

**RAS 8371**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

**DOCKETED 08/23/04**

**SERVED 08/23/04**

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 Nos. 70-143-MLA, 70-143-MLA-2,  
70-143-MLA-3

ASLBP Nos. 02-803-04-MLA, 03-810-02-MLA,  
04-820-05-MLA

August 23, 2004

MEMORANDUM AND ORDER

(Denying Request for Clarification of Issues to be Heard)

This proceeding involves the three applications of Nuclear Fuel Services, Inc. (Licensee) for amendments to its Special Materials License (SNM-124) to allow it to carry out on its Erwin, Tennessee site the Blended Low-Enriched Uranium (BLEU) project. The proceeding is governed by the provisions of the Commission's now-superseded Rules of Practice that were still in effect at the time of the filing of the numerous hearing requests addressed to that project.

In LBP-04-05, 59 NRC 186 (2004), Judge Cole and I granted the hearing requests submitted by a group of four organizations headed by the State of Franklin Group of the Sierra Club (Sierra). In light of the June 18, 2004 Federal Register publication of the NRC Staff's finding of no significant environmental impact with regard to the last of the proposed license amendments (69 Fed. Reg. 34,198), Sierra's initial written presentation in support of its challenge to the BLEU project is now due to be filed on or before October 1, 2004. See April 28, 2004 memorandum and order (unpublished), establishing the schedule for the filing of the written presentations of the parties.

Now in hand is a June 3, 2004 request by the Licensee, endorsed by the NRC Staff but opposed by Sierra, for a clarification of the issues to be heard in the proceeding. Specifically, the Licensee seeks a ruling that “the scope of the proceeding [does] not include the environmental effects of [the Licensee’s] current or past operations at its Erwin facilities or elsewhere.” Further, the Licensee would have excluded from further consideration any reference to “the safety or the history of [its] current or past operations at Erwin or elsewhere.” Clarification Request at 1.

In support of the proposed ruling, the Licensee maintains broadly (1) that “allegations concerning past violations or management character or integrity are inappropriate without a direct and obvious relationship with the licensing action in dispute;” and (2) that the allegations of past Licensee regulatory violations and criminal conduct contained in Sierra’s hearing requests do not meet the “direct and obvious relationship” test. *Id.* at 9 et seq. The Licensee might well be right with regard to the first proposition.<sup>1</sup> We are unprepared, however, to conclude at this juncture that, as a matter of certainty, Sierra will be unable to establish in its written presentation a link between (1) the past conduct of the Licensee in the pursuit of its activities at Erwin and elsewhere and (2) the activities sought to be licensed at this time. Stated otherwise, we do not believe that such a confident conclusion is permissible, as the Licensee would have it, simply by an examination of what was put forth by Sierra in its hearing requests by way of meeting the requirement that germane areas of concern be specified therein.

The short of the matter is that a determination as to the relevancy of particular instances of past Licensee conduct in the pursuit of other activities appropriately should await the filing of Sierra’s initial written presentation and the responses of the Licensee and NRC Staff thereto. In

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<sup>1</sup>At the very least, Sierra will be required to demonstrate the present relevancy of whatever it should put forth in its written presentation.

the event that Sierra elects to include in its presentation reference to, and reliance upon, past Licensee conduct, its counsel will presumably undertake to explain why such conduct has sufficient present relevance to justify its consideration in the adjudication of the challenge to the BLEU project. Should the Licensee (or the NRC Staff) believe that the explanation does not carry the day and that, under governing Commission precedent, the past Licensee conduct relied upon by Sierra is beyond consideration in this proceeding, it will have full opportunity in its responsive presentation so to establish.<sup>2</sup>

Accordingly, the clarification request is denied.

It is so ORDERED.

BY THE PRESIDING OFFICER<sup>3</sup>  
**/RA/**

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Alan S. Rosenthal  
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 23, 2004

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<sup>2</sup>Although it appears from their filings that the Licensee and Sierra are of different minds with regard to the teachings of certain NRC adjudicatory decisions, we think it best to tackle the disagreement in the context of a fully developed record – i.e., after the written presentations have illuminated in detail precisely what past Licensee practices are being relied upon by Sierra and what significance is being attached to them insofar as the Licensee's carrying out of the BLEU project is concerned.

<sup>3</sup>Copies of this memorandum and order were sent this date by e-mail transmission to the counsel for the parties to the proceeding.

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(Erwin, Tennessee) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING REQUEST FOR CLARIFICATION OF ISSUES TO BE HEARD) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket Nos. 70-143-MLA  
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LB MEMORANDUM AND ORDER  
(DENYING REQUEST FOR  
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[Original signed by Adria T. Byrdsong]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 23<sup>rd</sup> day of August 2004