

RAS 4830

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 09/11/02
SERVED 09/11/02

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of

NUCLEAR FUEL SERVICES, INC.

(Erwin, Tennessee)

Docket No. 70-143-MLA

ASLBP No. 02-803-04-MLA

September 11, 2002

MEMORANDUM AND ORDER
(Raising Questions Regarding Completeness of
Federal Register Notice)

In hand in this proceeding under Subpart L of the Commission's Rules of Practice, 10 C.F.R. § 2.1201 et. seq., are several hearing requests addressed to a proposed amendment to an outstanding Special Nuclear Material License (SNM-124) possessed by Nuclear Fuel Services, Inc. (hereafter Licensee). The amendment would allow the Licensee to construct and operate a Low-Enriched Uranyl Nitrate Storage Building at its Erwin, Tennessee site.

The hearing requests were timely filed in response to a Federal Register notice published on July 9, 2002 (67 Fed. Reg. 45,555). The notice recited that the Commission had prepared an environmental assessment (EA) in connection with the proposed action and had made a Finding Of No Significant Impact (FONSI). It went on to extend an opportunity to seek a hearing with respect to the sought amendment.

The various hearing requests before me were filed in response to that notice. Each has been opposed by the Licensee on identical grounds. According to the Licensee, none of the requestors had either established the required standing to challenge the proposed amendment

or demonstrated, as also required by the Rules of Practice, the existence of an area of concern germane to the subject matter of the proceeding. See 10 C.F.R. § 2.1205 (e) and (h).

Before considering the Licensee's objections to the several hearing requests, there is a preliminary matter that must be addressed. Although the Federal Register notice in question summarized in some detail the content of the EA that had led to the issuance of the FONSI, as correctly observed in one of the hearing requests¹ there was an inadequate identification in the notice of the license amendment application itself. The notice neither set forth the date upon which the application had been filed nor supplied any information as to how the content of the application might be located.

This omission raises troublesome questions. To begin with, although not extensive, my prior experience with Federal Register notices of opportunity for hearing has left me with the impression that it is customary in such notices to provide sufficient information to enable a potential hearing requestor to obtain access to the full content of the amendment application to which the notice refers. Accordingly, it occurs to me that the omission in this instance might have been inadvertent.

Be that as it may, it is beyond cavil that the initial burden placed upon hearing requestors with regard to establishing both standing and the existence of a germane area of concern is scarcely insubstantial. Thus, one might justifiably conclude that a notice of opportunity for hearing that did not point the reader in the direction of the license amendment application is of doubtful validity. For it surely cannot be seriously maintained that no reasonable possibility exists that the application might itself contain information, not contained

¹*Request for Hearing by Oak Ridge Environmental Peace Alliance et. al. (August 8, 2002) at 1-2.

in the notice itself, that might serve to assist a hearing requestor's ability to satisfy the conditions precedent to the grant of the request.²

The NRC Staff's time to make its election under 10 C.F.R. § 2.1213 regarding participation in the proceeding has not as yet expired. Nonetheless, in light of the foregoing, I am now calling upon the Staff to respond to the following questions in a memorandum to be filed and served no later than Thursday, September 19, 2002:

1. Was inadvertence the reason for the failure to include in the Federal Register notice sufficient information regarding the license amendment application to enable one to obtain ready access to the contents of the application?
2. If the failure was not inadvertent, how might it be justified in light of the heavy burden placed upon would-be hearing requestors by the Rules of Practice to establish both their standing and at least one germane area of concern? Might not the content of the license amendment application be of material assistance to a hearing requestor in the endeavor to satisfy that burden?
3. Should it be determined that the Federal Register notice was defective in the respect discussed herein, what is the appropriate remedy at this juncture? Must a new notice issue that serves to cure the defect or will it be enough if the present hearing requestors are allowed to supplement their requests after having had an opportunity to inspect the license amendment application?

²Indeed, in its August 19, 2002 opposition to the submissions of David and Trudy L. Wallack, the Licensee notes at the outset that those hearing requestors "do not appear to have read the license amendment application."

If so inclined, the Licensee and hearing requestors may provide their views on these questions in memoranda to be filed and served by the same September 19 deadline.

In the interest of expedition, all further submissions in this proceeding are to be filed and served by either electronic mail or facsimile transmission, with an additional paper copy simultaneously placed in the U.S. Mail. To this end, every participant (including the NRC Staff) that has not already done so shall promptly provide the designated representative of every other participant with either an e-mail address or fax number. Insofar as concerns filings with Judge Cole and me, fax transmissions should be sent to 301-415-5599 and e-mail filings should be sent to three separate addresses: sam4@nrc.gov; rfc1@nrc.gov; and rsnthl@aol.com.

Further action on the existing hearing requests and the Licensee's responses thereto necessarily must abide the resolution of the matter considered herein.

IT IS SO ORDERED.

BY THE PRESIDING OFFICER³

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland

September 11, 2002

³Copies of this memorandum and order were sent this date by e-mail transmission to the counsel or other representative of all of the parties and the NRC staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
NUCLEAR FUEL SERVICES, INC.) Docket No. 70-143-MLA
ERWIN, TENNESSEE)
)
(Material License Amendment))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RAISING QUESTIONS REGARDING COMPLETENESS OF FEDERAL REGISTER NOTICE) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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LB MEMORANDUM AND ORDER (RAISING
QUESTIONS REGARDING COMPLETENESS
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 11th day of September 2002