

April 16, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
SHIELDALLOY METALLURGICAL CORP.) Docket No. 40-7102
)
Materials Decommissioning Plan)

NRC STAFF'S RESPONSE TO APPEAL OF LORETTA WILLIAMS

INTRODUCTION

On January 3, 2007, Loretta Williams ("Petitioner") filed a request for a hearing on the Decommissioning Plan (DP) submitted by Shieldalloy Metallurgical Corporation ("Licensee").¹ In a Memorandum and Order dated March 28, 2007, the Atomic Safety and Licensing Board ("Board") denied the Petitioner's hearing request.² On April 5, 2007, the Petitioner filed an appeal of the Board's decision. For the reasons stated below, the NRC staff ("Staff") respectfully submits that the Commission should deny the Petitioner's appeal.

BACKGROUND

On November 17, 2006, the NRC placed in the Federal Register a notice of opportunity to request a hearing on the Licensee's plan to decommission its facility in Newfield, New Jersey. "Notice of Consideration of Amendment Request for Decommissioning for Shieldalloy Metallurgical Corporation, Newfield, NJ and Opportunity to Request a Hearing," 71 Fed. Reg. 66,986 (Nov. 17, 2006). In response to that notice, the Petitioner filed a timely request for hearing on January 3, 2007. In her request the Petitioner argued that the Licensee's

¹ "Request for a Hearing Submitted by Loretta Williams" (Jan. 3, 2007) (ADAMS ML0701902710) ("Hearing Request").

² "Memorandum and Order (Ruling on Hearing Requests)" (March 28, 2007) (ADAMS ML0708707090). In addition to ruling on the Petitioner's hearing request, the Board ruled on the hearing requests of six other petitioners.

DP is deficient for a number of reasons. The issues raised by the Petitioner included whether the DP meets the financial assurance requirements for decommissioning; the DP's assessment of economic, environmental, and health and safety risks; the security risks and costs associated with the on-site storage of radioactive waste; the accuracy of solubility testing used to support the DP; the NRC's threshold for acceptable radiation levels; and the Licensee's comparison of the costs for on- and off-site waste disposal. Petition at 1–2.

The Board denied the Petitioner's hearing request. In its March 28, 2007 Memorandum and Order, the Board held that the hearing request must be denied because the Petitioner failed to "demonstrat[e] that she might, through expert opinion or factual development, connect the alleged threats to specific aspects of the Licensee's DP." Memorandum and Order at 13. The Board explained that "[w]here [the Petitioner] does mention the Licensee's DP, she does not address, with specific references to the Licensee's analyses, how she intends to demonstrate that the DP is flawed." *Id.* Although the Board noted that "a certain amount of latitude might appropriately be extended to pro se litigants" such as the Petitioner, it concluded that in this case the Petitioner's hearing request fell "far short" of meeting the contention requirements in 10 C.F.R. § 2.309(f)(1). *Id.* at 14.

On April 5, 2007, the Petitioner filed a timely brief appealing the Board's decision.³ Although described as an "appeal," it appears the Petitioner is in fact merely attempting to submit additional information in support of her hearing request. At the very outset, the Petitioner states her purpose in filing the brief: "Loretta Williams files this appeal to the Board's denial for a hearing in accordance with 10 CFR § 2.315© [sic], respectfully submitting additional information to support her original hearing request." Petitioner's Brief at 1. The Petitioner then argues that, based on records from the Newfield Tax Assessor's Office—copies of which the Petitioner has attached to her appeal—the cost estimates and financial assurance provisions in

³ "Petitioner's Brief" (ADAMS ML071010138).

the Licensee's DP are inadequate. *Id.* at 2–3. The Petitioner does not address the criteria in 10 C.F.R. § 2.311, which governs interlocutory review of rulings on requests for hearing, but instead patterns her argument after 10 C.F.R. § 2.309(f), which sets forth the requirements for admissible contentions.

For the following reasons, the Commission should reject the Petitioner's arguments, regardless of whether those arguments constitute an appeal of the Board's decision or an attempt to submit additional information in support of her hearing request.

DISCUSSION

I. To The Extent The Petitioner Is Appealing the Board's Ruling, She Does Not Identify Any Error In That Ruling

On appeal, a petitioner must adequately call to the Commission's attention any claimed error in the Board's decisionmaking. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001). The petitioner must explain to the Commission whether she believes the Board's ruling was, for example, based on an erroneous finding of material fact or an improper application of Commission precedent. *Hydro Resources, Inc.*, CLI-01-04, 53 NRC 31, 45–46 (2001). The Commission will deem arguments to be waived if they are not raised before the Board or clearly articulated in the Petitioner's appellate brief: "[t]he burden of setting forth a clear and coherent argument for standing and intervention is on the petitioner." *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-04, 49 NRC 185, 194 (1999).

Here, the Petitioner does not identify any error in the Board's ruling. Rather, as the Petitioner plainly states at the beginning of her appeal, her purpose in filing the appeal is to "submit[] additional information to support her original hearing request." Petitioner's Brief at 1. The Petitioner relies on this newly submitted information to support her appeal, and nowhere does she claim that the Board ruled improperly on the information she presented with her hearing request. Indeed, the Petitioner's reference to her "original" hearing request strongly

implies that the Petitioner has filed her appeal not to argue that the Board ruled incorrectly in denying her request, but to cure the deficiencies in her request that the Board identified in its ruling. Because the Petitioner does not identify any error in the Board's decisionmaking, but only suggests the Board would have ruled differently had it considered the newly submitted information, the Commission should deny the Petitioner's appeal. *Carolina Power & Light*, 53 NRC at 383; see also *Nuclear Management Co., L.L.C.* (Monticello Nuclear Generating Plant), CLI-06-06, 63 NRC 161, 163–64 (2006) (rejecting appeal of order denying hearing request where appeal provided no grounds for questioning Board's ruling on petitioner's proposed contentions).

II. The Petitioner Improperly Seeks to Submit Additional Information in Support of Her Hearing Request

As noted, although the Petitioner refers to her filing as an "appeal," it appears she is in fact asking the Commission to amend her January 3, 2007 hearing request to include newly submitted information. 10 C.F.R. § 2.309(f)(2) sets forth the requirements for amending contentions and submitting new contentions. With limited exceptions not applicable here,⁴ § 2.309(f)(2) provides:

- . . . contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer and only upon a showing that—
- (i) The information upon which the amended or new contention is based was not previously available;
 - (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
 - (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. §2.309(f)(2)(i)—(iii).

⁴ Section 2.309(f)(2) provides that on issues arising out of the National Environmental Protection Act, a petitioner may amend a contention or file new contentions if data or conclusions in certain NRC-generated documents "differ significantly from the data or conclusions in the applicant's documents."

The Petitioner's attempt to supplement her hearing request fails in the first instance because she has not sought leave of the presiding officer. Section 2.309(f)(2) explicitly states that "contentions may be amended or new contentions filed after the initial filing *only with leave of the presiding officer.*" (Emphasis added.) Accordingly, the Petitioner's brief should have been filed with the Board, not with the Commission. The Commission should summarily reject the Petitioner's brief based on her failure to meet this requirement.

The Commission should also reject the Petitioner's attempt to amend her hearing request because she has failed to show that the "information upon which the amended or new contention is based was not previously available," as required by § 2.309(f)(2)(i). In fact, the Petitioner does not even claim that the newly submitted information—tax information for the year 2006—was unavailable when she filed her hearing request on January 3, 2007. Absent a showing of new information, the Petitioner cannot meet the requirements of § 2.309(f)(2)(i). *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004).

Finally, the Petitioner fails to meet the requirements of § 2.309(f)(2)(ii) because she has not shown—or even alleged—that the newly submitted information is materially different from information previously available. The Petitioner claims the newly submitted information is relevant to assessing the economic and financial burden the DP would impose on the Borough of Newfield. However, the Petitioner makes the exact same arguments in her brief as she did in her request for hearing, and nowhere does she explain how her analysis has changed as the result of the "new" information. Nor does the Petitioner describe what information was available at the time she filed her hearing request and explain why the new information is materially different from the information previously available.

Because the Petitioner fails to meet the multiple requirements of § 2.309(f)(2), the Commission should reject the Petitioner's attempt to amend her hearing request.⁵

III. The Petitioner Has Not Presented A Contention Admissible Under § 2.309(f)(1), Regardless Of Whether The Newly Submitted Evidence Is Considered

Even if a petitioner is allowed to supplement her initial hearing request, the petitioner still has the burden of establishing she meets the requirements of 10 C.F.R. §2.309(f)(1), the NRC regulation governing the admissibility of contentions. *Millstone*, CLI-04-36, 60 NRC at 636. In its ruling, the Board found that the Petitioner fell "far short" of meeting these requirements. Memorandum and Order at 14. The Petitioner's newly submitted information does not help her make that showing. Even with her supplemented and reformatted hearing request, the Petitioner is still missing "a demonstration that she might . . . connect the alleged threats to specific aspects of the Licensee's DP." Memorandum and Order at 13. Further, the Petitioner still "does not address, with specific references to the Licensee's analyses, how she intends to demonstrate that the DP is flawed." *Id.* The Petitioner again fails to cite the sections of the DP she wishes to challenge, and her factual analysis is limited to a discussion of tax assessments without a discussion of the relationship between the assessments and the Licensee's analysis. Petitioner's Brief at 1-2. The Petitioner claims that "a company like Shieldalloy should be paying at least \$518,000 a year in property taxes; the Borough of Newfield is losing \$451,000/year." Petitioner's Brief at 2. However, she does not provide any references to relevant documentation

⁵ In addition to meeting the requirements of § 2.309(f)(2), the Petitioner's hearing request cannot be amended unless the Petitioner satisfies § 2.309(c). That section provides that nontimely contentions shall only be admitted upon the determination of the Licensing Board after a balancing of eight factors, § 2.309(c)(1)(i)–(viii), and requires the petitioner to address these factors in its nontimely filing. § 2.309(c)(2) Because the Petitioner's newly submitted information must be considered nontimely, and because the Petitioner fails to affirmatively address the eight factors and demonstrate that, on balance, the contention should be admitted, § 2.309(c) provides an independent basis for rejecting the Petitioner's attempt to amend her hearing request. *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 578 (1982), *citing Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980).

or expert opinion to support these assertions. More significantly, the Petitioner fails to explain how this allegation is in any way relevant to whether or not the Licensee's DP should be approved.

The Petitioner's hearing request does not meet the requirements of § 2.309(f)(1) even if the newly submitted information is considered. Accordingly, the Commission should find that the Petitioner has not presented an admissible contention.

CONCLUSION

The Commission should reject the Petitioner's arguments regardless of whether her brief is construed as an appeal of the Board's decision or an attempt to amend her hearing request to include additional information. The Petitioner fails to identify any error in the Board's decision, does not even allege that the information she attaches to her brief is new information, and fails to explain how this information is in any way relevant to the NRC's review of the Licensee's DP. Accordingly, the Commission should affirm the Board's order denying the Petitioner's hearing request.

Respectfully submitted,

/RA by Michael J. Clark/

Michael J. Clark
Tison A. Campbell
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 16th day of April, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
SHIELDALLOY METALLURGICAL CORP.) Docket No. 40-7102
)
Materials Decommissioning Plan)

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Respectfully submitted,

/RA by Tison A. Campbell/

Tison A. Campbell
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Dated at Rockville, Maryland
this 16th day of April, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPEAL OF LORETTA WILLIAMS" and "NOTICE OF APPEARANCE" for Tison A. Campbell in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk(*); and by electronic mail as indicated by a double asterisk (**) on this 16th day of April, 2007.

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