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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

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In the Matter of: )

YANKEE ATOMIC ELECTRIC )  
COMPANY )

(Yankee Nuclear Power )  
Station) )

DOCKETED MAR 18 1994

Docket No. 50-29

MEMORANDUM AND ORDER

CLI-94-03

I. Introduction.

On November 15, 1993, Environmentalists, Inc. ("Petitioner"), filed a petition seeking an adjudicatory hearing regarding the "plans to decommission and dismantle" the Yankee Nuclear Power Station ("Yankee NPS"), including plans to ship radioactive components of the plant to the Barnwell waste disposal facility located in Barnwell, South Carolina. Yankee Atomic Energy Company ("YAEC"), the licensee, and the NRC Staff responded to the petition in filings dated November 23 and November 30, 1993, respectively. YAEC and the Staff both oppose the petition on the ground that there is no proceeding in existence in which an adjudicatory hearing may be held and that,

On December 16, 1993, Petitioner filed a supplement to the petition containing, inter alia, the names and addresses of four members of its organization living in South Carolina.

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in any event, petitioner's filings are insufficient to obtain intervention even if a hearing were to be held. The Staff argues, in addition, that there are no grounds for the Commission to grant a discretionary hearing. After due consideration, we deny the petition for the reasons stated below.

## II. Background.

The Commission's regulations governing the decommissioning process require the establishment of an adequate decommissioning funding mechanism, 10 C.F.R. §50.75, and establish requirements for the termination of a license, 10 C.F.R. §50.82. These regulations require, inter alia, that the licensee submit, within two years of the permanent cessation of operations, an application for termination of a license together with (or preceded by) a proposed decommissioning plan, 10 C.F.R. §50.82(a), and that the Commission provide notice of the plan prior to approving it and issuing an order authorizing the decommissioning, 10 C.F.R. §50.82(e).

The regulations do not specify what decommissioning activities the licensee may undertake prior to submission of its decommissioning plan. However, the Commission issued new guidance on this subject in January 1993. Under this guidance, the licensee may undertake preliminary decommissioning activities that do not (1) foreclose future release of the site for unrestricted use, (2) significantly increase decommissioning costs, (3) cause a significant environmental impact which has not

been previously reviewed, or (4) violate the terms of either the existing license or 10 C.F.R. §50.59.<sup>2</sup> In addition, the licensee may use its decommissioning funds for these activities. See Memorandum from Samuel J. Chilk to William C. Parler and James M. Taylor, January 14, 1993.<sup>3</sup>

By letter dated February 27, 1992, YAEC informed the NRC that it had ceased operations at Yankee NPS permanently. On August 5, 1992, the NRC Staff issued a "possession-only" amendment to the Yankee NPS license, removing YAEC's right to operate the facility. See 57 Fed. Reg. 37579 (August 19, 1992). Pursuant to the Commission's guidance described above, YAEC initiated the Component Removal Program ("CRP") under which it planned to remove the four steam generators, the pressurizer and

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<sup>2</sup>This guidance substantially modified our previous position on this issue. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-90-08, 32 NRC 201, 207 n. (1990); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-02, 35 NRC 47, 61 n.7 (1992). Under 10 C.F.R. §50.59, a licensee may make changes to its facility as described in the Final Safety Analysis Report ("FSAR") without prior Commission approval if the change does not involve (1) a change in the facility's technical specifications or (2) an unreviewed safety question.

<sup>3</sup>Subsequently, the Commission determined that, in the context of a decommissioning plan review, any decommissioning activities which can be undertaken pursuant to the above criteria are not subject to further review or approval by the NRC Staff. See Memorandum to William C. Parler and James M. Taylor from Samuel J. Chilk, June 30, 1993. Both this memorandum and the memorandum of January 14, 1993 are available in the NRC's Public Document Room.

In addition, the Commission has issued a Draft Policy Statement requesting comments on the question of when licensees should be allowed to use the money in their decommissioning funds before approval of a decommissioning plan. See 59 Fed. Reg. 5216 (Feb. 3, 1994). The comment period expires April 19, 1994.

some reactor internals for shipment to the Barnwell low-level waste facility.<sup>4</sup> Shipments of this material began on November 17, 1993 and are continuing.

### III. Discussion.<sup>5</sup>

- A. There is no action pending concerning Yankee NPS that gives rise to any hearing rights under Section 189 of the Atomic Energy Act.

Section 189a(1) of the Atomic Energy Act ("AEA") provides, in pertinent part:

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, ... the Commission shall grant a hearing upon the request of any person whose interest may be

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<sup>4</sup>By letter of July 15, 1993, the NRC Staff informed YAEC that the Staff had concluded that YAEC had suitable procedures in place, or in preparation, to ensure compliance with the Commission's guidance and that the Staff had no objection to the CRP activities.

<sup>5</sup>We have declined to grant Petitioner's request that we halt YAEC's implementation of the CRP and other decommissioning activities. First, the Petitioner did not address, much less satisfy, the traditional criteria for injunctive relief: (1) irreparable injury, (2) probability of success on the merits, (3) lack of injury to others, and (4) the public interest. Any request for emergency relief should address those criteria. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant), CLI-86-12, 24 NRC 1, 4-5 (1986). Cf. 10 C.F.R. §2.788 (listing factors to be addressed when requesting a stay of a Licensing Board decision pending appeal). Second, we have reviewed the Petitioner's pleadings and find that they present no public health and safety reason to stay YAEC's decommissioning activities.

In addition, while the Staff's December 22nd filing indicates that YAEC appears to have substantially completed the CRP, that same filing also indicates that YAEC intends to remove additional material that will then be shipped to the Barnwell facility for disposal during another CRP. Thus, the case before us does not appear to be "moot."

affected by the proceeding, and shall admit any such person as a party to such proceeding.

42 U.S.C. §2239(a)(1). The Supreme Court has noted that "[this] hearing requirement was tailored to the scope of proceedings authorized under the licensing Subchapter." Florida Power & Light v. Lorion, 470 U.S. 729, 739 (1985). In other words, the only "right" to an opportunity for a hearing under Section 189 exists for those actions which are identified in Section 189. In this case, the petitioner has not identified any action or proposed action taken to this date in connection with the decommissioning and dismantling of Yankee NPS which constitutes an action identified in section 189a of the AEA for which an opportunity for a hearing is required. Nor do NRC regulations provide an opportunity for a hearing regarding the decommissioning actions which are the subject of the petition.<sup>6</sup>

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<sup>6</sup>In fact, our regulations explicitly provide only for notice to be given to be given to the public regarding a proposed decommissioning plan.

If the decommissioning plan demonstrates that the decommissioning will be performed in accordance with the regulations in this chapter and will not be inimical to the common defense and security or to the health and safety of the public, and after notice to interested persons, the Commission will approve the plan subject to such limitations as it deems appropriate and necessary and issue an order authorizing the decommissioning.

10 C.F.R. §50.82(e). By a letter dated December 20, 1993, after this petition was submitted, YAEC filed its decommissioning plan which is presently under review by the Staff. The Staff will issue a Federal Register Notice which will advise members of the public where they can review the plan and how they can submit comments on the plan. In addition, the Staff will hold a public meeting near the Yankee facility in order to receive public

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Petitioner's concerns focus on three distinct types of decommissioning activities which are currently underway at Yankee NPS: (1) dismantlement activities which the licensee may undertake without the need for any NRC approval because they fall within the criteria of the Commission's guidance, supra; (2) transportation activities associated with transporting radioactive components from the Yankee NPS to the place of burial; and (3) activities associated with the burial of this material at the Barnwell low-level waste facility.

The dismantling and decommissioning activities currently being conducted by YAEC - the Component Removal Program - are being undertaken pursuant to 10 C.F.R. §50.59, which allows a licensee to make changes to its facility without prior NRC approval if those changes do not involve an unreviewed safety question or do not violate the terms of the license.<sup>7</sup> Under 10 C.F.R. §71.12, an NRC licensee is given a general license to ship or transport material subject to NRC license in an NRC approved package without approval by the Commission. See, e.g., State of New Jersey, CLI-93-25, 36 NRC 289, 293-94 (1993).<sup>8</sup> All

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<sup>6</sup> (...continued)  
comments on the proposed decommissioning plan. The Staff will then issue an order that will either approve or disapprove adoption and implementation of the proposed plan.

<sup>7</sup>A member of the public may challenge an action taken under 10 C.F.R. §50.59 only by means of a petition under 10 C.F.R. §2.206.

<sup>8</sup>On October 28, 1993, the NRC Staff issued Certificate of Compliance No. 9256 to YAEC, approving the package in which YAEC proposed to ship the CRP material to the Barnwell facility. We  
(continued...)

that is then required is that the licensee transport the materials in compliance with applicable DOT regulations. Finally, the Barnwell low-level waste facility is licensed to accept low-level waste from the Yankee NPS CRP by the State of South Carolina, not the NRC. Therefore, concerns regarding acceptance of the CRP materials by the Barnwell facility must be directed to the State of South Carolina, not the NRC.<sup>9</sup>

In summary, the activities which are the subject of the petition are not activities which invoke NRC actions which implicate the hearing rights afforded by Section 189a.<sup>10</sup>

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<sup>8</sup>(...continued)  
do not read the petition as alleging that there is a defect in the shipping package and asking for a hearing regarding that defect. E.g., State of New Jersey, CLI-93-25, 38 NRC at 294.

<sup>9</sup>We are informed that the materials shipped to Barnwell did not include any Special Nuclear Material ("SNM"). The Barnwell facility can accept SNM for disposal only under a separate NRC license which it also holds, not under the South Carolina license under which it has accepted the CRP materials from Yankee NPS.

<sup>10</sup>Even if there were to be a proceeding on the issues of concern to the Petitioner, it is clear that the petition fails to satisfy the minimum requirements of 10 C.F.R. §2.714 which governs intervention in NRC proceedings. That regulation requires that a petition for leave to intervene

shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, ... and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

10 C.F.R. §2.714(a)(2). As we recently noted in applying this standard, "[a] petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision." Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (citing cases). The petition here identifies a number of "rights" which it alleges

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B. A discretionary hearing is not warranted.

Under section 161(c) of the AEA, the Commission has the inherent discretion to institute a proceeding even where none is required by law. See 42 U.S.C. §2201(c). And our jurisprudence has long provided for discretionary intervention in any proceeding before the Commission. Portland General Electric Co.

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<sup>10</sup>(...continued)

would be endangered by "releases of radioactive waste materials into the atmosphere, water or environs[.]" However, the Petitioner did not allege that YAEC's actions or NRC's lack of objection to those actions would have the effect of causing a release of radioactive waste materials. Such an allegation would be necessary to establish the Petitioner's interest in any proceeding challenging YAEC's actions.

Nor does the petition meet the test for organizational standing. An organization must allege (1) that the action will cause an "injury in fact" to either (a) the organization's interests or (b) the interests of its members and that (2) that injury is within the "zone of interests" protected by either the AEA, the Energy Reorganization Act ("ERA"); or the National Environmental Policy Act ("NEPA"). See, e.g., Florida Power & Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), ALAB-953, 33 NRC 521, 528-30 (1991). In this case, the Petitioner has identified (in its supplement) four members whose interests have allegedly been injured or might be injured. However, those members live near the Barnwell facility, not near the Yankee NPS facility. As we noted above, the NRC does not regulate the disposal of low-level waste at Barnwell; instead that activity is regulated by the State of South Carolina as an Agreement State. In addition, the Petitioner's organizational address is further than 50 miles from the Yankee NPS site and thus outside even the radius within which we normally presume standing for those actions which may have significant offsite consequences at plants that are operating at full power.

The Petitioner also challenges the transportation of the CRP materials to Barnwell; however, neither the petition nor the supplement alleges any concrete or particularized injury which would occur as a result of the transportation. Furthermore, while the supplement alleges that Petitioner's members live "close" to transportation routes which will be used for the Barnwell shipments, the supplement does not identify those routes or explain how "close" to those routes the Petitioner's members actually live. In sum, the Petitioner has failed to identify any organizational interest within the zone of interests protected by either the AEA, the ERA, or NEPA.



(Pebble Springs Nuclear Power Station), CLI-76-27, 4 NRC 610, 614-17 (1976). However, we have also held that the institution of a proceeding where one is not required is appropriate only where substantial health and safety issues have been identified. Cf. Consolidated Edison Co. (Indian Point, Units 1, 2, and 3), CLI-75-8, 2 NRC 173, 176 (1975) (establishing criteria for instituting hearings in response to petitions under 10 C.F.R. §2.206). The Petitioner has not raised such issues here. While the petition raises broad questions about health and safety matters inherent in the decommissioning process, the petition makes no allegations that the activities actually being conducted pose any unusual unexamined issues significant enough to warrant the grant of a discretionary hearing. In addition, the Petitioner has not even attempted to address the standards governing discretionary intervention. See Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976). Therefore, we find that a discretionary hearing is not warranted in this case.<sup>11</sup>

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<sup>11</sup>We have directed the holding of a discretionary hearing in another case involving the general topic of decommissioning. However, that case involved Commission approval of a proposed decommissioning plan. Moreover, the NRC Staff issued a Notice of Opportunity for a Hearing when considering the plan; the only petition filed in response to that Notice raised a significant question about the standing of the persons who actually lived near the Rancho Seco facility; and the petition presented at least one litigable contention. Accordingly, we directed that the petitioner in that case be granted discretionary intervention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-03, 37 NRC 135, 141 (1993); Sacramento Municipal Utility District, CLI-93-12, 37 NRC 355, 358 (1993).

IV. Conclusion.

In summary, the Petitioner has failed to identify any action taken by the Commission that requires the offer of a hearing and our review reveals that no such action has been taken. Even if such an action had been identified, the Petitioner has failed to allege an interest to justify intervention in such a proceeding. Finally, the Petitioner has failed to demonstrate that a discretionary hearing is warranted in this case. Therefore, the Petitioner's request for an adjudicatory hearing is denied.

It is so ORDERED.



For the Commission,<sup>12</sup>

A handwritten signature in cursive script, appearing to read "John C. Hoyle".

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JOHN C. HOYLE  
Assistant Secretary of the Commission

Dated at Rockville, Maryland  
this 5<sup>th</sup> day of March, 1994.

<sup>12</sup>Commissioner Remick was not present for the affirmation of this order; if he had been present he would have approved it.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of  
YANKEE ATOMIC ELECTRIC COMPANY  
(Yankee Nuclear Power Station)

Docket No.(s) 50-029

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM MEO & ORDER (CLI-94-3) 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.

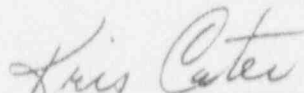
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Dated at Rockville, Md. this  
18 day of March 1994

  
Office of the Secretary of the Commission