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August 13, 1998

LBP-98-18

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:  
Peter B. Bloch, Presiding Officer  
Thomas D. Murphy, Special Assistant

OFFICE OF  
ADMINISTRATIVE  
JUDGES  
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In the matter of

ATLAS CORPORATION

(Moab, Utah)

Docket No. 40-3453-MLA-2

Re: Tailing Pile Integrity

ASLBP No. 98-747-02-MLA

**SERVED** AUG 13 1998

MEMORANDUM AND ORDER  
(Petition of the State of Utah Dismissed as Untimely)

The State of Utah has sought to intervene in Atlas Corporation's August 2, 1998, Request to Amend its License to provide for long-term safekeeping of its uranium mill tailing pile at Moab, Utah. The State objected that insufficient care had been taken to protect the tailings should the Colorado River migrate in the direction of the Pile. The Request for Hearing and Petition for Leave to Intervene (Petition) filed by the State of Utah are *denied* as untimely and referred to the Director of Nuclear Reactor Regulation for further consideration.<sup>1</sup>

<sup>1</sup>The State of Utah's Request for Hearing and Petition for Leave to Intervene (Petition) was filed on July 13, 1998. The Staff of the Nuclear Regulatory Commission (Staff) filed a Response and Notice of Staff Participation (Response) on August 3, 1998. Atlas Corporation also filed a Response to the State of Utah's Request for Hearing and Petition for Leave to Intervene on August 11, 1998. (Atlas Response)

I. The Standard for Determining Untimeliness

1. The Regulation

A timely request for a hearing must be filed within thirty days of the agency's publication of notice of the application or licensing action in the *Federal Register*. 10 C.F.R. § 2.1205(d)(1). If no notice is published, then the requester must file within 30 days of receiving actual notice either of a pending application or of the grant of an application. 10 C.F.R. § 2.1205(d)(2).

Untimely filings require a showing of good cause before a hearing may be granted.

As the State of Utah acknowledges on page 16 of the Petition:

An untimely petition to intervene must establish that "(1) the delay in filing a request for a hearing or petition for leave to intervene was excusable; and (2) the grant of the request for a hearing or petition for leave to intervene will not result in undue prejudice or undue injury to any other participant to the proceeding." 10 C.F.R. § 2.1205(l)(1).

See also Atlas Response at 10.

2. Legal Precedent

A delay in filing a request for a hearing may not be excused because a person chose to rely on the Nuclear Regulatory Commission to protect its interests. The State should be in no better position than the Skagit Indians, who also claimed they should be permitted to file late because they had relied on the federal government to protect them. *Puget Sound Power and Light Co.* (Skagit Nuclear Power Project, Unit 1 and 2), LBP-79-16, 9 NRC 711, 715, *aff'd* ALAB-559, 10 NRC 162 (1979). That case states:

On the assumption that a special fiduciary relationship exists between the [Skagit] Indians and the Federal Government as a result of the Treaty of Point Elliott, there

exists an obligation of the Government to protect the treaty interests of the petitioners. Such interests relate to the petitioners' fishing interests under the Treaty. Such interests do not extend to late intervention in this proceeding. The Treaty does not entitle petitioners to intervene late, particularly after they passed by the chance to intervene in a timely manner when there was good reason for them so to intervene. The Indians' disappointment with the Federal Government now is no basis for waiving their delinquency in filing their motion to intervene.

*See id.* at 114 (preoccupation with other matters does not afford the petitioners a basis for excusing their nontimely motion to intervene); *Nuclear Metals, Inc.*, LBP-91-27, 33 NRC 548, 551 (1991)(pursuit of negotiations is not an excuse for late filing); *but see Umetco Minerals Corporation*, LBP-92-20, 36 NRC 112 (1992).

These precedents are consistent with the purpose of 10 C.F.R. § 1205(d)(2). In the federal register announcement of the 1994 amendment to that regulation, the Commission explained that the amendment was adopted to resolve the issue of "whether potential requesters with actual notice of an application for a particular licensing action were intended to have two bites at the apple, or should instead be required to file for a hearing at their earliest opportunity." 59 Fed. Reg. At 29, 188.

The general principal governing the determination of lateness may be found in *Texas Utilities Electric Co.*, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, (1992):

The test for "good cause" is not simply when the Petitioners became aware of the material they seek to introduce into evidence. Instead, the test is when the information became available and when Petitioners reasonably should have become aware of that information. In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be new information, not information already in the public domain.

## II. Facts Concerning Untimeliness

Although the Petition of the State of Utah does not contain a complete chronology of the events governing the determination of untimeliness, the Staff Response does. For the sake of brevity, I have selected from the Staff Response some events that are important in this determination:

- Decommissioning of the Moab Mill, Source Material License SUA-917, began in 1988.<sup>2</sup>
- On July 20, 1993, the Staff published a notice of Intent to Amend Source License to approve Atlas' reclamation plan. 58 Fed. Reg. 38,796 (1993). At the same time, an Environmental Assessment was made available for public comment.<sup>3</sup>
- A Notice of Opportunity for a hearing was published April 7, 1994. 59 FR 16665. Petition at 1.
- In January 1996, the Staff published a Draft Technical Evaluation Report and a draft EIS and made them available for public comment by an announcement in the Federal Register.<sup>4</sup>
- Comments made by the State of Utah and the Utah Division of Radiation Control were addressed in NUREG-1532, the Final Technical Evaluation Report (FTER), in March 1997. See Response, Attachment A, page A-22-23. The FTER explained why the Staff rejected Utah's arguments concerning the characterization of the tailings with respect to shear strain and concerning the adequacy of "the rock apron that will provide the ultimate protection against erosion if the Colorado River channel erodes and migrates to the tailings pile."
- In response to comments made by Mr. Sinclair, the Staff completed a further evaluation of the rock armoring, completed on February 6, 1998.<sup>5</sup>

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<sup>2</sup>Response at 2.

<sup>3</sup>Id. at 2-3.

<sup>4</sup>Id. at 4.

<sup>5</sup>Id. at 5.

- On May 27, 1998, the State informed the Staff that it intended to pursue this matter further; and the Staff advised it that any petition for a hearing would have to meet the late filing requirements of 10 C.F.R. § 2.1205(l).<sup>6</sup>

### III. Conclusions About Untimeliness

I have decided that the Staff and Atlas are both correct in opposing Utah's petition as untimely.

The State of Utah has had many years to become familiar with this proceeding, which began in 1988 and was the subject of a federal register notices in 1993 and April 7, 1994 — the latest date on which the State should have been informed. We know that the State had actual notice of this proceeding before April 29, 1996, when it filed comments on the Draft Technical Evaluation Report with the NRC.<sup>7</sup> Even were I to assume that the state first received notice of the NRC's views from the publication of the FTER in May 1997, the State's filing would still be untimely.

That the State has been working with the Staff of the Nuclear Regulatory Commission, does not provide it with an excuse for untimeliness. See page 2. If it wanted to protect its rights to a public hearing, it should have filed a hearing request. Once it filed a request, the Presiding Officer would be responsible for managing the case and assuring that it was completed in a timely fashion. To permit intervention at this time would unduly delay final action on Atlas Corporation's request for a license amendment.

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<sup>6</sup>*Ibid.*

<sup>7</sup>Response at 10.

Since I have determined that the petition is inexcusably late, 10 C.F.R. § 2.1205(l)(1) requires me to dismiss the petition.

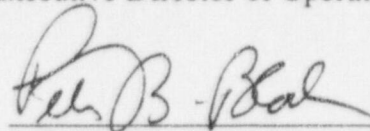
#### IV. Referral

This Memorandum and Order does not determine the merit of the concerns of the State of Utah. Pursuant to 10 C.F.R. § 2.1205(l)(2), the State's Petition will be treated as a petition under 10 C.F.R. § 2.206. Should the State of Utah wish to supplement its petition, in order to make its substantive points clearer, it may promptly notify the Executive Director of Operations of its intention to file a supplement.

#### V. ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 13th day of August, 1998, ORDERED, that:

1. The Request for Hearing and Petition for Leave to Intervene (Petition) filed by the State of Utah on July 13, 1998 are *denied*.
2. Within ten days after service of this Memorandum and Order, a party may file a petition for review with the Commission. 10 C.F.R. §§ 2.1205(o). The petition shall be no longer than ten (10) pages in length and shall contain the material specified in § 2.786(b)(2).
3. The State of Utah's Request for Hearing and Petition for Leave to Intervene (Petition) is referred to the Executive Director of Operations under 10 C.F.R. § 2.206. The State of Utah may promptly notify the Executive Director of Operations if it plans to supplement its Petition.



Peter B. Bloch, Administrative Judge  
Presiding Officer

Rockville, Maryland

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of

ATLAS CORPORATION

(Request for Material License  
Amendment)

Docket No.(s) 40-3453-MLA-2

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (LBP-98-18)  
have been served upon the following persons by U.S. mail, first class, except  
as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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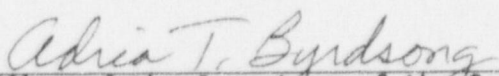
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Dated at Rockville, Md. this  
13 day of August 1998

  
Office of the Secretary of the Commission