IN RESPONSE, PLEASE
REFER TO: M960116

January 16, 1996

MEMORANDUM FOR: Karen D. Cyr
General Counsel

FROM: John C. Hoyle, Secretary /s/

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION SESSION, 2:45 P.M., TUESDAY, JANUARY 16, 1996, COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-96-003 - Petition to Intervene in Proceeding to Approve Proposed Decommissioning Plan for Yankee Nuclear Power Station

The Commission (Chairman Jackson, exercising delegated authority pursuant to a delegation from the Commission[1], in accordance with NRC Reorganization Plan No. 1 of 1980) approved an Order responding to a petition by Citizen's Awareness Network (CAN) and the New England Coalition on Nuclear Polution (NECNP) requesting a hearing on the proposed decommissioning plan for the Yankee Nuclear Power Station. The Order forwards the petition, together with the responsive pleadings by the Staff and Yankee Atomic, to the Atomic Safety and Licensing Board. In addition, the Order provides the Licensing Board with (1) guidance on selected issues and (2) a proposed expedited schedule, uder which the Licensing Board will issue a final initial decision in this matter by the middle of July, 1996.

(Subsequently, on January 16, 1996, the Secretary signed the Order.)

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[1] This decision was made after consultation with Commissioner Rogers, who also stated his agreement with the results announced here. Commissioner Rogers was not present when this item was affirmed. Commissioner Rogers had previously indicated that he would approve this item and had he been present he would have affirmed his prior vote.

cc: Chairman Jackson
Commissioner Rogers
OGC
OCAA
OCA
OIG
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR - Advance
DCS - P1-24

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONER:

Shirley Ann Jackson[2]

In The Matter of	)
YANKEE ATOMIC ELECTRIC COMPANY	) Docket No. 50-029
	) Decommissioning Plan
Yankee Nuclear Power Station	)

MEMORANDUM AND ORDER

CLI-96-__

I. Introduction.

This matter is before the Commission on a petition by the Citizens Awareness Network ("CAN") and the New England Coalition on Nuclear Pollution ("NECNP") (collectively "petitioners") in response to a Notice of Opportunity for a Hearing published in the Federal Register. See 60 Fed. Reg. 55069 (Oct. 27, 1995). The petitioners seek to intervene in a proceeding to consider approval of a plan to decommission the Yankee Nuclear Power Station ("Yankee NPS"), submitted by the Yankee Atomic Electric Company ("YAEC" or "licensee"), which holds a possession only license for Yankee NPS. The NRC Staff and YAEC have now filed answers to the petition. We have granted Petitioners' motion seeking leave to file a reply and considered their reply in issuing this Order. This Order refers the pleadings to the Atomic Safety and Licensing Board ("Licensing Board") for appropriate action with guidance on several novel issues raised in this proceeding and a suggested expedited schedule.[3]

[2]This decision was made by Chairman Jackson under delegated authority, as authorized by NRC Reorganization Plan No. 1 of 1980, after consultation with Commissioner Rogers. Commissioner Rogers has stated his agreement with this decision.

[3]The NRC Staff has filed a response to the petitioners' motion for leave, in which the Staff does not oppose the motion but asks for leave to file a pleading in opposition to the "new issues" it alleges are raised in the Reply. The licensee has filed two responsive pleadings. The

II. Background.

We have discussed the background of this matter before at some length. Suffice it to say that we have reinstated our pre-1993 policy on providing an opportunity for an adjudicatory hearing regarding the possible approval of nuclear power reactor decommissioning plans in light of a decision by the U.S. Court of Appeals for the First Circuit. See generally Citizens Awareness Network v. NRC, 39 F.3d 284 (1st Cir. 1995); Yankee Atomic Electric Company (Yankee Nuclear Power Station, CLI-95-14, 42 NRC 130 (Oct. 12, 1995). In accord with that pre-1993 policy, we offered an opportunity for a hearing on the unfinished portion of work to be completed under the proposed Yankee NPS decommissioning plan, which had previously been approved by the NRC Staff. See 60 Fed. Reg. 55069 (October 27, 1995), supra.

In order to obtain such a hearing, petitioners must satisfy the requirements of 10 C.F.R. §2.714. Thus, petitioners must

(1) demonstrate that they have standing to intervene and (2) submit at least one valid contention. In this case, as required by the expedited procedures announced in the Federal Register Notice, id., petitioners submitted a supplemental petition containing five proposed contentions. The licensee and the Staff have responded, arguing that: (1) petitioners have not requested a hearing; and (2) all proposed contentions are inadmissible. Petitioners have, in turn, replied to licensee's and Staff's objections and advocated the admissibility of each of the preferred contentions.

We refer the matter to the Atomic Licensing and Safety Board ("Licensing Board" or "ASLB") to rule on standing and contentions and to conduct any necessary further proceedings.

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first opposes the petitioners' motion for leave; the second is a motion for leave to file a substantive pleading in opposition to the Reply if we accept the reply. These two requests to file additional responses are forwarded to the Licensing Board for its appropriate consideration.

In so doing, we construe the original petition as requesting a hearing and not just intervention in the proceeding in the event a hearing is requested by someone else. While petitioners may be faulted for not expressly requesting a hearing in their original petition, it seems clear from the petition as a whole that this is what they desire, and their reply confirms this. Accordingly, we decline the suggestions by the Staff and the licensee that we dismiss the petition solely on the basis of a technical pleading defect.

III. Guidance To The Licensing Board.

We expect that many of the issues raised by the petitioners and related pleadings will be resolvable within the framework of the NRC's regulations and case-law. However, in order to expedite this proceeding and to avoid future delay, we are providing guidance to the Licensing Board on several novel issues raised by the pleadings.

A. The Nexus Between Standing and Contentions.

The licensee and the Staff challenge petitioners' "standing" to raise contentions related to occupational dose issues. In order to establish standing to intervene in a proceeding, a petitioner must demonstrate that (1) it has suffered a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute; (2) that the injury can fairly be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision. See, e.g., Cleveland Electric illuminating Co. (Perry Nuclear Power Plant), CLI-93-21, 38 NRC 87, 92 (1993). See generally Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1992); Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988). And as we have noted on other occasions, a prospective intervenor may not derive standing to participate in a proceeding from another person who is not a party to the action or is

not a member of its organization. See, e.g., Florida Power & Light Co. (St. Lucie Nuclear Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

However, once a party demonstrates that it has standing to intervene on its own accord, that party may then raise any contention that, if proved, will afford the party relief from the injury it relies upon for standing. See, e.g., Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 78-81 (1978) (rejecting a requirement for a "nexus" between the injury claimed and the right being asserted); Sierra Club v. Morton, 405 U.S. 727, 740 n.15 (1972) ("The test of injury-in-fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of its claims for equitable relief."). See generally 3 K.Davis and R.Pierce, Administrative Law Treatise, §16.13 (1994).[4]

In this case, the petitioners have asserted standing to intervene in this proceeding alleging that (1) they will suffer injuries resulting from implementation of the currently proposed Yankee NPS decommissioning plan and (2) these injuries could be redressed either by the choice of a different alternative or by modification of the plan. Assuming arguendo that the Licensing Board determines that petitioners do indeed have standing to intervene in this proceeding, they will then be free to assert any contention, which, if proved, will afford them the relief they seek, i.e., the rejection or modification of the Yankee NPS decommissioning plan in a manner that will redress their asserted injuries. Of course, any contention must also satisfy the other applicable requirements for contentions. We address here only the matters of "nexus" between standing and contentions.

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[4]10 C.F.R. §2.714(g) provides that an intervenor's participation may be limited in accordance with its interests. We construe this provision in accordance with the cited case law, i.e., that an intervenor's contentions may be limited to those which will afford it relief from the injuries asserted as a basis for standing.

B. NRC Review of The Choice of Decommissioning Option.

The petitioners allege that the licensee's choice of DECON as a decommissioning option violates 10 C.F.R. 20.1101 "in that it fails to maintain occupational and public radiation doses as low as reasonably achievable ["ALARA"]." The basis petitioners offer for this contention is that "significant dose savings" could be achieved by "cost effective measures," i.e. by postponing dismantlement of the facility for a 30 year SAFSTOR period.

We are not prepared at this time to put the licensee's choice of a decommissioning option forever beyond all challenge. Nevertheless, a fair reading of our decommissioning rules at 10 C.F.R. §50.82 is that it is for the licensee in the first instance to choose the decommissioning option and that neither DECON nor SAFSTOR can be deemed unacceptable a priori.[5] A choice of DECON over SAFSTOR involves trade-offs, e.g. earlier achievement of the decommissioning goal of unrestricted site release but at the cost of higher collective doses to plant workers performing the dismantlement.

In this case the petitioners challenge the validity of the licensee's evaluation of this trade-off by asserting that the site will not be available for release for unrestricted use for many years to come because spent fuel will have to remain stored at the site. Thus, they argue, implementation of DECON will involve approximately 900 person-rem more occupational

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[5]Under 10 C.F.R. §50.82(b)(1), "[T]he proposed decommissioning plan must include -- the choice of the alternative for decommissioning...", and under 10 C.F.R. §50.82(b)(1)(i), "for an electric utility licensee [of a nuclear power reactor] an alternative is acceptable if it provides for completion of decommissioning within 60 years." Thus, the principal criteria for judging a decommissioning alternative is the proposed time required for decommissioning completion; both SAFSTOR and DECON will, in general, meet this criteria. The Generic Environmental Impact Statement ("GEIS") supporting the decommissioning rule also finds both SAFSTOR and DECON generally acceptable.

However, decommissioning plans must also meet other applicable NRC regulations, including the ALARA requirement in 10 C.F.R. §20.1101(b). See 10 C.F.R. §50.82(e). It must be emphasized that one of the purposes of the revised 10 C.F.R. Part 20 was to change the status of ALARA from the hortatory suggestion in old 10 C.F.R. §20.1(c) to the mandatory requirement in new 10 C.F.R. §20.1101(b). Thus, ALARA is an essential part of Federal Radiation Protection Guidance.

exposure than implementation of SAFSTOR[6] but will provide no countervailing benefit. They further argue that, contrary to YAEC's figures, the SAFSTOR alternative would actually cost somewhat less than DECON. Petitioners thus contend that Yankee's proposal for a modified DECON plan violates the ALARA requirement because radiation exposure could be lowered at reasonable cost by adopting the SAFSTOR alternative.

We assume that an ALARA challenge can properly be made against a licensee's decommissioning alternative choice, if an adequate basis for the challenge is offered. The question presented by petitioners' ALARA contention is whether the petitioners' assertions regarding dose savings and cost effectiveness provide an adequate basis. As for the asserted dose savings, we note the 900 person-rem figure is based on estimates for decommissioning of a much larger nuclear plant than the Yankee NPS.[7] But different dose estimates may be expected at the Yankee NPS. Furthermore, Yankee's decommissioning plan has already been partially implemented, and the results of that implementation (which should be available for review) may reduce the anticipated occupational dose.

In any event, the 900 person-rem figure, being a generic estimate, is necessarily somewhat speculative as applied to a particular facility. The differences in occupational exposure between the DECON and SAFSTOR alternatives could in actual practice be less than 900 person-rem, or perhaps not much at all. Among the few inevitable uncertainties are the actual conditions of the facility after several decades, and the amount of institutional memory held by plant management and workers regarding the facility configuration and the extent and location of contamination. It is one thing to review a licensee's choice of alternative procedures

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[6]For this figure the petitioners cite Table 4.3-2 of NUREG-0586, "Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities" ["GEIS"].

[7]Table 4.3-2 of the GEIS presents dose analyses for decommissioning "the reference PWR," which is an 1175-MWe facility, significantly larger than the Yankee NPS.

and actions when that review can be based upon relatively certain data in the here and now; it may be quite another thing to review a licensee's choice based on estimates of doses that will occur thirty or more years in the future. Given that our rules treat DECON as a generally acceptable alternative, despite the acknowledged likelihood of reduced occupational dose under SAFSTOR, we conclude that a challenge to the licensee's choice of the modified DECON option instead of SAFSTOR cannot be based solely on differences in estimated collective occupational dose on the order of magnitude of the estimates in the GEIS.

We believe this position as applied in this case is entirely consistent with the ALARA concept. The petitioners appear to recognize that a licensee's actions do not violate the ALARA principle simply because some way can be identified to reduce radiation exposures further. The practicality and the cost of the measures required to achieve these reductions as well as "other societal and socioeconomic considerations" must also be taken into account. See 10 C.F.R. §20.1003 (definition of ALARA). As a matter of agency practice, the NRC will generally find that exposures are ALARA when further dose reductions would cost more than one or two thousand dollars for each person-rem reduction achieved. See generally Regulatory Analyses Guidelines, NUREG/BR-OO58, Rev. 2, announced in 60 Fed. Reg. 65694 (December 20, 1995). Applying that analysis here, the "value" of a 900 person-rem occupational dose reduction would be no more than about $2 million.

In the case before us all parties appear to agree that the cost estimates for both the DECON and SAFSTOR alternatives are on the order of $200 million and lie within $10 to $15 million of each other. The estimates (especially petitioners' "present value" estimates) are highly dependent on difficult-to-predict variables like interest, discount, and inflation rates and waste disposal fees. In short, it is not possible to say with great assurance whether switching from DECON to SAFSTOR might actually save money, as petitioners contend, or whether over the

next thirty years additional costs considerably in excess of $2 million might be incurred. In these circumstances we do not believe that potential dose reductions on the order of 900 person-rem can have ALARA significance, unless there is some extraordinary aspect to the case not apparent to us from the pleadings that the Licensing Board may uncover on its own review.

C. Decommissioning Cost Update.

In Contention C, petitioners allege, inter alia, that YAEC's "updated cost estimate," submitted under 10 C.F.R. §50.82(b)(4), is "not reasonable." Petition at 20. The essential purpose of this requirement in section 50.82 is to provide "reasonable assurance" of adequate funding for decommissioning. Thus, a contention that a licensee's estimate is not "reasonable," standing alone, would not be sufficient in and of itself because the potential relief would be the formalistic redraft of the plan with a new estimate. The issue seems important here because the licensee maintains that it has funds or access to funds to pay for decommissioning even if it costs more than it currently estimates. Thus, to be entitled to relief, petitioner will need to show not only that the estimate is in error but that there is not reasonable assurance that the amount will be paid.

D. Remedy For Past Conduct.

In Contention D, petitioners challenge allegedly "illegal" past conduct of the licensee and seek a remedy for that conduct. To the extent that the contention alleges that YAEC has violated NRC regulations, those allegations are more properly the subject of separate enforcement action. The focus of this proceeding is prospective only -- the future decommissioning of the remainder of the facility under the proposed decommissioning plan.

IV. Expedited Schedule.

As we noted in CLI-95-14, we intend to expedite this proceeding. We have already expedited the proceeding by requiring the filing of contentions with the petition to intervene. In an Appendix to this Order, we provide the Licensing Board with a suggested expedited schedule for the proceeding subject always, of course, to the demands of basic fairness. We will not require the Licensing Board to adhere to the following schedule to the letter and, indeed, we expect the Licensing Board to conduct its customarily thorough inquiry using all the tools normally at its disposal and following its customary practices and procedures under 10 C.F.R. Part 2, Subpart G (although a modification of usual discovery rules is suggested in the schedule). However, we expect that the Licensing Board will, if it declines to adopt our proposed schedule, adopt an equally expedited schedule which will generate a final initial decision by, at the latest, the middle of July, 1996.

V. Summary.

We hereby refer all pleadings in this matter to the Atomic Safety and Licensing Board for processing under the Licensing Board's normal practices and procedures, subject to the guidance expressed above, and with the proposed schedule provided in the Appendix below. We expect the Licensing Board to act expeditiously with the goal of issuing a final initial decision by or about the middle of July, 1996.

It is so ORDERED.

For the Commission,

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John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland
this __ day of January, 1996.

Appendix

PROPOSED EXPEDITED SCHEDULE FOR YANKEE HEARINGS

Action	Intervening # Days	DATE
Commission Order Referring Case to ASLB.		Day 0
ASLB Rules on Contentions.	28	Day 28

During this period, the ASLB should hold its normal special pre-hearing conference and take whatever steps it feels necessary to narrow the issues before it, including, if necessary, additional briefing and oral argument. The ASLB should then rule on preliminary matters including the admissibility of petitioners' proposed contentions.

Discovery Completed.	21	Day 49

During this period, the ASLB should require the parties to expedite discovery. If necessary, the ASLB may adopt the mandatory discovery procedures used in Rule 26(a)(1)-(3) of the Federal Rules of Civil Procedure.

Prefiled Testimony (by all parties) and All Motions For Summary Disposition.	14	Day 63

During this period, all parties should prepare and submit any prefiled testimony and motions for summary disposition.

ASLB Rules on Summary Disposition Motions.	21	Day 84

During this period, the parties should complete briefing and any oral argument (if necessary) on motions for summary disposition and the ASLB should rule on the motions.

ASLB Starts Hearing (if needed).	7	Day 91
ASLB Completes Hearing.	14	Day 105
Proposed Findings by Intervenor/Licensee.	21	Day 126
Proposed Findings by Staff.	07	Day 133
ASLB Final Initial Decision.	28	Day 161

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In The Matter of	)
YANKEE ATOMIC ELECTRIC COMPANY	) Docket No. 50-029
	) Decommissioning Plan
Yankee Nuclear Power Station	)

NOTICE OF APPOINTMENT OF ADJUDICATORY EMPLOYEE
AND OF COMMUNICATION COVERED BY 10 C.F.R. 2.781(c)

Pursuant to 10 C.F.R. §2.4 (1993), notice is hereby given that Mr. David N. Fauver, a Commission employee in the Office of Nuclear Material Safety and Safeguards, has been appointed as a Commission adjudicatory employee in the above-captioned matter. Therefore, until such time as a final decision is issued in this matter, parties to the proceeding shall not communicate with Mr. Fauver regarding the merits of this case or the merits of any dispute, legal or factual, which is at issue in this case. Mr. Fauver has not been previously engaged in the performance of any investigative or litigating function in connection with this or any other factually-related proceeding.

By mistake, portions of a draft legal analysis and/or a draft Commission Order, prepared by the Office of General Counsel ("OGC"), were provided to Mr. Hugh Thompson, Deputy Executive Director for Operations for Nuclear Materials Safety, Safeguards and Operations Support, and by him to Mr. Seymour H. Weiss and Mr. Singh S. Bawja, of the Non-power Reactors and Decommissioning Project Directorate, Office of Nuclear Reactor Regulation. Those portions addressed issues raised by Contention A, filed by Citizens Awareness Network ("CAN") and the New England Coalition on Nuclear Pollution (NECNP"), petitioners in this case. However, Messrs. Weiss and Bawja participated in preparing the NRC staff review of the decommissioning plan at issue in this adjudication and Mr. Weiss reviewed at least one draft

pleading filed by the NRC Staff in this proceeding. Therefore, Messrs. Weiss and Bawja cannot be designated as Commission adjudicatory employees for this proceeding.

Messrs. Weiss and Bawja reviewed the portions of the draft documents provided them and then participated in a meeting on these draft portions with Mr. Thompson. In turn, Mr. Thompson then provided advice arising from this meeting to the General Counsel. A memorandum describing that advice is attached for the record.

The advice that Messrs. Weiss and Bajwa provided to Mr. Thompson -- and which he in turn provided to the General Counsel -- did not result in any changes to the position advocated by adjudicatory advisors in the Office of the General Counsel, the final OGC analysis, or the draft order, which was issued today in final form as CLI-96-01. Furthermore, this advice was not communicated to either Chairman Jackson, Commissioner Rogers, or any member of their personal staffs prior to issuance of CLI-96-01.

This disclosure is made in order to fulfill the requirements of 10 C.F.R. §2.781(c).

IT IS SO ORDERED.

For the Commission,

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John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland
this __ day of January, 1996.

FOR AFFIRMATION

TUESDAY, JANUARY 16, 1996

SUBJECT: SECY-96-003 - PETITION TO INTERVENE IN PROCEEDING TO APPROVE PROPOSED DECOMMISSIONING PLAN FOR YANKEE NUCLEAR POWER STATION

The Commission is being asked to approve an order in response to a petition to intervene in the Yankee decommissioning proceeding. The Commission's Order construes the petition to intervene as a request for a hearing on the proposed decommissioning plan and forwards the petition, together with the responsive pleadings filed by the Staff and Yankee Atomic, to the Licensing Board for appropriate treatment. In addition, the Order provides the Licensing Board with (1) guidance on selected issues and (2) a proposed expedited schedule, under which the Licensing Board will issue a final initial decision in this matter by the middle of July, 1996.

The order being issued today is approved by the Chairman, under delegated authority voted by the Commission as authorized by the NRC Reorganization Plan No. 1 of 1980. The decision was made after consultation with Commissioner Rogers.

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John C. Hoyle
Secretary

Attachment:
As stated

cc: Chairman Jackson
Commissioner Rogers
EDO
OGC
OCAA