the "Schumer Amendment")[3], and (3) the license application is deficient in

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[1]The fabricated fuel is from the now-decommissioned Fort St. Vrain Power Station, a high temperature gas-cooled thorium fuel cycle prototype reactor located at Platteville, Colorado and owned by the Public Service Company of Colorado. The material is currently owned by Nuclear Fuel Services (NFS) and stored at the Erwin, Tennessee facility of NFS.

[2]Notice of receipt of the application was published in the Federal Register on May 26, 1993 (58 Fed. Reg. 30187).

[3]The Energy Policy Act of 1992, Public Law 102-486, signed into law on October 24, 1992, among other things, added new

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meeting the information requirements of NRC regulations in that it does not sufficiently describe the ultimate intended end use of the material to be exported. Petition at 10-11.

NCI requests that the Commission (1) grant NCI's Petition for Leave to Intervene, (2) order a full and open public hearing at which interested parties may present oral and written testimony and conduct discovery and cross-examination of witnesses, and (3) act to ensure that all pertinent information regarding the issues addressed by NCI is made available for public inspection at the earliest possible date. Petition at 1-2, 18.

Transnuclear filed an Opposition in Response to Petition to Intervene ("Response") on July 27, 1993. Before responding to the petition, Transnuclear amended its application on July 16, 1993, to require that the exported material be blended down and used as low enriched uranium ("LEU") for research or test reactors. In its Response, Transnuclear argues that the NRC is

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[3](...continued)
restrictions on the export of uranium, in a new Section 134 of the Atomic Energy Act (the "Schumer Amendment"). The Schumer Amendment permits the issuance of a license for export of uranium enriched to 20 per cent or more in the isotope-235 to be used as a fuel or target in a nuclear research or test reactor only if, in addition to other requirements of the Atomic Energy Act, the NRC determines that 1) there is no alternative nuclear reactor fuel or target enriched in the isotope 235 to a lesser percent than the proposed export, that can be used in that reactor; 2) the proposed recipient of that uranium has provided assurances that, whenever an alternative nuclear reactor fuel or target can be used in that reactor, it will use that alternative in lieu of highly enriched uranium; and 3) the United States Government is actively developing an alternative nuclear reactor fuel or target that can be used in that reactor. The applicability of the Schumer Amendment to the instant application is discussed infra.

not statutorily required to provide an adjudicatory hearing on export licenses and that in any case, NCI is not entitled to a hearing as a matter of right because NCI lacks standing. Response at 2-4. Transnuclear further argued that a discretionary hearing would not be in the public interest or assist the Commission in making its statutory determination because Transnuclear's amended license application makes clear that the uranium recovered from the exported material will be blended down to LEU thus removing the relevance of the contentions proffered by NCI. Response at 8-10.

NCI filed a timely Reply to Applicant's Opposition to the Petition for Leave to Intervene and Request for Hearing ("Reply") on August 16, 1993. In its Reply, NCI argues that a hearing of right is available in export licensing cases. Reply at 2-4. NCI concedes that Commission case law has denied standing, as a matter of right, to organizations with interests substantially similar to NCI in proceedings substantially similar to the instant one, but argues that the Commission should expand its approach to standing in export licensing proceedings to meet Congressional expectations regarding public participation in such proceedings. Reply at 5-7. NCI further argues that, notwithstanding Transnuclear's stated intention to blend down the material after it is exported, NCI's contentions remain valid because granting the license will increase the amount of HEU in international transport and commerce, and the expressed intention to down blend is unacceptably vague. Reply at 7-14.

Subsequent to NCI's Reply, COGEMA submitted a letter dated September 8, 1993, confirming that COGEMA will notify the NRC, in writing, within 30 days after all the exported material has been blended down to LEU. In a letter dated September 24, 1993, COGEMA again confirmed the earlier notification commitment and further confirmed that commercial arrangements regarding the material require that all the exported material be blended down with no substitutions or sale of HEU allowed, and that COGEMA will retain title to the material until it has been blended down to LEU.

III. THE PETITIONER'S STANDING

A. NCI Does Not Have Standing To Intervene As A Matter Of Right

Section 189a of the Atomic Energy Act of 1954, as amended, provides, among other things, that the Commission grant a hearing, as a matter of right, to any person "whose interest may be affected by" a proceeding under the Act for the granting of any license. 42 U.S.C. § 2239(a)(1).[4] To determine if a

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[4]The Commission's regulations at 10 C.F.R. § 110.84 list the factors to be considered in taking action on a hearing request or intervention petition in a licensing proceeding for the export of nuclear materials. Section 110.84(b) addresses considerations to determine whether a petitioner has standing to intervene as a matter of right and provides that:

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petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under section 189a, "the Commission has long applied contemporaneous judicial concepts of standing." Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993), citing Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992), aff'd, Environmental & Resources Conservation Org. v. NRC, No. 92-70202 (9th Cir. June 30, 1992); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). To satisfy the judicial concept of standing, a petitioner must demonstrate "a concrete and particularized injury that is fairly traceable to the challenged action." CLI-93-21, 38 NRC at 92 (1993).

NCI asserts a claim of interest for standing based on its institutional interests in the dissemination of information concerning nuclear weapons and proliferation in general and the use of HEU in particular. Petition at 3. The Commission has

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(b) If a hearing request or intervention petition asserts an interest which may be affected, the Commission will consider:
  (1) The nature of the alleged interest;
  (2) How the interest relates to issuance or denial; and
  (3) The possible effect of any order on that interest, including whether the relief requested is within the Commission's authority, and, if so, whether granting relief would redress the alleged injury.

10 C.F.R. § 110.84(b).

long held that institutional interest in providing information to the public and the generalized interest of their memberships in minimizing danger from proliferation are insufficient for standing under section 189a. See, e.g., Edlow International Co. (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563,572-78 (1976); Exxon Nuclear Company, Inc., et al. (Ten Applications For Low Enriched Uranium Exports To EURATOM Member Nations) CLI-77-24, 6 NRC 525, 529-32 (1977); Westinghouse Electric Corp. (Export to South Korea) CLI-80-30, 12 NRC 253, 257-60 (1980); General Electric Company (Exports to Taiwan) CLI-81-2, 13 NRC 67, 70 (1981). See also Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station) CLI-92-02, 35 NRC 47, 59-61 (1992) (rejection of "informational interests" as grounds for standing in reactor licensing case).

NCI "concede[s] that there is a line of Commission cases, starting with the pre-NNPA [Nuclear Non-Proliferation Act] decision in Edlow International Co., CLI-76-6, 3 NRC 563 (1976), denying standing to organizations with interests substantially similar to Petitioner in proceedings substantially similar to the present one." Reply at 5. NCI argues, however, that the Commission's approach to standing should be expanded to realize the Congressional intention to increase public participation in export licensing through enactment of section 304 of the Nuclear Non-Proliferation Act of 1978, 42 U.S.C. § 2155a ("NNPA"). Reply at 5-7.

The mechanism for increased public participation NCI urges already is provided for in the Commission's regulations. Section 304(b)(2) of the NNPA mandated that the Commission promulgate regulations establishing procedures "for public participation in nuclear export licensing proceedings when the Commission finds that such participation will be in the public interest and will assist the Commission in making the statutory determinations required by the 1954 Act." 42 U.S.C. § 2155a(b)(2). The Commission amended its regulations in 1978 expressly to accommodate this mandate by adding the criteria set out in 10 C.F.R. § 110.84(a) for granting a hearing as a matter of discretion.[5] See Statement of Considerations, 43 Fed. Reg. 21641, 21642-43 (1978). The regulation specifically sets forth the Commission policy to hold a hearing or otherwise permit public participation if the Commission finds that such a hearing or participation would be in the public interest and would assist the Commission in making the required statutory determinations.

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[5]Section 110.84(a) of Title 10 of the Code of Federal Regulations provides that:

> (a) In an export licensing proceeding, or in an import licensing proceeding in which a hearing request or intervention petition does not assert or establish an interest which may be affected, the Commission will consider:
> (1) Whether a hearing would be in the public interest; and
> (2) Whether a hearing would assist the Commission in making the statutory determinations required by the Atomic Energy Act.

10 C.F.R. § 110.84(a).

Thus, even though NCI has not established a basis on which it is entitled to intervene as a matter of right, the Commission could hold a hearing under 10 C.F.R. § 110.84(a)(1) and (2) if such hearing would be in the public interest and assist the Commission. See Braunkohle Transport, USA (Import of South African Uranium Ore Concentrate), CLI-87-6, 25 NRC 891, 893 (1987).

B. A Discretionary Hearing Would Not Assist The Commission And Be In The Public Interest

The issues raised by NCI - (1) the common defense and security of the United States, (2) compliance with the Schumer Amendment, and (3) assurance of the ultimate intended end use of the material - do concern matters which the Commission considers in making an export license decision. There is no indication in NCI's pleading, however, that it possesses special knowledge regarding these issues or that it will present information not already available to and considered by the Commission.

The Executive Branch and the Commission staff have addressed the issues sufficiently in their respective reviews of the Application. The transportation, international safeguards, and foreign physical security concerns associated with the issue of the common defense and security were addressed by the Executive Branch and the Commission staff in their consideration of the Application. The Commission has reviewed the Executive Branch's and Commission staff's evaluation of the ultimate end use of the

material and the effect of the COGEMA September 8 and 24, 1993, letters regarding that end use. NCI offers no reason for the Commission to differ with the views expressed by the Executive Branch and the Commission staff on these matters.

The only remaining issue raised by NCI is compliance with Section 134 of the Atomic Energy Act of 1954, as amended, (the Schumer Amendment) 42 U.S.C. § 2160d. NCI contends that, notwithstanding that the HEU is to be blended down for use as LEU reactor fuel, the Schumer Amendment issue "remains alive" because of the terms of the Amendment. Reply at 13-14. A fair reading of the entire amendment, however, shows that, while Congress may have been concerned about the transportation of HEU, the focus of the statute is on discouraging the continued use of HEU as reactor fuel and not on prohibiting the exportation, per se, of HEU. Any other reading would be inconsistent with the plain meaning of the legislation since it allows for the exportation of HEU fuel for use in a reactor provided that certain provisions are in place to ultimately convert the reactor to use LEU. See 42 U.S.C. § 2160d(a)(2) and (3). Further, assuming arguendo that the terms of the Schumer Amendment are ambiguous,[6] a review of

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[6]The Schumer Amendment states, in part:

> a. The Commission may issue a license for the export of highly enriched uranium to be used as a fuel or target in a nuclear research or test reactor only if, in addition to any other requirement of this [Act], the Commission determines that-
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> (1) there is no alternative nuclear fuel or target enriched in the isotope 235 to a lesser percent than the proposed export, that can be

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its legislative history clearly shows that the intent of the amendment is to "put into law what was, from 1978 to 1990, the policy of both Democratic and Republican administrations--prohibiting the NRC from licensing the exports of bomb-grade uranium fuel... ." 138 Cong. Rec. H. 11440 (daily ed. October 5, 1992) (remarks of Representative Schumer) (emphasis added). The NRC staff advises that the material the Applicant seeks to export, although fabricated as HEU fuel for the now defunct Fort St. Vrain reactor, is not in a form that can be used as HEU fuel or target material in a research or test reactor without first processing the material to recovery its uranium content. Exporting the material for processing, blending down, and subsequent fabrication into LEU fuel or target material for test and research reactors may aid in discouraging the continued use of HEU as fuel in reactors by increasing the availability of LEU fuel. The action, if nothing else, meets one of the goals of the Schumer Amendment, in that it will remove 280 kilograms of HEU from the world inventory and, thereby, help encourage "developing alternative fuels that will enable an end to the bomb-grade exports." Id.

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[6](...continued)
used in that reactor;

42 U.S.C. § 2160d. The meaning of the phrase "to be used as a fuel" in the first sentence, in the context of the whole provision, clearly means "to be used as a HEU fuel." The NCI argument depends on reading the word "fuel" in the first sentence as meaning either "HEU fuel" or "LEU fuel."

In summary, nothing in the NCI Petition and Reply indicates that a hearing would generate significant new insights for the Commission regarding the instant application. To the contrary, conducting a public hearing on issues concerning matters about which the Commission already has abundant information and analyses would be contrary to one of the purposes of the NNPA, namely, "that United States government agencies act in a manner which will enhance this nation's reputation as a reliable supplier of nuclear materials to nations which adhere to our non-proliferation standards by acting upon export license applications in a timely fashion." Westinghouse CLI-80-30, 12 NRC 253, 261 (1980) (citation omitted). For these reasons, NCI's petition and request for a public hearing should be denied as not in the public interest and not necessary to assist the Commission in making its statutory determinations.

IV. CONCLUSION AND ORDER

For the reasons stated in this decision, NCI has not established a basis on which it is entitled to intervene as a matter of right under the Atomic Energy Act. Further, a hearing, as a matter of discretion pursuant to 10 C.F.R. § 110.84(a), would not be in the public interest and is not needed to assist the Commission in making the determinations required for issuance

of the export license to Transnuclear. The Petition for Leave to Intervene and Request for Hearing is denied.

It is so ORDERED.

For the Commission[7]

JOHN C. HOYLE
Assistant Secretary of the
Commission

Dated at Washington, D.C.
this 19th day of January, 1994.

[7]Commissioner de Planque was not present for the affirmation of this order; if she had been present she would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

TRANSNUCLEAR, INC.

(Export of 93.15% Enriched Uranium,
License No. XSNM 02748)

Docket No.(s) 11004649

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM. M&O (CLI-94-01) DTD 1/19 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
19 day of January 1994

Emile J. Julian
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