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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
YANKEE ATOMIC ELECTRIC CO.	)	Docket No. 50-29
	)	
(Yankee Nuclear Power Station)	)	
	)	

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NRC STAFF RESPONSE IN OPPOSITION  
TO ENVIRONMENTALISTS, INC.'S  
PETITION FOR HEARING AND REQUEST TO INTERVENE

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November 30, 1993

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INTRODUCTION

On November 13, 1993, Environmentalists, Inc. ("Petitioner") filed a petition for an adjudicatory hearing and request to intervene ("Petition") concerning "dismantlement" of the Yankee Nuclear Power Station (YNPS). As discussed below, the NRC Staff opposes the Petition.

BACKGROUND

By letter dated February 27, 1992, Yankee Atomic Electric Co. ("Yankee Atomic") informed the NRC of its decision to permanently cease power operation at YNPS and of its completion of defueling activities on February 15, 1992. On August 4, 1992, the Commission approved the amendment of License No. DPR-3 to a possession only license, which provided that Yankee Atomic should not operate YNPS. The amendment was issued on August 5, 1992.

On January 14, 1993, in response to an NRC Staff request, the Commission issued guidance to the Staff interpreting the NRC's decommissioning regulations as found in

10 C.F.R. Part 50. Memorandum from Samuel J. Chilk to William C. Parler and James M. Taylor, dated January 14, 1993. Under this guidance, NRC licensees may initiate some decommissioning activities prior to approval of an overall decommissioning plan if those activities do not violate either the language or the intent of the Commission's decommissioning rules. *Id.* More specifically, 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. *Id.* In addition, the licensee may use its decommissioning funds for these activities. *Id.*

In accordance with the provisions of this guidance, the NRC Staff did not object to Yankee Atomic's initiation of some decommissioning activities at YNPS prior to approval of the decommissioning plan. *See* letter of July 15, 1993, from Seymour H. Weiss, NRC, to Jay K. Thayer, Yankee Atomic. Yankee Atomic removed the steam generators, the pressurizer, and some reactor internals from the YNPS containment. On November 16 and 17, 1993, two steam generators were shipped from YNPS to Barnwell for disposal as low level waste. The remaining two are scheduled for shipment on December 7 and 8, 1993.

Although there are no outstanding licensee requests for NRC action concerning YNPS that would involve an offer of opportunity for intervention in an adjudicatory proceeding, Environmentalists, Inc. filed a "Petition for Adjudicatory Hearing and for

Leave to Intervene" on November 13, 1993.<sup>1</sup> In its Petition, Environmentalists, Inc. states that it is an organization engaged in research and education activities and that it was founded in 1972. The Petition lists a Columbia, South Carolina address for the organization, but states that the organization has members who live, work or travel in areas that may be adversely impacted by Yankee Atomic's dismantlement and decommissioning plans, and lists six "contentions" that it seeks to litigate in the requested adjudicatory hearing. Petition at 3. It also asks that all shipments and dismantlement and decommissioning activities be stopped. Petition at 4.

#### DISCUSSION

- I. There is no action pending regarding the Yankee Nuclear Power Station that gives rise to any hearing rights under Section 189 of the Atomic Energy Act at this time.

Section 189a(1) of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239(a)(1), as here material, provides:

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

Under this section, hearing rights arise only when a proceeding is pending in connection with the actions listed there. Where a license proceeding for an action listed in Section 189 was never initiated or where the license proceeding has been terminated by the grant of the permission sought, there is no right to intervene or to a hearing

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<sup>1</sup>On November 15, 1993, Petitioner submitted a copy of the Petition by facsimile.

concerning the matter. See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 739 (1985); *Eddleman v. NRC*, 825 F.2d 46, 48 (4th Cir. 1987); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 67 (1992); *Id.*, CLI-93-1, 37 NRC 1, 3 (1993); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Unit 1), CLI-85-10, 21 NRC 1569, 1574-75 (1985).

In *Lorion* the Supreme Court, after examining the legislative history of Section 189a of the AEA, concluded that there was no right to a hearing under that section absent a particular application for the grant of a permission for the acts listed in that section. 470 U.S. at 739. Likewise, in the *Comanche Peak* and *San Onofre* cases, the Commission held that where there was no proceeding pending as to a facility, there was no right to intervene or request a hearing in regard to that facility. 36 NRC at 67; 37 NRC at 3; 21 NRC at 1574-75.

Yankee Atomic's removal of the steam generators was undertaken pursuant to 10 C.F.R. § 50.59,<sup>2</sup> which allows a licensee to take certain actions under its license without prior Commission approval.<sup>3</sup> Under 10 C.F.R. § 71.12,<sup>4</sup> an NRC licensee may

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<sup>2</sup>Section 50.59 authorizes licensees to make changes to their facilities without Commission approval where the proposed change does not involve a change in its technical specifications or an unreviewed safety question.

<sup>3</sup>Yankee Atomic's operating license for YNPS had been changed to a "possession only" status by an amendment issued on August 5, 1992.

<sup>4</sup>10 C.F.R. § 71.12(a) states:

A general license is hereby issued to any licensee of the Commission to transport, or to deliver to a carrier for transport, licensed material in a package, for which a license, certificate of compliance, or other approval has

ship or transport material subject to a Commission license in an NRC approved package without approval by the Commission.<sup>5</sup> Yankee Atomic's removal and transportation of the steam generators was undertaken pursuant to these regulatory provisions and there was no NRC action or need for any NRC action in regard to the shipment of the waste to Barnwell.

Thus, there was no NRC action granting, suspending, revoking or amending a license, as provided in § 189a of the AEA, and no proceeding in which a petitioner may intervene or request a hearing. *See Comanche Peak, supra; San Onofre, supra.* For this reason, the Petition should be denied.

II. The Petitioner does not meet the standards for intervention set forth in 10 C.F.R. § 2.714.

A. The Petitioner does not show how its interest might be affected.

Even where there is an existing proceeding, one seeking to intervene or request a hearing must show standing. *See generally Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 328-29 (1989).* The Commissioner's regulation applicable to standing, 10 C.F.R. § 2.714(a)(i), states in relevant part:

Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene. . . . The petition shall set

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been issued by the NRC.

<sup>5</sup>The NRC issued Certificate of Compliance No. 9256 approving the package on October 28, 1993.



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.

"To demonstrate standing, the 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, Unit 1)*, CLI-93-21, 38 NRC \_\_ (Sept. 30, 1993, slip op. at 9).

With respect to its interest, Petitioner identifies a number of "rights" to which it lays claim (Petition at 1-2); but it does not say how those rights or interests might be affected by the shipment of the subject material to Barnwell. No particularized injury is set forth. Although there are claims of violations of procedural rights, there is no showing that these can cause the actual substantive injury that is necessary for standing. *See Perry*, slip op. at 13-14. The Petitioner does not demonstrate how it or anyone it represents could be adversely affected by the shipments. *See Three Mile Island, supra; St. Lucie, supra.*

Petitioner provides a Columbia, South Carolina address, which is hundreds of miles from YNPS and at least 60 miles from the Barnwell disposal site. No harm that could come to Petitioner from either site is detailed or evident. Moreover, receipt and disposal at Barnwell of low level waste, such as that involved in the shipments of concern to Petitioner, is licensed by South Carolina under the Agreement State program, not by

the NRC.<sup>6</sup> Petitioner does not show how or why issues concerning alleged harm from the disposal of low level waste at Barnwell is appropriate for consideration by the NRC, much less with regard to the activities of which Petitioner complains. To the extent Petitioner claims harm from material traveling on railroads or highways, Petitioner fails to establish what route it is talking about, or how its members can be harmed from the transport of the material in approved packages on those routes.

Petitioner fails to show that any substantive harm could arise from the procedural violation claimed. *See Perry, supra*. Petitioner's identification of its interest is too vague to establish Petitioner's standing before this Commission under the Atomic Energy Act.

B. Petitioner has failed to raise an admissible contention.

The Petition, at 3, sets forth "contentions" Petitioner wishes to have considered. In each of its contentions, Petitioner refers to Yankee Atomic as "the applicant." As stated above, there is no application pending; hence, there is no applicant. For the same reason that it is difficult to evaluate Petitioner's standing absent a proceeding in which to consider standing, it is difficult to evaluate contentions absent a context for considering them.

Moreover, under 10 C.F.R. § 2.714(b)(2), which governs contentions in NRC proceedings:

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

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<sup>6</sup>The radioactivity in the shipments is byproduct and subject to regulation by South Carolina. *See generally* 10 C.F.R. § 8.4.



(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief on issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

None of the Petitioner's proffered contentions satisfies this regulation, as they are vague and do not set out matters in dispute. In its Contention 1, Petitioner complains of the inadequacy of Yankee Atomic's reports. However, Petitioner fails to particularize the inadequacy. Petitioner does not state what reports are required by what relevant regulation and how Yankee Atomic's reports are deficient. Thus, in failing to provide a specific statement of the issue of law or fact to be controverted, Contention 1 fails to satisfy the requirement of the first sentence of the regulation; the additional requirements need not be considered in finding the contention inadmissible.

Contention 2, alleging that the NRC has failed to require that the applicant carry out the 10 C.F.R. regulations, fails for the same reasons that Contention 1 fails: it does

not consist of the specific issue of law or fact to be controverted. It does not even indicate which particular NRC regulations Petitioner is talking about.

Similarly, Contention 3, complaining of the inadequacy of opportunity for public participation, fails to identify the opportunities that should have been afforded and were not.

Contention 4 complains of the inadequacy of information regarding the "waste stream associated with the dismantlement plan." Again, Petitioner fails to particularize what is missing and why it is required.

In Contention 5, Petitioner alleges that the approach to closing down YNPS is piecemeal and suggests that the total impact of the "decommissioning project" should have been assessed. Under 10 C.F.R § 2.714(b), a petitioner must set forth the specific issue of law or fact to be controverted. Contrary to that requirement, Petitioner provides no information that would tend to show there is any significant impact attached to the "decommissioning project" or why it is necessary to consider the "decommissioning project" as a single action.

Contention 6 is similarly vague and presents no basis for litigation. Although Petitioner alleges that there is insufficient information on "radioactive particulate problems associated with various operations to be used during decommissioning," there is no identification of the problems or the operations referred to or, for that matter, how such activities in Massachusetts could affect the Petitioner in South Carolina. In regard to the disposal of waste at Barnwell, Petitioner's allegations regarding NRC failures are too vague to satisfy the requirements of 10 C.F.R. § 2.714(b).

In *Yankee Nuclear Power Co. v. NRDC*, 435 U.S. 519, 553 (1978), the Supreme Court emphasized the need for one seeking to take part in NRC proceedings "to structure their participation so that it is meaningful, so that it alerts the agency to the intervenor's position and contentions." It is not enough to make "cryptic and obscure reference to matters that 'ought to be considered.'" 435 U.S. at 554. Petitioner's vague and unsupported contentions provide no basis for litigation.<sup>7</sup>

III. Petitioner has not established an equitable ground for initiating a proceeding or granting discretionary intervention.

The Commission has the discretion to institute a proceeding and to provide for discretionary intervention even where none is required by law. *See generally Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-91-11, 34 NRC 3, 6 (1991); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976).

The institution of a proceeding in response to a request, where one is not required, is appropriate only where substantial health and safety issues have been identified. *See Consolidated Edison Co.* (Indian Point, Units 1, 2 and 3), CLI-75-8, 2 NRC 173, 176

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<sup>7</sup>For similar reasons, Petitioner has failed to show any basis for the immediate halting of the shipment from YNPS to Barnwell, which it seeks at 4 of the Petition. Under the applicable Commission regulation (10 C.F.R. § 2.206), a request for the NRC Staff to prohibit a licensee from taking certain actions must ". . . set forth the facts that constitute the bases for the request." Petitioner has not set forth facts that provide a basis for its request for immediate Staff action. Hence, the Staff will not take the requested actions. Even if reviewed as a request for a stay under 10 C.F.R. § 2.708, the request must fail, as Petitioner has not even addressed, much less satisfied, the standards for a stay.

(1975).<sup>8</sup> As we have detailed above, Petitioner has not raised any substantial health and safety matters. Petitioner has not detailed the effects the subject shipments may have on health and safety. Petitioner mentions rights to be free of radioactive contamination and a desire for information, but does not provide a basis on which it could be concluded that substantial health and safety issues exist. *See* Petition at 2-3. The Petition does not show the existence of a substantial health and safety issue that should cause a proceeding to be instituted.

Further, the Petitioner fails to meet the test for discretionary intervention. In *Pebble Springs*, 4 NRC at 614-17, in considering discretionary intervention, the Commission stated:

Some factors bearing on the exercise of this discretion are suggested by our regulations, notably those governing the analogous case where the petition for intervention has been filed late, 10 C.F.R. 2.714(a), but also the factors set forth in 10 C.F.R. 2.714(d), governing intervention generally:

(a) Weighing in favor of allowing intervention \_

(1) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

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<sup>8</sup>Although the petition in that case was filed under 10 C.F.R. § 2.206 of the Commission's regulations, the reasoning there would as well apply to the request for the start of a proceeding under § 189a of the AEA. *See also San Onofre*, 21 NRC at 1575-76 (denial of hearing and stay where no substantial health and safety issues identified); and *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, unpublished Order of July 2, 1979; *Consolidated Edison Co. of New York*, (Indian Point Units 2 and 3), unpublished Memorandum and Order of May 30, 1980; *Id.* CLI-81-1, 15 NRC 1 (1981) (each indicating that a discretionary hearing will only be instituted where substantial health and safety issues exist).

(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

(3) The possible effect of any order which may be entered in the proceeding on the petitioner's interest.

(b) Weighing against allowing intervention \_

(4) The availability of other means whereby petitioner's interest will be protected.

(5) The extent to which petitioner's participation will be represented by existing parties.

(6) The extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

*Id.* at 616.

The Commission also provided the following guidance:

Permission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact which would not otherwise be properly raised or presented, set forth these matters with suitable specificity to allow evaluation, and demonstrate their importance and immediacy, justifying the time necessary to consider them.

*Id.* at 617.

Here, as discussed above, there is no proceeding and no substantial health and safety issue identified. Similarly, as set forth above, the nature of the Petitioner's interests and the extent those interests could be affected by an order herein is not specified in the Petition, and there is no basis to find that Petitioner could be affected by the subject shipments. The availability of other means to protect Petitioner's interest cannot be ascertained, as it cannot be determined from the Petition whether Petitioner

could suffer a substantive injury from the shipments so as to provide the requisite interest. It is also plain that instituting a proceeding where none exists will broaden the proceeding.

However, the most important factor weighing against allowing Petitioner to intervene, should there be a proceeding, is that it has not shown it could aid in the development of a sound record. The very vagueness of the description of Petitioner's standing and injury casts substantial doubt on whether it could aid in any proceedings that might be instituted. Petitioner's generalized statements do not show the expertise or knowledge required of a petitioner when a hearing would not otherwise be held. *See Watts Bar, supra; Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). "Generalized statements will not suffice" as a basis for discretionary intervention, as a petitioner has the burden of showing it will contribute facts and knowledge that will help the Commission decide substantive issues. *Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 745 (1978).

A listing of prospective witnesses and a precis of testimony or other germane evidence is required even in cases where a petitioner who has standing files a petition for late intervention. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 611 (1988), *aff'd sub nom. Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990); *Washington Public Power*



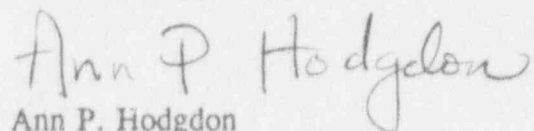
*Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180-81 (1983). These tests are applicable to a grant of discretionary intervention. *Pebble Springs, supra*; *Watts Bar, supra*.

The Petitioner has not shown the substantial health and safety question necessary for the institution of a proceeding on the application of a petitioner where a hearing is not otherwise required. Nor has Petitioner met any of the tests for discretionary intervention. No equitable ground exists to initiate a proceeding and to allow Petitioner to intervene.

CONCLUSION

The Petition to intervene and request for a hearing should be denied, as no matter is identified by Petitioner that gives rise to any hearing right under Section 189 of the AEA and, even if such matter were identified, Petitioner has not met the standards of 10 C.F.R. § 2.714 for intervention in NRC proceedings nor shown that it meets the standards for discretionary intervention.

Respectfully submitted,



Ann P. Hodgdon  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 30th day of November 1993

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO ENVIRONMENTALISTS, INC.'S PETITION FOR HEARING AND REQUEST TO INTERVENE," and in the above-captioned proceeding have been served on the following as indicated by an asterisk, by hand delivery, this 30th day of November 1993:

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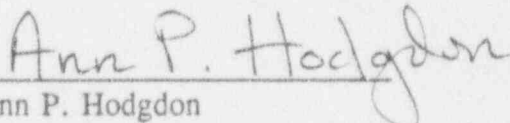
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