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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

'88 FEB 22 P4:32

Before

JOHN H. FRYE, III  
Administrative Judge

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

|                         |   |                        |
|-------------------------|---|------------------------|
| In the Matter of        | ) |                        |
|                         | ) |                        |
| ATLAS MINERALS DIVISION | ) | Docket No. 40-3453     |
| OF ATLAS CORPORATION    | ) | ASLBP No. 87-557-05-SP |
|                         | ) |                        |
| Source Material License | ) |                        |
| No. SUA-917             | ) |                        |

LICENSEE'S RESPONSE TO ORDER  
OF FEBRUARY 4, 1988

On February 4, 1988, Judge Frye issued an order denying the request of Atlas and the NRC Staff that this proceeding continue to be held in abeyance, and directing the parties to respond in detail to Mr. Darke's petition to intervene by addressing three specific issues:

1. The reasons for the differences between [the parties'] statement of the issue and that contained in the Commission's Order and the Notice of Hearing;
2. The applicability of the Marble Hill rationale to this proceeding; and
3. In the event that Mr. Darke is found to have standing in this proceeding, the inter-relationship between this proceeding and any proceeding which may be initiated on the renewed license.

Licensee's response to the Order of February 4, 1988 is set forth below.

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## I. Scope of the Present Hearing

This proceeding has its roots in an Order issued by the NRC Staff on July 31, 1987. That Order reflected a decision by the NRC Staff to deny Licensee's application to renew its source material license for the Moab, Utah facility. Included within the Order were certain directions and conditions which were made effective immediately. In accordance with applicable law and regulation, the Order specified:

Atlas may file within 20 days of the date of this Order a written answer under oath or affirmation which sets forth the matters of fact and law on which the licensee relies for relief from any part of this Order. \* \* \*

Atlas or any other person who has an interest adversely affected by this Order may request a hearing on this Order within 20 days of the date of its issuance. \* \* \* If a person other than Atlas requests a hearing, that person shall describe specifically, in accordance with 10 CFR Part 2.714(a)(2), the nature of the person's interest and the manner in which that interest is affected by this Order. \* \* \* If a hearing is held, the issue to be considered at such a hearing shall be whether this Order shall be sustained." [Emphasis added.]

Licensee responded to this Order on August 27, 1987, with an Answer and Request for Hearing. In Paragraph 7 of that filing, Licensee listed the six areas in which it would present evidence and make legal argument as directed by the Staff Order. The first area raised issue as to whether the July 31, 1987 Order should be effective immediately. That issue need not be considered at this time. The second and third areas argued that the

financial surety arrangements offered by Licensee satisfied the applicable regulations. The fourth area argued in the alternative that, if Licensee's proposed financial surety arrangements do not meet the applicable regulations, those regulations should be waived or an exception should be made. The fifth area identified the relief sought by Licensee: that its source material license be renewed. The last area sought to cover all other issues appropriate for hearing -- i.e., those "relevant to 'whether (the July 31, 1987 Order) shall be sustained.'"

It is thus clear from Licensee's Answer and Request for Hearing that the scope of any hearing would be whether the July 31, 1987 Order "shall be sustained." The specific issues raised by Licensee were the factual and legal predicates to Licensee's argument that the July 31, 1987 Order should not be sustained.

The Commission granted Licensee's request for a hearing (see Order of September 25, 1987, at 3), but specified that the hearing should be informal and not the formal hearing requested by Licensee. The Commission further stated (id.):

The issue before the presiding officer shall be whether Atlas' application for renewal of its license must be denied for failure to submit satisfactory surety arrangements.

This statement of the issue is but a paraphrase of the issue set forth in the July 31, 1987 Order: "whether [the] Order shall be sustained."

To be sure, the Commission in its discussion of Licensee's hearing request characterized the "single issue" presented by that request as whether the "proposed surety arrangements are in compliance with the Commission's requirements or, failing that, whether an exception or waiver, if permissible, should be granted." Id. at 2. That characterization succinctly summarizes the legal and factual arguments which Licensee identified in its hearing request as a basis for overturning the NRC Staff's Order. However, it does not appear that the Commission intended this characterization of the issue to broaden the scope of the proceeding since, as discussed above, the Commission then narrowly defined the scope of the proceeding.

In Judge Frye's Notice of Hearing issued on October 5, 1987, Paragraph 3 describes the issue in terms of the legal and factual matters raised by Licensee as a basis for not sustaining the July 31, 1987 Order. When Licensee reviewed this part of the Notice of Hearing, Licensee interpreted the notice as accepting the scope of Licensee's legal and factual arguments within the context of a hearing on whether the July 31, 1987 Order should be sustained, and not as enlarging the scope of the hearing.

The Order issued by Judge Frye on February 4, 1988, may indicate that Licensee was in error in its reading of the Notice of Hearing. In particular, from the nature of the first issue on which Judge Frye sought comment, it now appears to Licensee that

Judge Frye may be interpreting the scope of this hearing more broadly than whether the July 31, 1987 Order should be sustained. If that is, in fact, the case, Licensee regrets not raising the issue earlier, but firmly believes that the Commission did not direct such a broad hearing. The issue on which Licensee sought a hearing was whether the July 31, 1987 Order should be sustained.<sup>1/</sup> No other party timely sought a hearing on the July 31, 1987 Order.<sup>2/</sup> Licensee's hearing request was granted. If any person now seeks to intervene in that hearing (like Mr. Darke), that person must show an interest affected by the July 31, 1987 Order. This necessarily follows because, if such a person had sought a hearing on the July 31, 1987 Order directly, that person would have had to show an affected interest -- as explicitly set forth in the July 31, 1987 Order.

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<sup>1/</sup> Atlas contemplated that if it prevailed at the the hearing, the Hearing Panel would direct the NRC Region IV Staff to: (1) complete review of the renewal application, (2) establish appropriate license conditions, and (3) issue a renewed license.

<sup>2/</sup> It appears from the record that sometime in August 1987, Mr. Darke sent a mailgram to Robert Martin, Region IV Administrator, identifying Mr. Darke's concerns regarding the July 31 Staff Order and requesting that the NRC Resident Inspector be sent to the site. Mr. Darke made no specific request for a hearing in the mailgram.

## II. Applicability of the Marble Hill Rationale

Licensee does not believe it is necessary to determine whether the Marble Hill rationale should be applied to this proceeding. Since the proper scope of this proceeding is whether the July 31, 1987 Order should be sustained, if that Order is withdrawn there will be nothing left to decide in this proceeding, and Licensee's hearing request should be dismissed as moot. That, Licensee believes, is the proper basis for handling this proceeding. As noted in the last status report filed by Atlas and the NRC Staff, if and when a renewal license is issued by the NRC Staff, any affected person (including Mr. Darke if he qualifies) can petition for a hearing on the grant of that license. Since the issues in that proceeding would not be limited to whether the July 31, 1987 Order should be sustained, that proceeding would provide a better and more appropriate forum for addressing concerns like those raised by Mr. Darke (see discussion at Part III below).

That Judge Frye should associate Licensee's argument with the Marble Hill decision is easily understandable since both in that case and here the scope of the hearing was whether an agency order should be sustained. In Marble Hill an intervening party sought a hearing beyond the scope specified in the enforcement order. The Commission first held that "[t]he scope of a hearing directed at these issues [i.e., whether the enforcement order

should be sustained] would not include consideration of enforcement remedies beyond those already granted by the order." Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 N.R.C. 438, 440 (1980). That reasoning is equally applicable here and is not dependent on the order at issue being an enforcement order. It merely restates the obvious: if an order states that the scope of hearing is whether the order should be sustained, parties seeking relief beyond that specified in the order are not affected by the order and have no standing to seek a hearing.

The second holding of the Commission in Marble Hill was that the agency has the authority to so limit the scope of proceedings in enforcement actions. Id. at 440-42; see also Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983). While the reasoning in the Marble Hill decision is specific to enforcement proceedings, the conclusion may well also be true here. However, it is not necessary to reach this issue. In Marble Hill, the enforcement order was in place and a party sought a hearing under that Order. Here, by contrast, the NRC Staff proposes to withdraw the Order when it issues the renewal license. Once the Order is withdrawn, whether the agency has authority to limit the scope of the hearing as set forth in the Order will be moot.<sup>3/</sup>

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<sup>3/</sup> The NRC's authority to limit the scope of a hearing is also reflected in the hearing procedures set forth in the Commis-

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III. Interrelationship between Mr. Darke's Intervention  
in this Proceeding and any Proceeding which may be  
Initiated on the Renewed License

A review of Mr. Darke's filings shows that he has no standing in the proceeding. His petition fails to clearly describe his interest in the proceeding or how that interest may be affected by the results of the proceeding as required under the applicable regulations. 10 C.F.R. § 2.1205, as proposed in 52 Fed. Reg. 20089, 20093 (May 29, 1987). It is not even possible to discern Mr. Darke's place of residence since his petition lists a post office box number in Moab, Utah. Moreover, he has failed to make the required showing that the Staff Order will cause "injury in fact" and that the injury is within the "zone of interests" protected by the Atomic Energy Act. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1),

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(Continued)

sion's proposed rule (under which this hearing is proceeding). The proposed rule limits the scope of a proceeding to those matters raised by the parties:

Matters not put into controversy by the parties may not be examined and decided by the presiding officer or the Atomic Safety and Licensing Appeal Board. If the presiding officer or the Appeal Board believes that a serious safety, environmental, or common defense and security matter exists that has not been placed in controversy, the presiding officer or the Appeal Board promptly shall advise the Commission of the basis for that view, and the Commission may take appropriate action.

10 C.F.R. § 2.1251(d), as proposed in 52 Fed. Reg. 20089, 20096 (May 29, 1987).



CLI-83-25, 18 N.R.C. 327, 332 (1983); see also Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 N.R.C. 610 (1976).

Assuming, arguendo, that Mr. Darke is found to have standing, the subject matter on which he wishes to be heard is beyond the scope of this proceeding. Mr. Darke's petition, inter alia: (1) attacks NRC's handling of Atlas' license and renewal request as arbitrary and capricious and a willful abuse of authority since November 1978; (2) challenges the basis in fact for the \$6 million surety or any other proposed surety arrangement as Mr. Darke contends that NRC lacks adequate knowledge of the site on which to base a determination; (3) challenges the use of informal hearings for source materials licensing; and (4) alleges a suppression of facts by the NRC and a failure by NRC to provide public access to the record of the licensing proceeding. In addition, Mr. Darke's August 1987 telegram requests that the July 31, 1987 Order, and items 1-38 of the Order, not be sustained. It is impossible to discern the reasoning behind his request. However, the issue will be moot when the Staff withdraws its July Order.

The issues raised by Mr. Darke are not the subject of this hearing which, as discussed previously, is narrow in scope. Issues related to specific license conditions can and should be raised once the NRC reissues the license and the license conditions are known. At such time, any affected person can petition

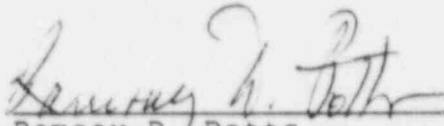
for a hearing as provided in 10 C.F.R. Part 2. A hearing on the renewed license is the appropriate forum should any legitimate issues be raised regarding the license renewal and specific license conditions.

#### Conclusion

Atlas contemplates that, if it reaches final agreement with the NRC Staff on renewing its license, the NRC will reissue Atlas' license and withdraw the July 31, 1987 Order. The parties then would submit a motion to terminate the proceedings. Since the issue before Judge Frye will be moot, Atlas believes that such a motion should be granted. A hearing on the reissued license may, in turn, be requested by any interested person.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE



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Robert E. Zahler  
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Division of Atlas Corporation

Dated: February 22, 1988

UNITED STATES OF AMERICA  
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Before

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CERTIFICATE OF SERVICE

I hereby certify that copies of LICENSEE'S RESPONSE TO ORDER OF FEBRUARY 4, 1988 have been served on the attached Service List by deposit in the United States mail, first-class or, as indicated by an asterisk, by messenger, this 22nd day of February, 1988.

  
Kenneth W. Farber

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