LBP-04-05

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 7471 **DOCKETED 03/17/04**

ATOMIC SAFETY AND LICENSING BOARD PANEL

SERVED 03/17/04

Before Administrative Judges:

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

In the Matter of	Docket Nos. 70-143-MLA, 70-143-MLA-2, 70-143-MLA-3
NUCLEAR FUEL SERVICES, INC.	ASLBP Nos. 02-803-04-MLA, 03-810-02-MLA, 04-820-05-MLA
(Erwin, Tennessee)	March 17, 2004

MEMORANDUM AND ORDER
(Ruling on Hearing Requests)

This issuance determines the acceptability of hearing requests submitted by numerous individuals and organizations with regard to a series of materials license amendment applications addressed to different phases of a single project. The determination is being made in the context of now-superceded provisions of the Commission's Rules of Practice that nonetheless govern this proceeding because they were in effect at the time the hearing requests were submitted. Applying those provisions, some of the hearing requests are granted and others denied.

I. BACKGROUND

In hand are a number of hearing requests filed in connection with three applications of Nuclear Fuel Services, Inc. (Licensee) for amendments to its Special Materials License (SNM-124). All three applications relate to the Blended-Low-Enriched Uranium (BLEU) Project that is to be conducted on the Licensee's Erwin, Tennessee site. That project is part of a Department of Energy program designed to reduce stockpiles of surplus high-enriched uranium through re-

use or disposal as radioactive waste. This objective would be accomplished by downblending that uranium into low-enriched uranium.

A. The first of the three applications was filed on February 28, 2002, and sought authorization to store low-enriched uranium-bearing materials in the Uranyl Nitrite Building (UNB) on the Erwin site. A notice of opportunity for hearing on that application was published in the Federal Register on July 9, 2002 (67 Fed. Reg. 45,555, 45,558) and, because of deficiencies in it, a revised notice was published on October 30, 2002 (67 Fed. Reg. 66,172, 66,173). In response to these notices, timely hearing requests were filed by (1) the State of Franklin Group of the Sierra Club in conjunction with three other organizations similarly based in the Erwin area (hereinafter collectively Sierra);[1] (2) the Blue Ridge Environmental Defense League (Blue Ridge); (3) Kathy Helms-Hughes; and (4) a group of fifteen individuals said to reside in Northeast Tennessee whose separate "declarations" were submitted through an attorney.

On October 22, 2002, the Licensee submitted its second license amendment application, which sought authorization to downblend the high-enriched uranium to low-enriched uranium in the BLEU Preparation Facility (BPF). On January 7, 2003, the NRC Staff published a Federal Register notice of opportunity for hearing with regard to this proposed license amendment (68 Fed. Reg. 796). Sierra and Ms. Helms-Hughes (but not either Blue Ridge or the fifteen individuals) filed timely requests with regard to this second application.

Rulings were deferred, however, on the hearing requests pertaining to these two amendment applications. This was the result of a January 21, 2003 order that was further explained ten days later in LBP-03-1, 57 NRC 9. On a determination that there was no good

---

[1]Those other organizations are Friends of the Nolichucky River Valley; Oak Ridge Environmental Peace Alliance; and Tennessee Environmental Council.

reason to consider separately the three license amendment applications associated with the BLEU Project, the January 21 order directed that all further action with regard to the first (UNB) and second (BPF) applications be held in abeyance to await the filing of the third license amendment application and the submission of any timely hearing requests with regard thereto. Order (Directing the Holding of the Proceeding in Abeyance) (Jan. 21, 2003) at 2 (unpublished).

That third amendment application -- addressed to the operation of the Oxide Conversion Building (OCB) and the Effluent Processing Building (EPB) – was filed in late October 2003 and led to the publication on December 24, 2003 of a Federal Register notice of opportunity for hearing with regard to it. 68 Fed. Reg. 74,653, 74,654. In response to that notice, on February 2, 2004, both Sierra and Ms. Helms-Hughes filed hearing requests that were timely under a deadline extension that had previously been granted to them. As with respect to the second (BPF) amendment application, no hearing request was filed by either Blue Ridge or the fifteen individuals.

B. Effective February 13, 2004, the Commission's Rules of Practice codified in 10 C.F.R. Part 2 have undergone a substantial revision. See 69 Fed. Reg. 2,182 (Jan. 14, 2004). Because, however, all of the hearing requests related to the BLEU Project were filed in advance of that date, and the Commission not having directed otherwise, this proceeding remains governed by those provisions of Part 2 in effect prior to the revision. Accordingly, all references hereinafter are to the now-superceded provisions.

Specifically, before the recent Rules of Practice revision, the provisions controlling the grant or denial of hearing requests in materials license proceedings such as the one at bar were to be found in I0 C.F.R. §§ 2.1205 (e) and (h), a part of Subpart L of the then Rules of Practice. As stipulated therein, to obtain acceptance of the hearing request, the petitioner must both meet the "judicial standard for standing" and specify at least one "area of concern" that is "germane to the subject matter of the proceeding."

On the first score, the Commission has noted:

> The concept of judicial standing requires a showing of "(1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act... and (4) is likely to be redressed by a favorable decision."

Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-02, 53 NRC 9, 13 (2001), (citing Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998)). See also, International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001). Thus, the first question that must be addressed in passing upon the submitted hearing requests is whether the various petitioners have made that showing.

As above noted, Blue Ridge and the fifteen individuals put forth hearing requests solely with regard to the proposed storage of low-enriched uranium-bearing materials in the UNB. It necessarily follows, therefore, that their entitlement to obtain a hearing is totally dependent upon whether they have sufficiently alleged an actual or threatened concrete and particularized injury that is fairly traceable to that storage and, in addition, have specified an area of concern germane to that storage.[2]

---

[2] This is so notwithstanding that there might have been some mention in the August and November 2002 submissions of those petitioners to phases of the BLEU Project that would later become the subject of the second and third license amendment applications. The subsequent determination in January 2003 to consolidate the three applications did not relieve Blue Ridge or the fifteen individuals of the obligation to respond to the Federal Register notices pertaining specifically to the BPF and OCB/EPB applications if, indeed, they believed that a grant thereof would cause them substantial injury.

By standing mute in the wake of the publication of those notices, the petitioners conveyed the impression that there had been an evaporation of any possible concern on their part regarding phases of the BLEU Project other than that involving UNB storage. In the circumstances, then, there is good reason to confine the inquiry in their cases to whether they have met the standing and area of concern requirements with regard to the UNB storage phase.

The situation is quite different, however, in the case of Sierra and Ms. Helms-Hughes, who have filed hearing requests with respect to each of the license amendment applications. In totality, these requests address the entire BLEU Project covered by the three license amendment applications. Because they have been consolidated, the applications can and will be considered as if the three phases of the project had been presented in a single application and challenged by Sierra and Ms. Helms-Hughes in single hearing requests. Accordingly, those petitioners will be deemed to have satisfied the dictates of the applicable Rules of Practice if found to have met the injury-in-fact and area of concern requirements with regard to any one of the facets of the BLEU Project.

Of course, to the extent that it is seeking to represent the interests of its members (i.e., is claiming representational standing), an "organization must show how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member." CLI-01-21, supra, 54 NRC at 250. Given that they are endeavoring to represent their members in a representational capacity, Sierra and Blue Ridge are confronted with these additional requirements.

II. ANALYSIS

With the foregoing principles in mind, each petitioner's hearing request(s) will be considered in turn. In that regard, without exception, the requests are opposed by the Licensee on the asserted ground that they do not meet the requirements imposed by section 2.1205 (e) and (h) of the applicable Rules of Practice.

A. Fifteen Individual Hearing Requesters. By August 8, 2002 letter, C. Todd Chapman, Esq. transmitted the "Declarations" of fifteen "residents of Northeast Tennessee" who Mr. Chapman stated that he represented. Letter to Richard A. Meserve, NRC Chairman, from C. Todd Chapman, Counsel to Individual Petitioners (Aug. 8, 2002) [hereinafter Chapman Letter]. The substance of each of the submissions was essentially the same. Specifically, each

declarer asserted that he or she had reviewed the NRC Staff's June 2002 Environmental Assessment (EA) and Finding of No Significant Impact that were said to have accompanied the July 9, 2002 Federal Register notice of opportunity for hearing on the first (UNB) license amendment application. 67 Fed. Reg. at 45,558. That review had prompted the conclusion that, in the context of the Nolichucky River (which borders the Erwin site),[3] the EA had improperly failed to address the impact of the proposed activity upon downstream sources of drinking water, consumers of harvested fish, or persons using the river downstream for recreational purposes.[4] By way of relief, each declaration sought the preparation of a "thorough Environmental Impact Statement *** detailing, among other things, the impact on downstream consumers of water from the Nolichucky River." See generally, Chapman Letter Declarations at ¶6.

As the Licensee pointed out in its August 23, 2002 opposition to the fifteen declarations (Applicant's Answer to [Chapman Letter] Request for Hearing at 8 [hereinafter Applicant's August 23 answer]), the July 9 Federal Register notice did not contain the entire Environmental Assessment issued in June 2002 but only what the notice characterized as a "Summary of Environmental Assessment." 67 Fed. Reg. at 45,555. In that connection, the notice called public attention to the electronic availability of the full EA and "the documents related to this proposed action." Id. at 45,558. Had those documents been consulted, the Licensee went on to observe (Applicant's August 23 answer at 8), the declarers would have determined that section 5 of the EA, entitled "Environmental Consequences," contained the statement that "[d]ischarges

---

[3]See June 2002 Environmental Assessment, fig. 4.1 at 4-5.

[4]Most, but not all, of the declarers asserted that they used the Nolichucky River as a source of drinking water or for recreational purposes. One declarer (David Byrd) referred simply to a desire not to breathe polluted air; another (Gerald M. O'Connor, Jr.) alluded solely to his ownership of two manufacturing plants in Erwin; and two others (James Smith and Peter H. Zars) expressed concerns regarding the possibility and consequences of an accident. See Chapman Letter Declarations at ¶2.

from the proposed action are not expected to have significant impact on the surface water quality in the Nolichucky river." EA §5.1.1.1 at 5-2. Additionally, the EA reflected the Staff's conclusion that "the proposed action will not discharge any effluents to the groundwater; therefore, no adverse impacts to groundwater are expected." Id. at 5-3.

It would thus seem clear that the declarations were founded entirely on a misapprehension of fact. Were this not so, however, the declarers would stand on no firmer footing in terms of providing reasons to grant them a hearing in this matter. For it is equally apparent that none of the declarers came close to meeting the requirement of a showing of "an actual or threatened, concrete and particularized injury" that is "fairly traceable to the challenged action." CLI-01-02, supra, 53 NRC at 13. In that regard, it is difficult to fathom how such a showing could have been made, given that the single license amendment application to which the declarations pertained involved solely the construction and operation of a storage building. It appears without contradiction that no chemical processes or reactions would take place in connection with that limited activity and that there would be no discharges of chemical or radiological contaminants into the Nolichucky River.[5] That being so, it seems hardly likely that the employment of the River as a source of drinking water or for recreational activities would be at all adversely impacted.[6]

---

[5]On August 19, 2003, the Staff furnished Judge Cole and this Presiding Officer, as well as the hearing requesters, with a copy of NRC Inspection Report 70-143/2003-04 in which it is stated (at 11) that "there would be no process liquid waste and no direct liquid effluent discharges as the result of UNB operations." The report concluded (ibid) that the "UNB has no liquid waste stream, and expected airborne effluents released to the environment were predicted to be a small fraction of regulatory limits."

[6]Likewise, those declarers concerned with either air pollution or accidents (see fn. 4 supra,) offered nothing to establish an actual or threatened concrete injury stemming from the construction and operation of the UNB building.

Accordingly, the hearing requests of the fifteen individuals, as set forth in their declarations, must be denied for lack of a showing of standing.[7]

B. Blue Ridge Environmental Defense League.

According to its November 29, 2003 hearing request submitted in response to the October 30, 2002 revised Federal Register notice of opportunity for hearing (67 Fed. Reg. at 66,173), Blue Ridge has members living within two to six miles of the Erwin site who work within a mile of the facility. The Substitute Request of the Blue Ridge Environmental Defense League for a Hearing on a License Amendment for Nuclear Fuel Services at 1 [hereinafter Blue Ridge Hearing Request]. In support of this assertion, Blue Ridge appended to the hearing request the affidavits of two of its members that contain averments to that effect. Although neither member expressly authorized the organization to represent his or her interests, such authorization might reasonably be inferred from the totality of their affidavits. In addition to the claim of representational standing, the hearing request referred (at 2) to Blue Ridge's offices in Glendale Springs, North Carolina as illustrative of the "property, financial, or other interest in the proceeding" possessed by the organization itself.

The hearing request asserted (ibid.) that several buildings on the Erwin site already are contaminated and, additionally, that the groundwater below the site is contaminated with numerous toxic chemicals including isotopes of uranium, thorium and plutonium. Although Blue Ridge and its members supplying affidavits evinced a concern that this contamination would be increased during the fulfillment of the BLEU Project, their submission offered no basis for that

[7]Although the matter need not be pursued here, it is at best doubtful that a different result might have been obtained had the largely boilerplate declarations been considered in the context of the overall BLEU Project. For none of the declarations contained anything approaching the required illumination regarding how the second or third phase of the project might threaten its sponsor with harm.

belief, let alone a foundation for a conclusion that there might be an injury-in-fact sustained by Blue Ridge members.

Accordingly, as in the case of the fifteen declarations, it is unlikely that the Blue Ridge hearing request would prove to be successful were it considered in the context of the entire BLEU Project. Once again, however, that request pertained exclusively to the construction and operation of the UNB building and there is no apparent reason to entertain it more broadly. And, as noted in connection with the appraisal of the declarations submitted by Mr. Chapman, that first phase of the overall BLEU Project does not involve any chemical processes or reactions. It thus is not readily apparent how it might nonetheless occasion harm to Blue Ridge members in the vicinity of the Erwin site and the hearing request provides no illumination in that respect. In that regard, standing alone, the asserted proximity of some Blue Ridge members to the Erwin site is totally irrelevant. It is now well-settled that, in NRC materials licensing cases (unlike those involving commercial reactor licensing), there is no presumption of harm stemming from residing, working, or recreating within any particular distance of the specific activity under scrutiny. See International Uranium (USA) Corp, (White Mesa Uranium Mill), CLI-8-6, 47 NRC 116, 117 fn. 1 (1998); Sequoyah Fuels Corp. et al. (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 75 fn. 22 (1994).[8]

The short of the matter thus is that, in common with the declarations of the fifteen individuals discussed above, the Blue Ridge hearing request falls well short of demonstrating the requisite standing to obtain a hearing on the UNB license amendment application. To be sure, as will be later discussed in greater detail, the pleading requirement at this stage of a

---

[8]Regarding Blue Ridge's claim of organizational (as opposed to representational) standing based upon its offices in Glendale Springs, the Licensee points out in its December 13, 2002 opposition to the Blue Ridge hearing request that that community is located approximately 44 miles from the Erwin site and approximately 37 miles from the closest point of the Nolichucky River. Applicant's Answer to Request for Hearing and Areas of Concern of the Blue Ridge Environmental Defense League (Dec. 13, 2002) at 9-10.

Subpart L proceeding is relatively modest. Nonetheless, once again, the hearing request must allege facts that provide an underpinning for a conclusion that the requester (and/or those that it represents) are confronted with an actual or threatened, concrete and particularized injury that is fairly traceable to the activity in question. The Blue Ridge request simply does not meet that standard.

C. Kathy Helms-Hughes.

1. As previously noted, in contrast to the fifteen individual declarers and Blue Ridge, Ms. Helms-Hughes submitted hearing requests in connection with all three license amendment applications associated with the BLEU Project. In essence, as reflected in her November 29, 2002 filing with regard to the UNB application, her claim of standing to challenge the project rests upon her ownership of three parcels of land in Butler, Tennessee, approximately 20 miles distant from the Erwin site, that were stated to represent a family ancestral home.[9]

According to the November 2002 hearing request, Ms. Helms-Hughes was then living with her ten year-old daughter and conducting farming activities on her Butler property. In that regard, they ate the produce of the land and drank the spring water that flowed across the property from the Cherokee National Forest. Helms-Hughes Declaration at 1. See also Helms-Hughes January 26 Response at 2-3.

That situation, however, no longer obtains. At present, Ms. Helms-Hughes (presumably with her daughter) resides in Arizona, where she is employed by a newspaper. Although

---

[9]In that filing, Ms. Helms-Hughes described her property as being “less than 20 miles downwind” from the site, without any specification with regard to how much “less”. Declaration of Kathy Helms-Hughes (Nov. 29, 2002) at 1 [Hereinafter Helms-Hughes Declaration]. See also Kathy Helms-Hughes Response to Applicant’s Motion to Strike Part of Helms-Hughes Response to Nuclear Fuel Services, Inc.’s January 16, 2003 Motion to Deny Helms-Hughes Request for Standing and Leave to Intervene (Jan. 26, 2003) at 2 [Hereinafter Helms-Hughes January 26 Response]. From our examination of a detailed map of the area, the distance between the specific address of the property provided in the hearing request and the facility would appear to be almost precisely 20 miles.

acknowledging that she is not "physically present on her [Tennessee] property at this time***because she must work out of state temporarily in order to earn a living in her profession," she maintains that she "fully intends to return to Tennessee within the next five years."[10]

With regard to the injury-in-fact that she deems to be threatened by the BLEU Project, Ms. Helms-Hughes asserts (Request for Hearing and Leave to Intervene by Kathy Helms-Hughes in the Matter of Nuclear Fuel Services, Inc.'s Notice to Amend Its NRC Special Nuclear Material Licence SNM-124 (Feb. 6, 2003) at 2) that the project will bring about additional airborne contaminants that will pose a health risk to her, her family and the community at large. On this score, she points to disclosures in the June 2002 Environmental Assessment to the effect that both uranium and thorium air emissions are expected to increase by a factor of four to five times current levels. EA §2.1.3.1 at 2-9, 2-10. In addition, the hydrogen and nitrogen oxide emissions from the BLEU complex will almost double when added to the existing airborne releases. Ibid. Still further, the radiological impacts of the project would include the release of plutonium, americium, actinium, and lesser quantities of fission products including technicium, cesium and strontium. EA §5.1.1.2 at 5-4.

---

[10]Helms-Hughes Response to Applicant's Answer to Third Segment of License Amendment Request Regarding Nuclear Fuel Services proposed [BLEU] Project (Feb. 23, 2004) at 1-2. Apparently, caretakers are maintaining and farming the property in Ms. Helms-Hughes' absence. Third Request for Hearing by Kathy Helms-Hughes Regarding Nuclear Fuel Services proposed [BLEU] Project (Feb. 2, 2004) at 2. She does not seem, however, to rely on that fact as a basis for standing. Nor could she. As the Appeal Board held over 25 years ago, a person who resides far from a facility cannot acquire standing to intervene by asserting the interests of a third party who will be near the facility unless the latter is "a minor or otherwise under a legal disability," which would preclude his or her own participation. The Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit No.2), ALAB-470 7 NRC 473, 474 fn.1 (1978). That holding was cited by the Commission a decade later in connection with its ruling that a person cannot derive standing from the interests of another person. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

2. The fact that she does not currently reside on her Tennessee property, but is instead pursuing her profession at a distance of some 1,400 miles or so from that property, would seem of itself to defeat any claim that the BLEU Project threatens Ms. Helms-Hughes with the injury-in-fact upon which standing must rest. See Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336-38 (1979) (petitioner owning and renting to another farmland ten to fifteen miles from the reactor site held not to have standing even though he occasionally visited the farm). To be sure, she expresses a current intent to return to Tennessee within the next five years. Without questioning the sincerity of that representation, whether her return actually occurs within any time period must be regarded as a matter of substantial conjecture. That Ms. Helms-Hughes took the step of leaving her ancestral home to take a position with a newspaper in a far distant part of the country definitely suggests a strong commitment to the pursuit of her profession that might or might not lessen with the passage of time.

In the circumstances, the teachings of Sequoyah Fuels Corporation (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) come into play (standing denied where threat of injury too speculative). Even if, however, her current residence were not to be deemed an insuperable barrier to a grant of her hearing requests, it would scarcely perforce follow that she has made the required showing on injury-in-fact.

As noted, the Helms-Hughes property is located at a considerable distance from the BLEU complex on the Erwin site. To establish standing, Ms. Helms-Hughes therefore cannot simply point to references in the EA to the effect that there will be some airborne emissions as the result of the execution of the BLEU Project. Rather, her burden extends to supplying some good reason to believe that, 20 miles away from the site, the emissions might prove harmful. Mere potential exposure to minute doses of radiation within regulatory limits does not constitute

a “distinct and palpable” injury on which standing can be founded. See Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 87-88 (1993).

A careful review of the content of her various submissions has left Judge Cole and this presiding officer entirely unpersuaded that Ms. Helms-Hughes has come close to satisfying that burden. According to the June 2002 EA, “[b]ecause the BLEU Project supports the production of nuclear generated electric power for public use, [the Licensee] will have to comply with a more stringent public dose constraint of” 25 millirems (mrem) per year. EA §2.1.4 at 2-13. Thus, the question is whether Ms. Helms-Hughes has offered anything to suggest that, at a distance of 20 miles, an individual on her property might receive a radiation dose that, because of the Licensee’s operations, might equal or exceed that limitation. In that connection, although relying on the EA references to increases in existing levels of airborne emissions, Ms. Helms-Hughes does not endeavor to quantify those levels.

The significance of the absence of such quantification is highlighted by the estimates contained in the June 2002 EA with respect to the total annual dose that would be received by the “maximally exposed individual.” EA §5.1.1.2 at 5-5. Located at the nearest point of water use (the Jonesborough Water Plant located eight miles downstream from the Erwin site), that individual would receive an estimated annual dose from all existing and planned liquid and airborne effluents of 2.26 mrem – less than ten percent of the allowable 25 mrem/year public dose limit. Id. §5.1.1.2 at 5-5. Importantly, more than 90 percent (2.06 mrem/year) of the 2.26 mrem annual dose is attributable to liquid discharges (as opposed to the airborne discharges which appear to be Ms. Helms-Hughes’ sole concern). Ibid.; see also Table 5.1 at 5-5, Table 5.2 at 5-6.

Needless to say, there is no reason to believe that the dose received at a distance of 20 miles would exceed that received by an individual eight miles distant from the Erwin site.

Indeed, it clearly will be substantially less. This being so, Ms. Helms-Hughes' burden on the injury-in-fact question was hardly satisfied by reliance on the EA acknowledgment that there would be some increase in existing airborne emissions.

In sum, were Ms. Helms-Hughes now residing on her Tennessee property, she still would lack the requisite standing to challenge the BLEU Project. She has simply provided no basis for a possible conclusion that, notwithstanding the appreciable distance between the Erwin site and that property, the project poses a threat of harm to her upon which standing might be founded. To the contrary, all of the information at hand negates the existence of any such threat.[11]

D. State of Franklin Group of the Sierra Club et al. (Sierra).

1. Although, in common with Ms. Helms-Hughes, the four organizations collectively referred to as Sierra submitted hearing requests with regard to all three license amendment applications, for standing purposes an examination of the February 2, 2004 hearing request in connection with the third (OCB/EPB) application should suffice. Third Request for Hearing by State of Franklin Group of the Sierra Club et al. Regarding Nuclear Fuel Services' proposed

---

[11]In a March 7, 2003 reply to the Licensee's opposition to her hearing request regarding the second (BPF) license amendment application, Ms. Helms-Hughes urged (at 1) that she be at least granted discretionary standing under the authority of Portland General Electric Co.et.al. (Pebble Springs Nuclear Plant, Units 1 and 2). CLI-76-27, 4 NRC 610, 616 (1976). On a balancing of the factors that the Commission there determined should be considered, it is manifest that the conferral of such standing is not warranted in this instance. Two of the stated factors appear decisive.

First, as has just been determined, given the distance between her property and the Erwin site, Ms Helm-Hughes' interest in the proceeding is very limited at best. Second, as will be seen shortly, the hearing requests of the four organizations led by the Sierra Club is being granted. Those requests were presented on the organizations' behalf by counsel with considerable experience in NRC adjudicatory proceedings garnered over a long period of time. There thus is no reason to doubt that, irrespective of its extent, the Helms-Hughes interest will be adequately represented by existing parties to this proceeding. Stated another way, her participation does not seem necessary for the development of a sound record on the presented environmental and safety issues pertaining to the BLEU project, yet another factor referred to by the Commission in Pebble Springs.

BLEU Project (Feb. 2, 2004) [hereinafter Sierra Third Hearing Request]. Appended as exhibits to that request in support of the claim of representational standing were the declarations (in some instances an amendment of a previously submitted declaration) of members of one or more of the four organizations.

The declaration of Willa D. Early (Sierra Third Hearing Request, Exhibit 2) is illustrative. According to the declaration, she resides within one mile of the Licensee's Erwin facility and passes directly by it five days a week while driving to a nearby city. Id. at ¶2. A member of two of the four organizations submitting the hearing request, Ms. Early has authorized those organizations to represent "my interests in protecting my health and safety and my environment with respect to the entire BLEU Project, by participating in the NRC proceedings with respect to all three license amendments sought by [the Licensee]." Id.

With regard to the threatened injury-in-fact, Ms. Early states (id. at ¶4) as follows:

> As shown by the EA, the operation of the BLEU project facilities involves a number of potential accidents, including "spill of chemical and or radioactive material in a building, leak in a storage tank or supply piping, release of gaseous and particulate effluents (chemical and/or radioactive materials) due to a malfunction of the process off gas treatment system, and upset in the control of process parameters leading to undesirable reactions and release of hazardous or explosive compounds such as hydrogen, hydrogen peroxide, ammonia, NO_x and nitric acid vapors." EA at 5-10. The NRC also states that "the loss of control of the process may include release of radioactive materials and nuclear criticality." Id. According to the NRC, these accidents "can potentially impact worker safety, public health and safety, and the environment." Id.

The same proximity to the Erwin site and the same concern regarding the possibility of an accident undergirds the declarations of several of the other individuals who have likewise authorized the organizations to which they belong to represent them in this proceeding.

The distinction between Sierra's claim of representational standing and the standing claim advanced by Ms. Helms-Hughes is so apparent as not to warrant extended discussion. Notwithstanding the Licensee's assertion to the contrary (Applicants Answer to Third Request

for Hearing by State of Franklin Group of the Sierra Club et al. Regarding Nuclear Fuel Services' Proposed BLEU Project (Feb. 12, 2004)), there is little room for serious doubt that, were an accident of the kind postulated in the EA to occur, persons residing within a short distance of the Erwin site might well be threatened with injury. In contrast, as seen, given the appreciable distance between her property and that site there is absolutely no reason to believe that the emissions referred to in the EA (upon which Ms. Helms-Hughes relies for standing) might cause injury to those on the property or damage to the property itself. Put in its simplest terms, Sierra presented a credible threat of injury stemming from the execution of the BLEU Project whereas Ms. Helms-Hughes did not.

In arriving at this conclusion, Judge Cole and this presiding officer have not overlooked that, just last month, we denied a motion filed by Sierra seeking a stay of the effectiveness of the NRC Staff's decision in January to issue the second license amendment associated with the BPF portion of the BLEU Project. See LBP-04-02, 59 NRC __ (Feb. 18, 2004). Although it is true that the motion was founded in large measure upon the assertion that an accidental release of the hazardous materials involved at the BPF would cause irreparable injury to Sierra members, its denial is of no moment here. As we pointed out, in order to satisfy the crucially important irreparable injury prong of the four-part test applied in determining whether stay relief is appropriate, the movant must establish "a threat of injury both 'certain and great,'" something that we found Sierra had failed to do. Id., slip op. at 6-7.

No comparable burden exists where, as here, the issue is not entitlement to stay relief but, rather, standing to obtain a hearing on a license amendment application. Indeed, LBP-04-02 itself pointed to the likelihood that, notwithstanding the denial of a stay, Sierra would be found to have standing to challenge the BLEU Project. Id., slip op. at 4 fn.1. The short of the matter is that it suffices for present purposes (as it did not in passing upon the stay application) that the possibility of an accident occasioning injury to persons in the vicinity of the site is

acknowledged in the EA and thus cannot be excluded from consideration. The likelihood of such an accident, together with an appraisal of the possible consequences were one to occur, must be left for determination once the written presentations (and any supplementary oral presentations) are in hand.

2. It follows that the grant of a hearing to Sierra on the license amendment applications associated with the BLEU Project hinges upon whether it has asserted in its several submissions at least one area of concern "germane to the subject matter of the proceeding." 10 C.F.R. §2.1205 (h). In addressing this matter, it is well to take note anew of the fact that "[a]ll that [the hearing requester in a Subpart L proceeding] need do is 'state [its] areas of concern with enough specificity so that the Presiding Officer may determine whether the concerns are truly relevant -- i.e., 'germane' -- to the license amendment at issue." Fansteel, Inc. (Muskogee, Oklahoma Facility), LBP-03-22, 58 NRC 363, 368, (2003), quoting from the Commission decision in Sequoyah Fuels Corp.,CLI-01-02, supra, 53 NRC at 16.

Applying this standard, it is beyond cavil that Sierra has satisfied the area of concern requirement. This is apparent from an examination of the concerns set forth in the February 2, 2004 hearing request addressed to the third (OCB/EPB) license amendment application.

As developed in that hearing request, those concerns fall within two categories: environmental and safety. On the first score, Sierra asserted that, for a wide variety of reasons, the NRC Staff has failed to comply with the dictates of the National Environmental Policy Act (NEPA). Sierra Third Hearing Request at 11-15. Among other things, it pointed (id. at 12) to what it deems to be a concession in the June 2002 EA that "operation of the BLEU Complex, including the OCB, the EPB, and associated storage tanks, poses significant hazards to human health and the environment."[12] That being so, Sierra would have it that the Staff was required to

[12] In an earlier portion of the hearing request concerned with the issue of standing (at 5-8), Sierra discussed in some detail the specific provisions of the June 2002 EA that it regarded as containing the asserted concession. There is no apparent need to rehearse them here.

prepare an environmental impact statement "that addresses these impacts in detail, and also discusses the costs and benefits of alternatives and mitigative measures." Ibid.[13]

Manifestly, whether or not ultimately found to be meritorious, Sierra's environmental concerns are germane. The same may be said of its three specified safety concerns. According to the hearing request (id. at 15-16), the Licensee has failed to demonstrate (1)"that it has made adequate arrangements to fund the decommissioning of the OCB and EPB at the end of the facility's life;" (2) that it "can and will comply" with certain operational requirements imposed by 10 C.F.R. §§70.23(a)(2), (3) and (4); and (3) that it can be counted on to "make complete and accurate reports to the NRC." In each instance, the hearing request assigned a reason for the concern.

With a single exception,[14] the concerns set forth in the other Sierra hearing requests likewise appear admissible for adjudication. In substantial measure they mirror the concerns

---

[13]A second, at least marginally germane, environmental concern advanced in the February 2 hearing request (at 13 -14) related to what Sierra regarded as a prior history on the Licensee's part of exceeding permit limits with respect to the emission of effluent to the environment. On a seemingly better footing insofar as admissibility is concerned is the Sierra challenge as unreliable of the estimates contained in the EA for certain airborne and liquid effluent releases. Id. at 14.

[14]In its November 27, 2002 hearing request addressed to the first (UNB) license amendment application, Sierra maintained as an area of concern (Request of Hearing by State of Franklin Group of the Sierra Club et al. (Nov. 27, 2002) at 9) that there are several "significant environmental impacts posed by the proposed BLEU Project" requiring the preparation of an environmental impact statement. Among the examples cited in support of that proposition (at 11) was that "[o]peration of the BLEU Project will involve transport, storage, handling, and processing of tons of HEU [High-Enriched Uranium], an attractive target for terrorists and insane individuals who might seek to do harm to the facility, or to steal HEU for the production of a nuclear weapon." The Commission has squarely held, however, that such a concern is not open to litigation in its adjudicatory proceedings. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002). A like concern contained in Sierra's February 6, 2003 hearing request pertaining to the second (BPF) license amendment application (Second Request for Hearing by State of Franklin Group of the Sierra Club et al. (Feb. 6, 2003) at 13-14) is similarly barred.

specified in the third hearing request that have already been discussed.[15] It bears repetition, however, that this does not mean that they have been found meritorious. Once again, whether there is substance to a particular specified concern is not to be determined at this preliminary stage of the proceeding but, instead, must await the submission of written presentations.

The conclusion is thus compelled that, unlike the other hearing requesters, Sierra has satisfied both the standing and area of concern requirements for obtaining a hearing on the BLEU Project license amendment applications. Accordingly, its request for that relief will be granted.

For the foregoing reasons, the hearing requests of the State of Franklin Group of the Sierra Club, et al. are granted and those of the fifteen individual declarers, the Blue Ridge Environmental Defense League and Kathy Helms-Hughes are denied for lack of standing. As mandated by 10 C.F.R. 2.1231(a), within thirty (30) days of the date of this order, the NRC Staff

[15]See pages 9-14 of Sierra's November 27, 2002 hearing request and pages 7-15 of its February 6, 2003 hearing request.

shall file a hearing file in the manner prescribed in that section.[16] Following the receipt of the hearing file, a telephone conference will be conducted with counsel for the purpose of scheduling the filing and service of the written presentations called for by 10 C.F.R. §2.1233. In that connection, although the Staff had elected not to participate in the proceeding, we have

---

[16]In accord with 10 C.F.R. § 2.1231, in creating and providing the hearing file for this proceeding within thirty days of the date of entry of this order, the NRC staff can utilize one of two options:

1. Hard copy file. The hearing file that is submitted to the Presiding Officer and the parties in hard copy must contain a chronologically numbered index of each item contained in it and each file item shall be separately tabbed in accordance with the index and be separated from the other file items by a substantial colored sheet of paper that contains the tab(s) for the immediately following item. Additionally, the items shall be housed in hole-punched three ring binders of no more than four inches in thickness.

2. Electronic file. For an electronic hearing file, the staff shall make available to the parties and the Presiding Officer a list that contains the ADAMS accession number, date and title of each item so as to make the item readily retrievable from the agency's web site, www.nrc.gov., using the ADAMS "Find" function. Additionally, the staff should create a separate folder in the agency's ADAMS system, which it should label "Nuclear Fuel Services - 70-143-MLA Hearing File," and give James Cutchin of ASLBP and the SECY group (Office of the Secretary) viewer rights to that folder. Once created, the staff should place in that folder copies of the ADAMS files for all the Hearing Docket materials. For documents in ADAMS packages a subfolder should be created into which the package content should be placed. The subfolder should have a title that comports with the title of the package. Thereafter, as part of its notice to the parties and the Presiding Officer regarding the availability of the Hearing File materials in ADAMS, the staff should advise the Presiding Officer that this process is complete and the "Hearing File" folder is available for viewing. (As an information matter for the parties, once this notice is received, the contents of the folder will be copied so as to make its contents available to an ASLBP-created ADAMS folder that will be accessible to ASLBP personnel only and into a folder that will be accessible by the parties from the NRC web site.) If the staff thereafter provides any updates to the hearing file, it should place a copy of those items in the "Nuclear Fuel Services - 70-143-MLA Hearing File" ADAMS folder and indicate it has done so in the notification regarding the update that is then sent to the Presiding Officer and the parties. If at any juncture the staff anticipates placing any non-public documents into the hearing file for the proceeding, it should notify the Presiding Officer of that intent prior to placing those documents into the "Nuclear Fuel Services -70-143-MLA Hearing File" and await further instructions regarding those documents from the Presiding Officer. (Questions regarding the electronic hearing file creation process should be addressed to James Cutchin at 301-415-7397 or jmc3@nrc.gov.)

If the staff decides to utilize option two, within seven days from the date of this order it shall give notice to the Presiding Officer and the parties of that election. If any party objects to this method of providing the hearing file, it shall file a response within seven days outlining the reasons why access to an electronic hearing file will place an undue burden on that party's ability to participate in this proceeding.

now concluded that its participation on all issues will be of material assistance in the resolution of those issues. See 10 C.F.R. §2.1213. The Staff is therefore hereby made a full party to the proceeding and its counsel will be expected to take part in the scheduling conference.

If so inclined, within ten (10) days of the service of this order, the hearing requesters whose requests were denied may appeal to the Commission in accordance with the provisions of 10 C.F.R. §2.1205(o). The Licensee may similarly appeal from so much of the order as granted the Sierra hearing requests. Responses to any such appeals may be filed within fifteen (15) days of the service of the appeal brief. Unless the Commission should direct otherwise, the filing of an appeal shall have no effect upon the further progress of the proceeding.

It is so ORDERED.

BY THE PRESIDING OFFICER[17]

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 17, 2004.

[17] Copies of this memorandum and order were sent this date by e-mail transmission to the counsel or other representative of each of the participants in the proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)		
	)		
NUCLEAR FUEL SERVICES, INC.	)	Docket Nos.	70-143-MLA
	)		70-143-MLA-2
	)		70-143-MLA-3
(Erwin, Tennessee)	)		

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON HEARING REQUESTS) (LBP-04-05) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Alan S. Rosenthal, Presiding Officer
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Richard F. Cole, Special Assistant
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dennis C. Dambly, Esq.
Marian L. Zobler, Esq.
Angela B. Coggins, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Louis Zeller
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629

Diane Curran, Esq.
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

Docket Nos. 70-143-MLA
70-143-MLA-2
70-143-MLA-3
LB MEMORANDUM AND ORDER (RULING ON HEARING REQUESTS) (LBP-04-05)

Daryl M. Shapiro, Esq.
D. Sean Barnett, Esq.
ShawPittman, LLP
2300 N Street, NW
Washington, DC 20037

C. Todd Chapman, Esq.
King, King & Chapman, P.L.L.C.
125 South Main Street
Greeneville, TN 37743

Kathy Helms-Hughes
P.O. Box 2394
Fort Defiance, AZ 86504

Neil J. Newman
Vice President and General Counsel
Nuclear Fuel Services, Inc.
1700 Rockville Pike
Rockville, MD 20852

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of March 2004