UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

SERVED 05/20/04

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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

CLI-04-13

MEMORANDUM AND ORDER

Nuclear Fuel Services, Inc. submitted a series of three materials license amendment applications associated with its portion of a Department of Energy program to reduce stockpiles of surplus high-enriched uranium. Kathy Helms-Hughes appealed the Presiding Officer's denial of her three hearing requests. The Commission affirms the Presiding Officer's decision.

I. BACKGROUND

The Blended Low Enriched Uranium (BLEU) Project is a Department of Energy program to reduce stockpiles of surplus high enriched uranium (HEU) by re-use as low enriched uranium (LEU) or disposal as radioactive waste. Nuclear Fuel Services, Inc. (NFS) has contracted with DOE to downblend surplus HEU uranium material to a LEU nitrate and to convert the LEU nitrate to a uranium oxide at its Erwin, Tennessee site. To support its role in the BLEU project, NFS has applied for a series of three amendments to its special nuclear materials license. The three related license amendments would authorize NFS: (1) to store LEU-bearing material at the uranyl nitrate building; (2) to downblend HEU/aluminum alloy and HEU material metal to low

enriched uranyl nitrate solutions; and (3) to convert uranyl nitrate solutions to uranium dioxide powder and conduct associated effluent processing.[1]

Ms. Helms-Hughes petitioned for a hearing on each of the three NFS license amendment requests. The Presiding Officer deferred ruling on any hearing requests until after NFS filed the last of its three related license amendment requests.[2] Thereafter, the Presiding Officer found that Ms. Helms-Hughes lacked standing and denied her requests,[3] and Ms. Helms-Hughes filed a "Motion for Appeal," asking the Presiding Officer to reconsider her "motion for standing."[4]

II. DISCUSSION

We first address a preliminary procedural question about the nature of Ms. Helms-Hughes' Motion for Appeal. The Presiding Officer deemed it a misfiled appeal, rather than a motion for reconsideration, and referred it to the Commission.[5] We elect to consider Ms. Helms-Hughes' misdirected motion as an appeal of the Presiding Officer's standing decision

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[1]We refer the reader to our earlier more detailed discussion of these amendment requests. *See Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-03-03, 57 NRC 239, 240-41 (2003).

[2]*See* unpublished "Order (Directing the Holding of the Proceeding in Abeyance)" (Jan. 21, 2003); LBP-03-01, 57 NRC 9 (2003).

[3]*See* LBP-04-05, 59 NRC __ (Mar. 17, 2004). Besides Ms. Helms-Hughes, other petitioners for hearing on one or more of the license amendment requests were the State of Franklin Group of the Sierra Club in conjunction with three other organizations; the Blue Ridge Environmental Defense League; and a group of 15 individuals. The Presiding Officer granted the hearing request of the Sierra Club and denied the other requests.

[4]*See* "Kathy Helms-Hughes' Motion for Appeal of March 17, 2004, Memorandum and Order/Ruling on Hearing Requests in the Matter of Nuclear Fuel Services' Proposed Blended Low-Enriched Uranium Project" (Apr. 1, 2004).

[5]*See* unpublished "Memorandum and Order (Referring Filing to the Commission)" (Apr. 7, 2004).

pursuant to 10 C.F.R. § 2.1205(o).[6] That regulation provides that a presiding officer's denial of a request for a hearing is appealable to the Commission on the question whether the hearing request should have been granted in whole or in part. A disappointed hearing requester also has the option of filing a motion for reconsideration with the Presiding Officer.[7] Ms. Helms-Hughes' filing of her motion for appeal with the Presiding Officer was "neither fish nor fowl;" however, we are exercising our discretion to treat the timely filed motion as an appeal, as the Presiding Officer suggested in his referral order. We turn now to the merits of Ms. Helms-Hughes' appeal.

The concept of standing in a Subpart L materials licensing case has been well developed. A petitioner must meet the "judicial standards for standing."[8] To do so requires the following four-part showing:

> (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.[9]

The Presiding Officer denied Ms. Helms-Hughes' hearing request on two grounds, both relating to the lack of a concrete and particularized injury, or "injury-in-fact." He ruled, first, that Ms. Helms-Hughes currently resides in Arizona rather than on the property she owns

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[6]The NRC has recently amended its adjudicatory procedural rules, 10 C.F.R. Part 2. *See* "Changes to Adjudicatory Process: Final Rule," 69 Fed. Reg. 2182 (Jan. 14, 2004). The new rules of procedure apply to proceedings noticed on or after Feb. 13, 2004. Thus, the NRC's adjudicatory regulations which were in effect before Feb. 13, 2004, apply to the NFS proceeding. All references to 10 C.F.R. Part 2 in this order cite the earlier version of the rules.

[7]*See* 10 C.F.R. §§ 2.1259(b), 2.771.

[8]10 C.F.R. § 2.1205(h).

[9]*International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001) (*quoting 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)).

approximately 20 miles from the NFS site[10] and second, that she failed to show a "'distinct and palpable'" injury on which standing can be founded," even were she to live on her Tennessee property.[11]

Absent an error of law or an abuse of discretion, the Commission generally defers to the Presiding Officer's decisions regarding standing.[12] Here, the Presiding Officer reasonably found that Ms. Helms-Hughes has "provided no basis for a possible conclusion that, notwithstanding the appreciable distance between the [NFS] site and [her] 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."[13]

On appeal, Ms. Helms-Hughes takes issue with both the "residence" and "injury" grounds on which the Presiding Officer relied in denying her hearing request. She states that she intends to return to her Tennessee property and has been forced for economic reasons to work out of the area on a temporary basis. Despite the distance of her property from the NFS site, she claims the activities described in the license amendment requests will injure her. But in materials licensing cases proximity alone does not suffice for standing, absent an "obvious" potential for offsite harm.[14] There is no obvious potential for harm at Ms. Helms-Hughes' property 20 miles from the NFS site. Thus, it becomes her burden to show a specific and

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[10]LBP-04-05, 59 NRC at __, slip op. at 10.

[11]*Id.* at __, slip op. at 10-13, *citing Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 87-88 (1993).

[12]*See International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001).

[13]LBP-04-05, 59 NRC at __, slip op. at 14.

[14]*Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994).

plausible means how BLEU-related activities at the NFS site will affect her,[15] a burden she does not meet. Instead, she only makes conclusory allegations about potential radiological harm to herself and others.[16] "[P]leadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he . . . will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action."[17] Because any alleged injury to Ms. Helms-Hughes is entirely speculative, the Presiding Officer was correct in his conclusion that she has no standing in these license amendment proceedings.[18]

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[15]*See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-05, 51 NRC 90, 98 (2000).

[16]*See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 191-93 (1999) (conclusory allegations about potential radiological harm insufficient basis for standing); *Fla. Power & Light Co.* (St Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (injury to others not a basis for standing).

[17]*United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973). *Accord Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1339 (D.C. Cir. 1999).

[18]We do not reach the Presiding Officer's alternate rationale that Ms. Helms-Hughes' absence from her Tennessee property defeats her standing claim. This can be a complex issue that we need not analyze to resolve this case. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 31-32 (1998) (*citing Dubois v. Dept. of Agriculture*, 102 F.3d 1273, 1282-83 (1st Cir. 1996) (consider length and nature of visits); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324-25 (frequent visits enough to establish standing). *Cf. Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 336-38 (1979) (occasional trip insufficient); *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-358, 4 NRC 558, 560 (1976) (transfer of residence would defeat intervention).

III. CONCLUSION

We affirm the Presiding Officer's decision to deny Ms. Helms-Hughes' hearing request.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of May 2004.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-04-13) have been served upon the following persons by electronic mail or facsimile, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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Docket Nos. 70-143-MLA
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(CLI-04-13)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of May 2004