

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
G. Paul Bollwerk, III
Nicholas G. Trikouros

In the Matter of
RARE ELEMENT RESOURCES, INC.
(Bear Lodge Project)

Docket No. 40-38367-ML
ASLBP No. 16-945-01-MLA-BD01
February 24, 2016

ORDER

(Addressing Request to Suspend the Proceeding)

I. BACKGROUND

On May 4, 2015, Rare Element Resources, Inc. (RER) filed an application under 10 C.F.R. Part 40 to possess and use source material associated with the processing of rare earth elements mined at the Bear Lodge Project in Crook and Weston counties, Wyoming.¹ On November 16, 2015, notice of RER's application to the NRC was published in the Federal Register, allowing anyone with interests affected by the application to petition to intervene and request a hearing.² Defenders of the Black Hills (Defenders or Petitioner) filed a request for

¹ [RER] License Application for Source Material Possession Submitted to the [NRC], 1 at § 5.0, 2 at § 6.0 (May 4, 2015) (ADAMS Accession No. ML15134A434).

² [RER]; Bear Lodge Project, 80 Fed. Reg. 70846 (Nov. 16, 2015).

hearing within the deadline.³ The NRC Staff and RER filed answers opposing the petition to intervene and the request for a hearing on February 9, 2016.⁴

On January 21, 2016, RER sent two requests for suspension to the NRC. Citing financial difficulties, RER sent one request to the NRC Staff to suspend all permitting and licensing efforts,⁵ and one request to the Commission to suspend adjudicatory proceedings until the Staff's licensing process resumes.⁶ The NRC Staff granted RER's request to suspend licensing review on February 4.⁷

The Commission on February 1 referred the Petitioner's hearing request to the Atomic Safety and Licensing Board Panel.⁸ On February 9, the Chief Administrative Judge established this Atomic Safety and Licensing Board to conduct any adjudicatory proceeding regarding Defenders' petition.⁹ The Licensing Board then suspended any pending procedural dates, namely the deadline for Defenders to file a response to NRC Staff and RER's already submitted

³ Letter from Charmaine White Face, Coordinator for Defenders of the Black Hills, to Kenneth Kalman, Office of Nuclear Material Safety & Safeguards (Jan. 14, 2016) .

⁴ NRC Staff Response to Defenders of the Black Hills Petition to Intervene and Request for Hearing (Feb. 9, 2016); Applicant's Response to Petition to Intervene Filed by Defenders of the Black Hills (Feb. 9, 2016).

⁵ Letter from Jaye Pickarts, RER Chief Operating Officer, to Andrew Persinko, Deputy Dir., NRC Div. of Decommissioning, Uranium Recovery, & Waste Programs (Jan. 21, 2016) (ADAMS Accession No. ML16022A191).

⁶ Letter from Tyson R. Smith, Counsel for RER, to NRC Commissioners (Jan. 21, 2016) (ADAMS Accession No. ML16021A468).

⁷ Letter from Michael A. Norato, Acting Deputy Dir., NRC Div. of Decommissioning, Uranium Recovery, and Waste Programs, to Jaye Pickarts, RER Chief Operating Officer (Feb. 4, 2016) (ADAMS Accession No. ML16032A140).

⁸ Memorandum from Annette L. Vietti-Cook, NRC Office of the Secretary, to E. Roy Hawken, Chief Administrative Judge, Atomic Safety and Licensing Board Panel (Feb. 1, 2016).

⁹ [RER]; Establishment of Atomic Safety and Licensing Board, 81 Fed. Reg. 7834 (Feb. 16, 2016).

answers to its request for a hearing,¹⁰ and scheduled a February 22 conference call with the participants regarding RER's pending request to suspend any adjudicatory proceeding.¹¹ During that call, RER requested that the Board continue with the adjudicatory proceeding, effectively seeking to withdraw its request for suspension.¹² In support of this change in its position regarding suspension, RER asserted that it having already incurred the expense of filing its response to Defenders' petition, the most efficient way for the Board to proceed was to complete the only remaining steps in the procedural process associated with a determination regarding whether a hearing on Defenders' petition would be convened, i.e. Petitioners' reply and the Board's ruling on the viability of their hearing request.¹³ The NRC Staff also stated that it had no issue moving forward with the adjudicatory proceeding, rather than suspending it.¹⁴ Petitioner stated that it preferred to suspend the proceeding as originally requested by RER.¹⁵

During that conference, the Board also discussed with the parties the permitting review process related to the Bear Lodge Project that RER has been working through with the United

¹⁰ Licensing Board Order (Suspending Deadline for Filing Reply Pleading under Section 2.309(i)(2) and Scheduling Telephone Conference Call to Establish Further Procedures) (Feb. 11, 2016) (unpublished).

¹¹ Licensing Board Notice (Scheduling Conference Call) (Feb. 17, 2016) (unpublished).

¹² Tr. at 7–8 (Mr. Smith).

¹³ Tr. at 16–17 (Mr. Smith).

¹⁴ Tr. at 8 (Mr. Carpenter).

¹⁵ Tr. at 8–9 (Ms. White Face). Also in response to a Board inquiry, the representatives for Defenders and RER indicated they were not inclined to enter into settlement discussions with an eye toward possibly dismissing this adjudication subject to re-noticing at an appropriate time in the future. See Tr. at 24–26.

States Forest Service (USFS).¹⁶ The USFS has also suspended review of the Bear Lodge Project at RER's request.¹⁷

II. RULING ADDRESSING REQUEST FOR SUSPENSION

Pursuant to the Commission's referral of the Petitioner's request for hearing to the Board for appropriate disposition and the agency's regulations requiring a licensing board to expeditiously address the issues before it,¹⁸ the Board will resume the adjudicatory portion of this docket. The Board thus grants RER's February 22, 2016, request to withdraw its January 21 request to suspend the adjudicatory proceeding and declines to suspend this proceeding as requested by Defenders.

III. FURTHER PROCEDURES

This adjudicatory proceeding will resume with the filing of Defenders' reply to the answers submitted on February 9, 2016, by RER and the NRC Staff. The Commission's regulations provide that "the participant who filed the hearing request, intervention petition ... may file a reply to any answer."¹⁹ No other written answers or replies are to be entertained.²⁰ Upon receipt of Defender's reply, and subject to any determination the Board may make about any oral presentations by the participants regarding the viability of Defenders' hearing request, the Board will rule on the petition to intervene and the request for hearing.

¹⁶ See Tr. at 10–11.

¹⁷ U.S. Forest Service, News Release, "Bear Lodge Project – Rare Earth Mine – Suspended," (Jan. 22, 2016), available at http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/84481_FSPLT3_2669840.pdf.

¹⁸ See generally 10 C.F.R §§ 2.319, 2.332.

¹⁹ 10 C.F.R. § 2.309(i)(2).

²⁰ 10 C.F.R. § 2.309(i)(3).

Defenders' reply should address the RER and the NRC Staff's answers, namely in the areas of (1) Defenders' standing to participate in this proceeding under 10 C.F.R. § 2.309(d)(1) and (2) the admissibility of Petitioner's contention under 10 C.F.R. § 2.309(f). While Petitioner may not use its reply to introduce new arguments in support of its contention,²¹ it can respond to any RER or Staff arguments regarding the admissibility of its contention under the § 2.309(f) standards. Additionally, the reply can be used as an opportunity to cure potential defects in standing.²² While the burden to establish its standing lies with Petitioner, the Commission has held that in considering the standing showing proffered by an unrepresented petitioner, such as Defenders, we should not "hold . . . [such] a *pro se* petitioner . . . to the same standards of clarity and precision to which a lawyer might reasonably be expected to adhere."²³

Notwithstanding the provisions of 10 C.F.R. § 2.309(i)(2), given the unique circumstances of this case, with its overlap of filing dates and the establishment of this Board, as well as changing requests from the participants, the Board grants Petitioner until March 7, 2016, to file its reply to the NRC Staff and RER's answers to Defenders' hearing request.

It is so ORDERED.

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 24, 2016

²¹ Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-15-13, 81 NRC 456, 461 n.25 (2015) (citing La. Energy Servs., L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004)).

²² Turkey Point, LBP-15-13, 81 NRC at 461 n.25 (2015) (citing PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139-40 (2010) and S.C. Electric & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 (2010)).

²³ Fla. Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), CLI-15-25, 82 NRC ___, ___ n. 34 (slip op. at 7) (Dec. 17, 2015) (internal quotations omitted).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Addressing Request to Suspend the Proceeding)** in the above-captioned proceeding have been served upon the following persons by Electronic Information Exchange.

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[Original Signed by Clara Sola _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 24th day of February, 2016