

January 14, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
NUCLEAR FUEL SERVICES, INC	)	Docket No. 70-143
	)	
Special Nuclear Materials Facility	)	ASLBP No.
(License Amendment Request)	)	

NRC STAFF'S RESPONSE TO HEARING REQUEST OF  
SIERRA CLUB'S NATIONAL RADIATION COMMITTEE

INTRODUCTION

Nuclear Fuel Services, Inc. (Licensee) manufactures nuclear reactor fuel at its facility in Erwin, Tennessee. On May 15, 2007, the Licensee submitted to the Nuclear Regulatory Commission (NRC) an application for a license amendment increasing the uranium-235 possession limit at its Erwin facility.<sup>1</sup> On October 18, 2007, the NRC placed notice in the Federal Register of the opportunity to request a hearing regarding the Licensee's application.<sup>2</sup> The Federal Register notice states that any person whose interest may be affected by this proceeding and who desires to participate as a party must file a written request for a hearing and a specification of the contentions which the person seeks to have litigated in the hearing.<sup>3</sup>

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<sup>1</sup> The version of the amendment request submitted by the Licensee on May 15, 2007 is designated "Official Use Only" and is not publicly available. However, the Licensee subsequently submitted a redacted version of its amendment request, which the NRC made publicly available before giving notice of the opportunity for a hearing in this proceeding. "Submittal of Redacted Version of Amendment Request to Increase the U-235 Possession Limit for the NFS Site" (August 22, 2007) (ADAMS ML072550166).

<sup>2</sup> *Notice of License Amendment Request of Nuclear Fuel Services, Inc., Erwin, TN, and Opportunity To Request a Hearing*, 72 Fed. Reg. 59,117 (October 18, 2007).

As stated in the Federal Register notice, the deadline for requesting a hearing was December 17, 2007.<sup>4</sup>

On December 17, 2007, the Sierra Club's National Radiation Committee (Petitioner) filed a request for a hearing.<sup>5</sup> The Commission should deny this request because the Petitioner fails to demonstrate it has either standing to participate in a hearing or any admissible contention.

#### BACKGROUND

The Licensee is the holder of Special Nuclear Materials License No. SNM-124, issued by the NRC on July 2, 1999, under 10 C.F.R. Part 70. The license authorizes the possession and use of nuclear materials associated with operation of the Licensee's facility, in accordance with the conditions specified therein. The facility is located on the Licensee's site in Erwin, Tennessee.

The Licensee's application, dated May 15, 2007, seeks a license amendment that would allow the Licensee to receive and store more uranium-235 than its current license permits. The NRC's October 18, 2007 Federal Register notice provides the opportunity to request a hearing regarding the proposed license amendment. The Federal Register notice also explains the requirements for participating in a hearing, including the requirements that a petitioner demonstrate standing and set forth at least one admissible contention, citing the relevant regulatory language in 10 C.F.R. § 2.309(d)(1) and (f)(1).<sup>6</sup> In addition, the Federal Register

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(. . .continued)

<sup>3</sup> *Id.* at 59,117-18.

<sup>4</sup> *Id.* at 59,118.

<sup>5</sup> "Request for Hearing Submitted by Sierra Club's Radiation Committee" (Hearing Request) (December 17, 2007) (ADAMS ML\_\_\_\_\_).

<sup>6</sup> 72 Fed. Reg. at 59,117-18.

notice informs prospective petitioners that documents related to the Licensee's amendment request, including the application and supporting documentation, are available electronically at the NRC's website.<sup>7</sup>

## DISCUSSION

### I. Standing

#### A. Requirements for Standing

A petition for a hearing must demonstrate that the petitioner has standing to intervene. 10 C.F.R. § 2.309(d)(1). In order to demonstrate standing, a petition must: (1) identify the petitioner; (2) state the nature of the petitioner's right under the Atomic Energy Act of 1954, as amended, to be made a party to the proceeding; (3) state the petitioner's interest in the proceeding; and (4) state the possible effect of any order or decision in the proceeding on the petitioner's interest. *Id.* The NRC interprets the requirements of 10 C.F.R. § 2.309(d)(1) by applying an "injury-in-fact" test, under which the petitioner must allege "a concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision." *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The injury must be actual or threatened, rather than abstract and conjectural. *Perry*, CLI-93-21, 38 NRC at 92. The injury-in-fact also must be "arguably within the zone of interests protected by the governing statute," in the case of the NRC, either the Atomic Energy Act or the National Environmental Policy Act. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998).

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<sup>7</sup> *Id.*

Although the Commission has historically presumed standing in reactor licensing proceedings based on a petitioner's proximity to the facility, *see, e.g., Virginia Elec. Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979), a presumption of standing based on geographic proximity alone is not applied in other cases, including cases involving fuel facilities such as the Licensee's plant. *See Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). Rather, the Petitioner must show that the proposed action "involves a significant source of radioactivity producing an obvious potential for offsite consequences." *Sequoyah Fuels Corporation* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n. 22 (1994). Whether a proposed action carries with it an "obvious potential for offsite consequences," and, if so, at what distance a petitioner can be presumed to be affected, must be determined "on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source." *Exelon Generation Company, LLC and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580–81 (2005).

An organization may demonstrate standing by showing "either immediate or threatened injury to its organizational interests or to the interests of identified members." *Georgia Tech.*, CLI-95-12, 42 NRC at 115. If basing its standing on that of a member, "the organization must demonstrate that the individual member has standing to participate, and has authorized the organization to represent his or her interests." *Id.*

B. Petitioner's Claim of Standing

In its two-page hearing request, the Petitioner fails to demonstrate that it has standing to participate in this proceeding as measured by the criteria in 10 C.F.R. § 2.309(d)(1). The Petitioner appears to be requesting a hearing on behalf of a wide range of individuals. First, the

Petitioner states that it seeks a hearing “on behalf of its members in the Erwin area as well as other concerned citizens[.]”<sup>8</sup> Next, the Petitioner states that it is requesting a hearing “on the apparent violation by NRC Staff of citizens’ Fifth Amendment due process rights.”<sup>9</sup> The Petitioner also asserts that it seeks a hearing “to allow the public living in the Region of Interest (ROI) around NFS to express its concern” regarding certain NRC actions. These actions affect not only the public living and working in the ROI, the Petitioner claims, but also those “along the route of the increased amount of HEU shipments.”<sup>10</sup> Finally, the Petitioner requests a hearing “to address Sierra’s concern” regarding certain actions of various federal agencies.<sup>11</sup>

None of the Petitioner’s claims is sufficient to establish standing. Because the Petitioner is an organization, the Petitioner must show “either immediate or threatened injury to its organizational interests or to the interests of identified members.” *Georgia Tech.*, CLI-95-12, 42 NRC at 115. Here, the Petitioner does not allege any injury to its organizational interests, either immediate or threatened. The Petitioner instead alleges that the proposed license amendment would potentially harm various groups of individuals. However, the Petitioner fails to identify specific members of its organization that fall within these groups and demonstrate that these individuals have authorized the Petitioner to represent their interests.

The sole individual identified in the Petitioner’s hearing request is its author, Linda C. Modica, identified as Chair of the Petitioner’s National Radiation Committee.<sup>12</sup> To the extent the

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<sup>8</sup> Hearing Request at 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1–2.

Petitioner bases its standing on Ms. Modica's individual standing, that claim must likewise fail. As noted, in materials licensing cases such as the present proceeding, an individual cannot establish standing unless she shows there is an "obvious potential for offsite consequences." *Sequoyah*, CLI-94-12, 40 NRC at 75 n. 22. Whether a proposed action carries with it an "obvious potential for offsite consequences" must be decided "on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source." *Peach Bottom*, CLI-05-26, 62 NRC at 580-81. Here, the hearing request states only that Ms. Modica lives within the Region of Interest (ROI) around the Licensee's facility.<sup>13</sup> The Petitioner does not define the ROI or explain how the ROI is relevant to the particular license amendment at issue here. Without additional support both defining the ROI and explaining the ROI's relevance to this particular case, it is not apparent why there is an obvious potential for offsite consequences affecting Ms. Modica.<sup>14</sup>

Although hearing requests will be construed in favor of the petitioner on issues of standing, *Georgia Tech.*, CLI-95-12, 42 NRC at 115 (citing *Kelley v. Seldin*, 42 F.3d 1501, 1508 (6th Cir. 1995)), the petitioner nonetheless bears the burden of establishing standing. *Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2)*, CLI-00-05, 51 NRC 90, 98 (2000). Here, the Petitioner fails to provide sufficient information to carry its burden of demonstrating either organizational standing or the standing of an identified member. The Petitioner's hearing request must therefore be denied.

## II. Contentions

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<sup>13</sup> *Id.* at 2.

<sup>14</sup> See *Shieldalloy Metallurgical Corp.*, CLI-99-12, 49 NRC 347, 355 (1999) (rejecting petitioners' claims of standing based on economic and non-economic injuries where petitioners failed to provide detailed descriptions and cite evidence in support of their standing claims).

A. Requirements for Admissible Contentions

In addition to establishing standing, a hearing request must include at least one admissible contention. 10 C.F.R. § 2.309(a). For each contention, the petitioner must provide: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position; and (6) sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute or the identification of each failure to include necessary information in the application and the supporting reasons for the petitioner's belief. 10 C.F.R. § 2.309(f)(1). As explained below, even if the Petitioner were found to have standing, it has not set forth any valid contention on which its hearing request could be granted.

B. Petitioner's Claims and Concerns

The Petitioner raises six concerns related to the Licensee's operation of its Erwin, Tennessee facility. However, none of the Petitioner's concerns meets the requirements for an admissible contention at § 2.309(f)(1). Most of the Petitioner's concerns relate to the Licensee's operation of its facility in general, not to the Licensee's amendment request. Even for those concerns that arguably relate to the amendment request, the Petitioner fails to meet numerous requirements in § 2.309(f)(1).

The Petitioner twice asks for a public meeting at which the NRC Staff would answer questions or hear public comments regarding its regulation of the Licensee. Initially, the Petitioner "requests the opportunity to have NRC Staff explain in public—rather than hiding behind their desks serving boiler-plate responses to the public's concerns and filtering them

through NRC's bureaucracy—why it continues to run rough-shod over American citizens' rights to participate in their government's decision-making."<sup>15</sup> The Petitioner later states that it is "request[ing] an Oral Hearing to allow the public living in the Region of Interest (ROI) around NFS to express its concern regarding the inconsistent actions & statements of NRC staff who, on the one hand, assert that NFS continues to have 'problems in the implementation of safety controls' (Erwin Record, 09/18/07) yet, on the other hand, allow the Erwin licensee to threaten the health and safety of the public living and working not only within the ROI but also along the route of the increased amount of HEU shipments."<sup>16</sup> These requests fail to meet any of the requirements for an admissible contention in 10 C.F.R. § 2.309(f)(1)(ii)–(vi). Most significantly, the Petitioner fails to comply with § 2.309(f)(1)(iii) because it does not demonstrate that the adequacy of the NRC's response to public concerns is within the scope of the present proceeding, which involves the Licensee's request for a license amendment.<sup>17</sup> In fact, the Petitioner's requests do not even reflect that it wishes to participate in this proceeding; rather the Petitioner is requesting an entirely different proceeding—a public meeting at which the NRC would respond to its allegations.

The Petitioner also states that it is requesting an oral hearing "on the apparent violation by NRC Staff of citizens' Fifth Amendment due-process rights, as well as possible violations of the Administrative Procedures Act (APA) and the National Environmental Policy Act (NEPA)."<sup>18</sup>

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<sup>15</sup> *Id.* at 1.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, ALAB-825, 22 NRC 785, 790–91 (1985) (holding that the scope of the proceeding is defined by the NRC in its initial hearing notice).

<sup>18</sup> *Id.*

This argument likewise fails to meet any of the contention requirements in § 2.309(f)(1)(ii)–(vi). For example, the Petitioner does not explain the basis for any of its claims regarding alleged violations by the NRC Staff, as required by § 2.309(f)(1)(ii),<sup>19</sup> nor does the Petitioner cite alleged facts or expert opinion in support of its claims, as required by § 2.309(f)(1)(v).<sup>20</sup> To the contrary, the Petitioner mentions only “apparent” or “possible” violations, suggesting it has no identifiable basis for its claims.

The Petitioner additionally asserts that “because NFS is still operating under the Confirmatory Order and has yet to meet the apparent conditions of its license which requires a Safety Culture at NFS’s Erwin facility, an Oral Hearing is requested so that the ASLB can hear the concerns of the Sierra Club and the Erwin community regarding the disregard for worker and public health and safety demonstrated not only by the licensee which is taking more than 3 years to institute a Safety Culture in Erwin, but also by the NRC which continues to allow NFS to run the BLEU process despite its continued failure to operate safely and in accordance with the safety requirements of SNM-124.”<sup>21</sup> This claim appears to be based on a Confirmatory Order issued to the Licensee on February 21, 2007.<sup>22</sup> As such, the claim is outside the scope of the

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<sup>19</sup> See also *Changes to Adjudicatory Process (Part II)*, 69 Fed. Reg. 2182, 2202 (explaining that the Commission, through its contention rules, “seeks to ensure that the adjudicatory process is used to address real, concrete, specific issues that are appropriate for litigation”).

<sup>20</sup> See also *Fansteel Inc. (Muskogee, Oklahoma Site)*, CLI-03-13, 58 NRC 195, 203 (2003) (holding that a petitioner’s issue will be ruled inadmissible if the petitioner offers only “bare assertions and speculation”).

<sup>21</sup> *Id.*

<sup>22</sup> On July 30, 2007, the NRC provided notice of the opportunity to request a hearing on a Confirmatory Order to the Licensee issued on February 21, 2007. *Nuclear Fuel Services, Inc.; Notice of Publication of Confirmatory Order and Opportunity for Hearing*, 72 Fed. Reg. 41,528 (July 30, 2007). The Petitioner filed a hearing request on the Confirmatory Order. “Hearing Request of the Sierra Club’s National Radiation Committee and We the People, Inc.,” August 20, 2007. (ADAMS ML072400586). That request was denied in a recent Board decision. *Nuclear Fuel Services, Inc. (Confirmatory Order)*, LBP-(continued. . .)

present proceeding and fails to comply with § 2.309(f)(1)(iii). The Petitioner also fails to meet other requirements in § 2.309(f)(1). The Petitioner fails to demonstrate that past safety issues are in any way relevant to findings the NRC must make in acting on the license amendment request. Therefore, the Petitioner fails to comply with § 2.309(f)(1)(iv).<sup>23</sup> The Petitioner raises the Licensee's "continued failure to operate safely," but fails to provide any information in support of that claim, much less the "facts or expert opinion" required by § 2.309(f)(1)(v). Finally, the Petitioner does not dispute any information in the Licensee's application or allege deficiencies in the application.<sup>24</sup>

The Petitioner next states that "on November 8, 2007, NFS had yet another accident at its Erwin facility: a worker was sprayed with a radioactive, caustic liquid and required emergency medical attention at Unicoi County Memorial Hospital. (Johnson City Press, 11/10/07, p.4A). . . . The Sierra Club requests [a] hearing regarding this latest failure by NFS to protect worker health and safety, and the repeated failure of the NRC to protect the public's health and safety."<sup>25</sup> Here again, the Petitioner seeks a hearing on a matter entirely different than that specified in the October 18, 2007 Federal Register notice. The Petitioner does not

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07-16, 65 NRC \_\_ (December 13, 2007), slip. op. at 26–30. The Petitioner did not seek review of the Board's decision within the ten-day period provided for in 10 C.F.R. § 2.311.

<sup>23</sup> See *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005) (explaining that it is the intervenor's burden to show both the significance and materiality of any claimed deficiency).

<sup>24</sup> See also *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247–48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994) (holding that any contention failing to directly controvert the application, or that mistakenly asserts the application does not address a relevant issue, must be dismissed).

<sup>25</sup> Hearing Request at 1–2.

even attempt to explain how the cited incident is relevant to the Licensee's application for a license amendment. Because the Petitioner does not raise an issue within the scope of the present proceeding, its claim fails to satisfy § 2.309(f)(1)(iii). The Petitioner also fails to demonstrate how a hearing on the cited incident is material to any finding the NRC must make in the present proceeding, as required by § 2.309(f)(1)(iv). Further, the Petitioner fails to comply with § 2.309(f)(1)(vi) in that it does not explain what portion of the Licensee's application, if any, it disputes or deems inadequate based on the cited incident.

The Petitioner states that “[f]inally, an Oral Hearing is requested to address Sierra’s concern that the Department of Energy (DOE) and the Tennessee Valley Authority (TVA) may be pressuring NRC to deliver license amendments to their contractor, NFS, that serve the DOE and TVA program interests but not the public’s health, safety and security.”<sup>26</sup> The Petitioner’s concern clearly does not rise to the level of an admissible contention. The Petitioner does not cite any facts or expert opinion in support of its concern, and it provides no apparent basis for that concern, other than mere speculation. The Petitioner also makes no attempt to show its concern is within the scope of the present licensing action, nor does the Petitioner explain how the issue it raises is material to any finding the NRC must make in this proceeding. Accordingly, the Petitioner’s concern fails to satisfy any part of §§ 2.309(f)(1)(iii)-(v).

#### CONCLUSION

The Petitioner fails to demonstrate that it has standing to intervene in this proceeding, either in its organizational capacity or as the representative of any identified member. The Petitioner also fails to set forth any admissible contention. The Petitioner raises a number of concerns related to the Licensee's current operation of its facility and the NRC's regulation of

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<sup>26</sup> *Id.*

the Licensee, but those concerns are outside the scope of this proceeding and fail to meet multiple other requirements in § 2.309(f)(1). Accordingly, the Commission should deny the Petitioner's hearing request.

Respectfully submitted,

*/RA/*

Michael J. Clark  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 14<sup>th</sup> day of January, 2008

UNITED STATES OF AMERICA  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO HEARING REQUEST OF SIERRA CLUB'S NATIONAL RADIATION COMMITTEE" and "NOTICE OF APPEARANCE FOR MICHAEL J. CLARK" in the above captioned proceeding have been served on the following persons by deposit in either the United States Mail or the Nuclear Regulatory Commission's internal mail system and by electronic mail, where indicated by an asterisk (\*); or by express mail, where indicated by a double asterisk (\*\*); on this 14th day of January, 2008.

Office of the Secretary \*  
Attn: Rulemaking and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 C1  
Washington, D.C. 20555  
E-mail: [hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)

Office of Commission Appellate  
Adjudication \*  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 C1  
Washington, D.C. 20555  
E-mail: [OCAAMail@nrc.gov](mailto:OCAAMail@nrc.gov)

Daryl M. Shapiro, Esq. \*  
Blake J. Nelson, Esq. \*  
Stefanie M. Nelson, Esq. \*  
Pillsbury Winthrop Shaw Pittman LLP  
2300 N Street, N.W.  
Washington, D.C. 20037  
E-mail: [daryl.shapiro@pillsburylaw.com](mailto:daryl.shapiro@pillsburylaw.com)  
[blake.nelson@pillsburylaw.com](mailto:blake.nelson@pillsburylaw.com)  
[stefanie.nelson@pillsburylaw.com](mailto:stefanie.nelson@pillsburylaw.com)

Ann M. Ward, Esq. \*\*  
General Counsel  
Nuclear Fuel Services, Inc.  
1205 Banner Hill Road  
Erwin, TN 37650

Linda Cataldo Modica, Chair \*\*  
Sierra Club Radiation Committee  
266 Mayberry Road  
Jonesborough, TN 37659

/RA/

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Michael J. Clark  
Counsel for NRC Staff