



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

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OFFICE OF THE  
GENERAL COUNSEL

May 30, 1997

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

Mr. Norman Begay  
White Mesa Community  
P.O. Box 1138  
White Mesa, Utah 84511

Ms. Lula Jim Katso  
Westwater Navajo Community  
264 West 100 North  
Blanding, Utah 84511

Mr. Winston M. Mason  
Native American Peoples  
Historical Foundation, Inc.  
Box AVIKAN  
Blanding, Utah 84511

In the Matter of  
Energy Fuels Nuclear, Inc.  
(White Mesa Uranium Mill, License Amendment 1)  
Docket No. 40-8681-MLA

Gentlemen/Madame:

I have received a copy of your letter to Dr. Shirley Ann Jackson, Chairman of the Nuclear Regulatory Commission, dated May 24, 1997. In your letter, you express various concerns regarding the NRC Staff's licensing actions with respect to the White Mesa Uranium Mill, as well as concerns regarding a legal response ("Response") which I filed on May 21, 1997, as Counsel for the NRC Staff, to your requests for hearing in the ongoing "Cotter Concentrate" license amendment proceeding. I wish to reply briefly to the concerns you have expressed regarding my filing of the Staff's Response. The other matters raised in your letter will be addressed separately, as may be determined to be appropriate.

Your letter expressed the following concerns with respect to the Staff's Response: (1) the Response failed to "dignify" each of your groups "as separate bona fide clans, communities, and organizations," inasmuch as it addressed all of your requests for hearing in one response rather than in separate responses; (2) the Response was sent to you by first class mail "with no Certified Receipt"; (3) the Response was filed 14, 7, or 4 days later than permitted by NRC regulation -- which you state "appears to be more than coincidental," and to be indicative of either "willful suppression of information" or "incompetence in the Staff lawyers and judges"; (4) the Response was "ill prepared, in what appears could very well be another ploy in delaying and disrupting proper proceedings" since it attached a 23-page decision on standing issued in a proceeding concerning the Atlas Corporation "rather than . . . any adequate documentation of reasons for denial in our own case" -- which you describe as being either "an intentional diversion in the suppression of information" or "a prime example of negligence and incompetence in high government offices"; (5) "Mr. Turk's claim that in a telephone conversation Mr. Norman Begay stated that he did not oppose the granting of Counsel's

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request regarding late notification is far removed from Mr. Begay's understanding"; and (6) you request review by Chairman Jackson "of the Staff's initial decisions regarding our individual petitions."

In response to these concerns, I wish to assure you as follows. First, the filing of a single response to your requests for hearing was not intended to reflect any judgment as to the status or independence of your organizations or communities; rather, it constituted an efficient means of responding to all hearing requests which have been received to date, including the request to participate that was filed by the Department of Energy/Nevada Operations Office. Second, service of the Staff's Response by certified mail was not required by Commission regulation (see 10 C.F.R. § 2.712(c)). Third, the Staff's response to your requests for hearing was admittedly filed late (by 12, 5 or 1 day, respectively), as noted therein at 2 n.1. This delay was inadvertent, however, and was not part of any attempt to "suppress information."<sup>1</sup> Further, however this error may reflect upon Staff Counsel's abilities, it does not in any manner reflect upon the competence or integrity of the Commission or its judges, whose actions are wholly independent from those of Staff Counsel.

Fourth, your comments concerning my attachment, to the Staff's Response, of a decision on standing in *Atlas* proceeding indicates that you have misunderstood my reasons for doing so. In brief, I attached that decision, and the previous *EFN* decision granting standing to Mr. Begay, because they provide an excellent summary of the requirements which you must satisfy to demonstrate standing in this proceeding, and they contain other information which I believe may be relevant to your participation in this proceeding. Fifth, whatever may be Mr. Begay's recollection of our telephone conversation, I am satisfied that my representation of that conversation is entirely accurate; please note I did not say Mr. Begay agreed with the substantive position expressed in the Staff's Response, only that he did not object to my request for permission to file that document late.

Finally, as I am sure you are aware, in an Order issued on May 27, the Presiding Officer afforded you an opportunity to amend your requests for hearing, in order to demonstrate your standing in this proceeding. This outcome was, in fact, suggested in the Staff's Response -- which set out the standards you are required to meet, indicated that your requests should not be granted "in the absence of any further information" (*Id.* at 2, 6), and raised the possibility that the Presiding Officer could "determine[]" to afford the requestors an opportunity to amend their requests for hearing in order to demonstrate their standing" (*Id.* at 2, n.2). The NRC Staff will file a timely response to your supplemental filings, and the Presiding Officer will then reach an independent decision as to whether your requests for hearing should be granted. That decision, and any subsequent decision in the proceeding, would then be subject to review by the Commission, itself. In sum, although the Staff may express its views

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<sup>1</sup> To be sure, while the Staff's Response itself was filed late, a litigant's lack of standing (*i.e.*, the sole issue addressed in that Response) is jurisdictional, and can be raised at any time -- even for the first time on appeal, or by the trial or appellate court itself. See, *e.g.*, Rule 12(h)(3), Fed. R. Civ. P.; *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990); *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). See generally, 15 *Moore's Federal Practice*, § 101.30[1]-[2] (3d ed. 1997), at 101-22 - 101-23, and cases cited therein.

concerning procedural issues in the proceeding, the Staff's views are entitled to no more weight than your views or the views of other parties.

I trust that this letter resolves some of the concerns expressed in your letter to Chairman Jackson. Please do not hesitate to contact me if you wish to discuss these or other matters in the future. My telephone number is (301) 415-1575.

Sincerely,



Sherwin E. Turk  
Counsel for NRC Staff

cc: Chairman Shirley Ann Jackson  
Commissioner Kenneth C. Rogers  
Commissioner Greta J. Dicus  
Commissioner Nils J. Diaz  
Commissioner Edward McGaffigan, Jr.  
Peter B. Bloch, Esq.  
Presiding Officer  
Dr. Charles N. Kelber  
Special Assistant  
Rich A. Munson, Esq.  
Michelle R. Rehmann  
G. Leah Dever  
Office of the Secretary  
Office of Commission  
Appellate Adjudication  
Atomic Safety and Licensing Board