UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of	Docket No. 70-143-MLA
NUCLEAR FUEL SERVICES, INC.	ASLBP No. 02-803-04-MLA
(Erwin, Tennessee)	January 31, 2003

MEMORANDUM
(Further Explanation of the Basis for the
January 21, 2003 Order Holding Proceeding in Abeyance)

On January 21, 2003, I entered an order (attached hereto) holding further proceedings in this matter in abeyance pending certain forthcoming events. Because there appeared to be good reason to make that action known before there was time to prepare a fuller explanation of the basis for it, the January 21 order stated that one would be supplied at a later date. The purpose of this memorandum is to provide that explanation.

BACKGROUND

1. On February 28, 2002, Nuclear Fuel Services, Inc. (Licensee) filed an application for an amendment to its Special Material License (SNM-124) that would authorize the storage of low-enriched uranium-bearing materials in the Uranyl Nitrate Building located at Licensee's Erwin, Tennessee site. That proposed amendment is associated with the portion of the Blended Low-Enriched Uranium (BLEU) Project that is to be conducted at that site. On July 9, 2002, the NRC Staff published in the Federal Register a notice in connection with the proposed amendment. 67 Fed. Reg. 45,555. The notice described the BLEU Project as being a part of a

Department of Energy program to reduce stockpiles of surplus high enriched uranium through re-use or disposal as radioactive waste. In addition, it noted that the license amendment addressed in the application at hand was but the first of three amendments that the Licensee would seek in connection with aspects of the project. Specific reference was made in this regard to the construction and operation of an Oxide Conversion Building; the construction and operation of a new Effluent Processing Building; and the relocation of downblending operations in a BLEU Preparation Facility.

Despite the fact that only a portion of the overall BLEU project was covered by the amendment application then before the NRC Staff, the July 9 notice pointed out that, to avoid segmentation of the environmental review, the Licensee had submitted environmental documentation for all three amendments. Accordingly, the Staff had embarked upon an environmental assessment (EA) of the entire project. The notice stressed, however, that that assessment did not serve as authorization for any proposed activities and that, as each amendment application was submitted, the Staff would perform a separate safety evaluation. It added:

> As part of the safety evaluation, the NRC will perform an environmental review. If the review indicates that this EA appropriately and adequately assesses the environmental effects of the proposed action, then no further assessment will be performed. However, if the environmental review indicated that this EA does not evaluate fully the environmental effects, another EA [or environmental impact statement (EIS)] will be prepared in accordance with the National Environmental Policy Act (NEPA).

Following this introduction, the July 9 notice went on to summarize the content of the EA, which had produced the conclusion that "the environmental impacts associated with the proposed action would not be significant and do not warrant the preparation of an Environmental Impact Statement." Accordingly, the Staff had determined that a Finding of No Significant Impact (FONSI) was appropriate. Id. at 45,556-58.

Finally, the July 9 notice provided an opportunity for a hearing on the proposed license amendment then in hand. Id. at 45,558. Nowhere in the notice, however, was there to be found either the date upon which the application for the amendment had been filed or any information as to how the content of the application might be located.

2. Several hearing requests were filed in response to the July 9 notice and opposed by the Licensee on the ground that none of them satisfied the requirements imposed by Subpart L of the Commission's Rules of Practice, which sets forth the informal hearing procedures applicable to material license proceedings such as this one. See 10 C.F.R. § 2.1205(e) and (h). One of the requests pointed specifically to the omissions in the notice pertaining to the application. That led to the issuance of an unpublished order on September 11 calling upon the NRC Staff to address the question of the adequacy of the notice.

The Staff's September 19 response acknowledged that the July 9 notice was defective and that, as a consequence, a revised notice providing a fresh opportunity for hearing would be published in the Federal Register. Such a notice surfaced on October 30 (67 Fed. Reg. 66,172) and received a minor correction on November 12 (67 Fed. Reg. 68,699). In response to that notice, some (but not all) of the prior requestors filed new hearing requests and, in addition, a hearing request was received from someone who had not responded to the July notice.

3. In the wake of the publication of the October 30 revised notice, but before the receipt of the new hearing requests in response thereto, the Licensee filed on November 12 a motion in which it sought a ruling that that notice required the then existing hearing requestors and those additional ones taking advantage of the notice to address the entire EA. According to the Licensee, the requestors should be precluded from raising concerns regarding the EA when, at

some later point, the second and third license amendment applications were to come before the NRC Staff for its consideration.

In a solicited November 18 response, the Staff took the position that the scope of the hearing was necessarily limited to areas of concern related to the February 2002 license amendment application then before me and could not extend to areas of concern that related to future license amendment applications. In that connection, the Staff noted that, given that it did not notice the entire BLEU project or either the second or third license amendment, the October 30 Federal Register publication could not serve to bar the future assertion of environmental issues by persons having an interest in the project but not in the first license amendment. Thus, the Staff observed, requiring the current hearing requestors to raise all of their areas of concern related to the EA in advance of the submission of the second and third license amendment applications would not accomplish the Licensee's desire to avoid repetitious litigation. In a November 19 order (unpublished), I found this analysis persuasive and determined (at 3) "that the scope of the proceeding is limited to those safety and environmental areas of concern that directly relate to the February 2002 license amendment application."

4. One of the hearing requests in response to the October 30 revised Federal Register notice was filed on November 27 on behalf of Friends of the Nolichucky River Valley and three other organizations (hereafter collectively FNRV). It was accompanied by a motion to hold the proceeding in abeyance pending the submission of the additional license amendment applications. According to the motion, among other things a hearing at this time on any NEPA issues associated with the BLEU project would be premature as well as wasteful of the parties' resources. In addition, the motion insisted that the safety issues that had been raised in the hearing request would be better considered in the context of the entire project.

In its December 13 response, the Licensee insisted that, given that it had not as yet been admitted to the proceeding, FNRV was not entitled to seek a postponement of further adjudicatory consideration. Additionally, the response took issue with the reasons assigned by those hearing requestors in support of a postponement.

For its part, in a December 6 letter reiterating its intention not to participate in the proceeding, the NRC Staff had noted in passing its agreement with FNRV, et. al. that it would be more expeditious to postpone the proceeding pending the submission of all the related license amendment applications. In a December 17 order, I requested the Staff to advise Judge Cole and me whether it adhered to that view notwithstanding the Licensee's opposition. In a January 6 letter, the Staff took a different position. As the Staff then saw it, "the three amendments are each distinct and independent undertakings that may be analyzed and acted upon separately. There is no requirement that this proceeding be held in abeyance pending the receipt and analysis of the remaining amendments."

DISCUSSION

Upon a preliminary examination of the papers in hand with regard to the motion to hold the proceeding in abeyance, this much seemed quite clear. Irrespective of whether, as the Licensee maintained, the motion was 'unripe' because FNRV has not as yet been admitted as a party to the proceeding, nothing stood in the way of my providing the requested relief if that course appeared warranted in the totality of circumstances. The authority of the presiding officer in Subpart L proceedings is set forth in 10 C.F.R. § 2.1209 and is quite broad. That authority includes the power to "[r]egulate the course of the hearing...[d]ispose of procedural requests or similar matters...and [t]ake any other action consistent with the [Atomic Energy] Act and this chapter."

That being so, there appeared to be no present necessity to pass upon the validity of the Licensee's claim that the FNRV motion could not be entertained because the movants had not as yet achieved party status. Rather, what needed to be determined was whether, as a matter of sensible case management, there was compelling reason for the three license amendments to be considered together rather than piecemeal.

Because the papers on file did not appear to address that question adequately, Judge Cole and I decided to conduct a telephone conference with the parties and the NRC Staff on January 17. As the January 13 order scheduling the conference stated, the participants were to focus on two possible options.

The first would have Judge Cole and me move forward to pass upon the viability of the hearing requests now in hand with respect to the first license amendment application. If one or more of those requests were found to meet the requirements imposed by 10 C.F.R. § 2.1205(e) and (h), and without waiting for the outcome of any hearing requests filed with respect to the second and third proposed amendments, we would then address the merits of the viable challenges to the first amendment. The second option would have all hearing requests addressed to one or another of the three license amendments considered collectively after the expiration of the time for the filing of requests directed to the third amendment. Under that option, all viable challenges to aspects of the BLEU project would be jointly determined.

What was not said by the participants during the January 17 telephone conference was just as significant as what was said. For his part, Licensee's counsel stressed that the three license amendments were independent in the sense that they involved different buildings and different processes (Tr. 34). At no point during the conference, however, did he offer any practical reason why it would be more expeditious to adjudicate the challenges to the BLEU project piecemeal, rather than as an entity once the third license amendment application was

filed in the projected May-June 2003 time frame.[1] In this connection, the Licensee did not appear to take issue with the assertion of FNRV (Tr. 7-8) that those challenges involved global environment and safety issues. On that score, FNRV counsel referred specifically to concerns regarding the Licensee's past operating history insofar as environmental protection was concerned, as well as to safety concerns in the area of financial assurance and management capabilities.

For its part, the Staff clarified the seeming inconsistency between the position on deferral taken in its December 6 letter and that later advanced in its January 6 filing. According to its counsel, the Staff was of the view that the adoption of either option was acceptable and therefore it was not specifically pressing for the acceptance of one or the other. As summarized by counsel (Tr. 19):

> It is the staff's position now – and we have always maintained – there could be some efficiency in holding this proceeding in abeyance for the simple reason that one proceeding, as opposed to three, would likely be a little more efficient.
>
> However, it is also our position, both then and now, that the projects are independent, such that they could be dealt with in separate proceedings.[2]

Apart from the fact that neither the Licensee nor the Staff provided any good practical reason to conduct a piecemeal adjudication of the challenges to the overall BLEU project – and the Staff perceived some advantage in unitary adjudication – both counsel also professed a

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[1]Counsel hypothesized that a hearing request might be filed with regard to the second amendment application by someone with an interest restricted to the activities covered by that application (Tr. 14-15). If that requestor had a sufficient reason not to wish the consideration of its request deferred until the receipt of the third license amendment application, it would be free to bring that fact to my attention.

[2]Staff counsel did acknowledge that, although independent, the projects were interrelated (Tr. 18).

lack of awareness of any prior instance of a single project being segmented in this fashion (Tr. 16, 21).[3] Nor is either Judge Cole or this presiding officer aware of such an instance. That is not to say, however, that a like attempt at segmentation might not have been possible in other material license proceedings.

I made reference during the conference (Tr. 21-22) to the case that Judge Cole and I recently had before us involving receipt at the International Uranium (USA) Corporation's White Mesa Mill in Utah of alternate feed material originating at a site in California. See International Uranium (USA) Corporation (White Mesa Mill), LBP-02-19, 56 NRC__ (August 28, 2002). The sought license amendment contemplated that the Licensee would, among other things, process the received material to extract its uranium content and then store the residue in on-site tailing cells. Although a single license amendment application was filed that covered the entire project, no apparent reason exists why, as transpired here, the Licensee could not have instead elected to file separate applications, each addressed to a different phase of the project. Had it done so, however, it is scarcely likely that any serious thought would have been given to adjudicating separately the various phases. This would have been so even though there were independent concerns advanced by the intervenors with regard to the receipt and residue disposition portions of the overall undertaking.

[3]Although the Licensee maintained that the segmentation here was at the Staff's suggestion, Staff counsel responded that such was not the case (Tr. 16, 17).

In sum, following the telephone conference it seemed manifest to Judge Cole and to me that, although nothing would preclude moving forward on the first license amendment at this time, on balance the better course was the deferral directed in my January 21 order in the exercise of the authority conferred upon me by 10 C.F.R. § 2.1209.[4]

BY THE PRESIDING OFFICER[5]

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 31, 2003

[4]As at least implicitly acknowledged in my January 21 issuance, there is the possibility that, acting pursuant to 10 C.F.R. § 2.1207(a), the Commission or the Chief Administrative Judge might assign hearing requests addressed to either or both the second and third license amendment applications to a different presiding officer for adjudication. In that event, a motion to reconsider the deferral action taken by me might well be in order.

[5]Copies of this memorandum were sent this date by e-mail transmission to the counsel or other representative of each of the participants in the proceeding, as well as to counsel for the NRC staff.

ATTACHMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of	Docket No. 70-143-MLA
NUCLEAR FUEL SERVICES, INC.	ASLBP No. 02-803-04-MLA
(Erwin, Tennessee)	January 21, 2003

ORDER
(Directing the Holding of the
Proceeding in Abeyance)

This license amendment proceeding being conducted under Subpart L of the Commission's Rules of Practice, 10 C.F.R. § 2.1201 et seq, involves the portion of the Blended Low-Enriched Uranium (BLEU) project that is to be performed on the Nuclear Fuel Services, Inc. (Licensee) site in Erwin, Tennessee. Rather than cover all activities associated with the project in a single comprehensive license amendment application, the Licensee has chosen to address them in three separate amendment applications.

The first application was submitted early last year but not properly noticed in the Federal Register until the end of October (see 67 Fed. Reg. 66,172 (October 30, 2002)). It led to the filing of several hearing requests, all of which are opposed by the Licensee. The second amendment application, submitted in October, received its Federal Register notice of opportunity for hearing earlier this month and the deadline for filing hearing requests in response to that notice is February 6, 2003. See 68 Fed. Reg. 796 (January 7, 2003). The third application apparently will not be submitted to the NRC Staff for several additional months.

At current issue is whether all further adjudicatory action should now be held in abeyance until the third license amendment has been submitted to the Staff and the time established in a Federal Register notice for the filing of hearing requests with regard thereto has expired.[1] Stated otherwise, Judge Cole and I are called upon to decide whether the three proposed license amendments and the challenges to them should be adjudicated piecemeal or, instead, collectively once all are in hand.

We have given full consideration to the arguments advanced in favor of and in opposition to each option, as those arguments were presented in written submissions as well as at a telephone conference held with the parties and the NRC Staff on January 17, 2003. On the basis of that consideration, it is hereby directed sua sponte in the exercise of the authority conferred upon the presiding officer by 10 C.F.R. § 2.1209:

1. All further action with regard to the hearing requests now on file pertaining to the first license amendment shall abide the event of the filing of the third license amendment application and the expiration of the period set forth in the Federal Register notice of opportunity for hearing pertaining to that proposed amendment.

2. Assuming that any hearing requests filed in response to the now pending second license amendment application are assigned to this presiding officer, the consideration of those requests similarly shall be held in abeyance.

3. Hearing requests addressed to the second or third license amendment application may incorporate by reference all or a part of any hearing request previously filed by that hearing requestor.

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[1]Although that issue surfaced in the form of a motion on the part of one group of hearing requestors, Judge Cole and I deemed it worthy in any event of consideration on our own initiative.

Because, as above noted, the deadline for the filing of hearing requests addressed to the second proposed amendment rapidly approaches, it seems advisable to announce this determination without further delay. A memorandum setting forth in greater detail the basis for the determination will issue later. It suffices for present purposes to note that Judge Cole and I are convinced that, in the totality of circumstances, it makes good sense from a case management standpoint to consider all aspects of the BLEU project as an entity.

It is so ORDERED.

BY THE PRESIDING OFFICER[2]

[Original Signed]

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 21, 2003

[2]Copies of this order were sent this date by e-mail transmission to the counsel or other representative of each of the participants in the proceeding, as well as to counsel for 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 (FURTHER EXPLANATION OF THE BASIS FOR THE JANUARY 21, 2003 ORDER HOLDING PROCEEDING IN ABEYANCE) (LBP-03-01) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Dated at Rockville, Maryland,
this 31st day of January 2003