LBP-04-02
RAS 7366 **DOCKETED 02/18/04**

UNITED STATES OF AMERICA
RAS 7367 NUCLEAR REGULATORY COMMISSION **SERVED 02/18/04**

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of	Docket Nos. 70-143-MLA, 70-143-MLA-2
NUCLEAR FUEL SERVICES, INC.	ASLBP Nos. 02-803-04-MLA, 03-810-02-MLA
(Erwin, Tennessee)	February 18, 2004

MEMORANDUM AND ORDER
(Ruling on Stay Application)

Pending before this Presiding Officer is a request by several petitioners for a stay of certain licensing action taken by the NRC Staff in this material license amendment proceeding. For the reasons stated below, the stay request is denied.

I. BACKGROUND

A. Currently before the agency are three applications of Nuclear Fuel Services, Inc. (Licensee) for amendments to its Special Materials License (SNM-124). All three applications relate to the Blended Low-Enriched Uranium (BLEU) Project that is to be conducted on the Licensee's Erwin, Tennessee site. In a nutshell, the project is part of a Department of Energy program to reduce stockpiles of surplus high-enriched uranium through re-use or disposal as radioactive waste. This objective would be accomplished by downblending that uranium into low-enriched uranium.

The first of the three applications was filed on February 28, 2002, and sought authorization to store low-enriched uranium-bearing materials in the Uranyl Nitrate Building

(UNB) on the Erwin site. A notice of opportunity for hearing on that application was published in the Federal Register on July 9, 2002, (67 Fed. Reg. 45,555) and, because of deficiencies in it, a revised notice was published on October 30, 2002 (67 Fed. Reg. 66,172). In response to these notices, timely hearing requests were filed by, among others, the State of Franklin Group of the Sierra Club and three other organizations based in the area (hereafter collectively Sierra).

On October 22, 2002, the Licensee submitted its second license amendment application, which sought authorization to downblend the high-enriched uranium to low-enriched uranium in the BLEU Preparation Facility (BPF). On January 7, 2003, the NRC Staff published a Federal Register notice of opportunity for hearing with regard to this proposed license amendment (68 Fed. Reg. 796). Sierra and one individual filed timely hearing requests with respect to this second application.

Rulings were deferred, however, on the hearing requests pertaining to these two amendment applications. This was the result of a January 21, 2003 order that was further explained ten days later in LBP-03-1, 57 NRC 9. On a determination that there was no good reason to consider the three license amendment applications associated with the BLEU project separately, the January 21 order directed that all further action with regard to the hearing requests pertaining to the first and second applications be held in abeyance to await the filing of the third license amendment application and the submission of any timely hearing requests with regard thereto.

Although its submission was initially slated to take place in May 2003, the third license amendment application -- addressed to the operation of the Oxide Conversion Building (OCB) and the Effluent Processing Building (EPB) -- did not actually surface until late October 2003. Moreover, the Federal Register notice providing an opportunity for hearing on that application was not published until December 24, 2003 (68 Fed. Reg. 74,653). In response to it, both

Sierra and the individual who had sought a hearing in connection with the earlier license amendment applications filed hearing requests on February 2, 2004, that were timely under a deadline extension that had been provided to them. On February 12, the Licensee filed its oppositions to those requests.

B. The various hearing requests pertaining to the first two license amendment applications associated with the UNB and BPF portions of the BLEU project are now ripe for consideration under the terms of the January 21, 2003, order. Additionally, it is anticipated that the hearing requests on the third application will shortly be referred to the Licensing Board Panel for designation of a Presiding Officer. Once this occurs, a decision will be rendered seasonably on whether the totality of requests satisfy the requirements imposed by Subpart L of the Commission's Rules of Practice, which was still in effect at the time the hearing requests were filed and therefore (unless the Commission were to direct otherwise) continues to govern the conduct of this materials license proceeding. There is, however, a matter requiring more immediate attention.

On January 26, 2004, Sierra filed an application for a stay of the effectiveness of the NRC Staff's decision earlier in the month to issue at this time the second license amendment associated with the BPF portion of the BLEU project. Sierra Club et al.'s Application for Stay of NRC Staff Decision to Issue Second License Amendment for NFS BLEU Project (Jan. 26, 2004) [hereinafter Sierra Application]. The stay application was filed under the provisions of 10 C.F.R. § 2.1263, which authorizes the seeking of a stay of Staff licensing actions in Subpart L proceedings. That section further adopts the familiar four factors to be considered in determining whether to grant or to deny stay relief. As set forth in 10 C.F.R. § 2.788(e), those factors are:

> (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) Whether the party will be irreparably injured unless a stay is granted;
(3) Whether the granting of a stay would harm other parties; and
(4) Where the public interest lies.

In Sierra's view, the application of the four factors requires the grant of a stay in this instance. In responses filed on February 5, 2004, the Licensee and the NRC Staff (which had been directed to reply to the stay request even though it had elected not to participate in the proceeding) take the opposite position. Applicant's Opposition to Sierra Club et al.'s Application for Stay of NRC Staff Decision to Issue Second License Amendment for NFS BLEU Project (Feb. 5, 2004) [hereinafter Licensee Response]; NRC Staff Response to Sierra Club et al.'s Application for Stay of NRC Staff Decision to Issue Second License Amendment for NFS BLEU Project (Feb. 5, 2004) [hereinafter Staff Response].

II. ANALYSIS

In considering whether Sierra has made a sufficiently compelling case for the grant of the extraordinary relief sought,[1] the appropriate starting point is an examination of the underpinnings of the claim that, absent the grant of a stay, it will suffer irreparable injury -- the second, and most important, stay factor set forth in section 2.788(e). See Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981) (citing

[1]Before addressing the competing assertions on the merits of the claim of entitlement to stay relief, one threshold matter requires attention. As the Licensee notes (Licensee Response at 4 and n.11), Sierra has not as yet been admitted to the proceeding as a party. While that consideration ordinarily might have some relevance respecting Sierra's right to seek a stay, in the unusual circumstances of this case it plainly does not. The Licensee's timing in submitting the third license amendment application stands as the sole reason why there has been no action to date on Sierra's hearing request pertaining to the second license amendment application -- the one in issue here. That being so, the Licensee scarcely is in a position to endeavor to capitalize on Sierra's present non-party status. Moreover, although a formal ruling on the acceptability of Sierra's several hearing requests is yet to be issued, a preliminary appraisal of the content of those requests suggests that it is not unlikely that Sierra will be admitted to this consolidated proceeding as having established, in accordance with 10 C.F.R. §§ 2.1205(e) and (h), both its standing to challenge the proposed licensing action and the specification of at least one area of concern germane to the subject matter of the proceeding.

Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977)). For, if that claim is found to lack a firm foundation, it follows that the grant of a stay will be improvident in the absence of a convincing showing that success on the merits of the controversy is not only likely, but a "virtual certainty." Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 7 (1994) (citing Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990)); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985). Needless to say, the making of such a merits showing at this very preliminary stage of the proceeding -- when no party has as yet put forth through the mandated detailed written presentations its full case on the issues raised by the hearing requesters -- is not an easy undertaking. Indeed, even after those presentations are in hand, it might well turn out that, as 10 C.F.R. § 2.1235 recognizes might prove to be the case, still further oral presentations will be required before a confident judgment will be possible on the merits of the controversy.

A. Turning first to the most crucial of the four stay factors, Sierra asserts that it will suffer irreparable injury in the form of an unacceptable risk to its health and environment if the effectiveness of the second license amendment is not stayed. Sierra Application at 9. According to Sierra, not only did the NRC Staff fail to perform an adequate environmental review of the proposed amendment but, more important, it acknowledged that an accidental uncontrolled release of the radioactive, toxic, and explosive materials that will be used at the BPF "could pose a risk to the environment as well as to workers and public health and safety." Id. at 9-10 (quoting Environmental Assessment for Proposed License Amendments to Special Nuclear Material License No. SNM-124 Regarding Downblending and Oxide Conversion of

Surplus High-Enriched Uranium (June 2002) at 5-7 [hereinafter June 2002 Environmental Assessment]).[2]

In order to have the irreparable injury factor weigh in its favor, a stay applicant must, as the District of Columbia Circuit has observed, demonstrate that "the injury claimed is 'both certain and great.'" Cuomo v. NRC, 772 F.2d 972, 976 (1985) (quoting Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)). Further, under well-settled Commission precedent, mere speculation about the potential occurrence of a nuclear accident does not constitute the requisite imminent, irreparable harm justifying a stay of a licensing decision. See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 259 (1990); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 964 (1984).

Here, Sierra's claim of irreparable injury -- resting at bottom on little more than a Staff statement about a possible risk to the environment and to the health and safety of workers and the public should the hazardous materials involved at the BPF be accidentally released -- falls far short of the demanding standard articulated by the court of appeals and the Commission. There is nothing in the relied-upon statement that might be taken as reflecting a Staff belief either that the occurrence of an uncontrolled accidental release is more than a remote possibility or that the consequences of such a release might be truly significant in terms of the public health and safety. Of itself, then, the statement fails to establish a threat of injury both

[2] The Staff has prepared several environmental assessments in connection with the BLEU project, in addition to the June 2002 Environmental Assessment, which addressed the cumulative environmental impacts of all three license amendments. In September 2003, the Staff issued an environmental assessment specific to the BPF license amendment. Environmental Assessment and Finding of No Significant Impact for License Amendment Request Dated October 11, 2002, Blended Low-Enriched Uranium Preparation Facility (Sept. 17, 2003) [hereinafter September 2003 Environmental Assessment].

"certain" and "great."[3] Given that Sierra has presented nothing beyond the Staff statement that might support the existence of such a threat, the irreparable injury factor manifestly weighs against the issuance of a stay of the licensing decision under challenge.

B. Accordingly, this all important second factor having been found lacking, the question becomes whether Sierra has demonstrated as a matter of virtual certainty that it will prevail on the merits of the substantive claims undergirding its insistence that a stay of the issuance of the second license amendment is warranted. Those claims are (1) that the Staff's environmental review of the second license amendment is incomplete in that the Staff has not finalized its safety evaluation of the likelihood of potential accidents and their consequences (Sierra Application at 6-7); and (2) that the Staff should have prepared an environmental impact statement for the BPF license amendment, given the significance of the impacts of the proposed project (id. at 7-9).

With respect to the first claim, as the Licensee and Staff correctly point out, it is settled that the Staff may complete its environmental review of a license amendment application prior to the completion of its safety evaluation. Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 220-21 (2002); Nuclear Fuel Services, Inc. (Erwin, Tennessee), CLI-03-3, 57 NRC 239, 247 n.46 (2003). Putting aside the issue of timing, however, the Staff's safety evaluation was completed with the issuance of the Safety Evaluation Report for the BPF amendment.[4] Thus, regardless of the sequential timing of

[3] In this regard, the Staff has in fact concluded that all credible intermediate consequence accidents are unlikely to occur and all credible high consequence accidents are highly unlikely to occur. Safety Evaluation Report for Nuclear Fuel Services, Inc. License Amendment 47 Blended Low-Enriched Uranium Preparation Facility (Jan. 2004) at 7.0-13 [hereinafter Safety Evaluation Report].

[4] As part of its review process, the Staff evaluated the Licensee's integrated safety assessment and called for certain changes to the assessment and to the BPF process design, which the Licensee has made. Safety Evaluation Report at 7.0-13. As noted above, the Staff concluded that the Licensee has put into place measures that render credible intermediate consequence accidents unlikely and credible high consequence accident highly unlikely.

the Staff's environmental and safety findings, at the time the requested second license amendment was issued the Staff had in fact completed both its environmental and safety reviews. Because it has not offered anything to show that the Staff's environmental assessment is otherwise incomplete and insufficient to support its granting of the BPF license amendment, Sierra cannot prevail on this claim.

As to Sierra's second claim, that the Staff was required to prepare an environmental impact statement for the second license amendment, Sierra's two-fold argument is that (1) the Staff did not perform its own independent assessment of the potential likelihood or consequences of an accident; and (2) the Staff did not assess the environmental impacts of the BPF amendment in a sufficiently specific manner. In the June 2002 Environmental Assessment (at 5-7 to 5-8), however, after describing the radioactive and hazardous materials to be used at the BPF and the potential hazards associated with those materials, the Staff concluded that operations at the facility would be safe, given the precautions the Licensee has committed to take to ensure the safe handling of chemical and radioactive materials. Further, the Staff found in the September 2003 Environmental Assessment (at 4-5) that normal operations of the BPF would be safe and would not present any adverse environmental impacts. Finally, in the Safety Evaluation Report prepared for the BPF license amendment (at 7.0-13), the Staff determined that the Licensee's items relied upon for safety, management measures, and programmatic commitments would render all credible intermediate consequence accidents unlikely and all credible high consequence accidents highly unlikely.

On their face at least, its environmental assessments and Safety Evaluation Report indicate that the Staff has indeed performed an independent evaluation of the likelihood and consequences of an accident with specific reference to the environmental impacts of the BPF license amendment. Without having the benefit of full presentations by the parties, it

simply cannot be concluded with the requisite degree of certainty at this very early stage of the proceeding that the Staff was at fault in not issuing an environmental impact statement for the proposed facility. Rather, a confident judgment on that matter must await the development of a complete record on it .

3. Because Sierra has failed to demonstrate either irreparable injury or a strong likelihood of success on the merits -- the two most important factors of the section 2.788(e) test -- detailed consideration of the remaining two factors is unnecessary. Sequoyah Fuels, CLI-94-9, supra, 40 NRC at 8. It is sufficient to note that, even if found to favor Sierra, those factors could not possibly serve to overcome Sierra's failure to meet its burden on the other factors.

For the foregoing reasons, Sierra's stay application must be, and hereby is, denied.

It is so ORDERED.

BY THE PRESIDING OFFICER[5]

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 18, 2004

[5] Copies of this order were sent this date by e-mail transmission to the counsel or other representative of each of the participants in the proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
NUCLEAR FUEL SERVICES, INC.	)	Docket No. 70-143-MLA
ERWIN, TENNESSEE	)	
	)	
(Material License Amendment)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON STAY APPLICATION) (LBP-04-02) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Alan S. Rosenthal, Presiding Officer
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Richard F. Cole, Special Assistant
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dennis C. Dambly, Esq.
Marian L. Zobler, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Louis Zeller
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629

Diane Curran, Esq.
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

Daryl M. Shapiro, Esq.
D. Sean Barnett, Esq.
ShawPittman, LLP
2300 N Street, NW
Washington, DC 20037

C. Todd Chapman, Esq.
King, King & Chapman, P.L.L.C.
125 South Main Street
Greeneville, TN 37743

Kathy Helms-Hughes
P.O. Box 58
Hampton, TN 37658

Neil J. Newman
Vice President and General Counsel
Nuclear Fuel Services, Inc.
1700 Rockville Pike
Rockville, MD 20852

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of February 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
NUCLEAR FUEL SERVICES, INC.	)	Docket No. 70-143-MLA-2
ERWIN, TENNESSEE	)	
	)	
(Material License Amendment-2)	)	

CERTIFICATE OF SERVICE

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Adjudication
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Washington, DC 20555-0001

Administrative Judge
Alan S. Rosenthal, Presiding Officer
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Richard F. Cole, Special Assistant
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dennis C. Dambly, Esq.
Angela B. Coggins, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Kathy Helms
P.O. Box 2394
Fort Defiance, AZ 86504

Diane Curran, Esq.
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

Docket No. 70-143-MLA-2
LB MEMORANDUM AND ORDER (RULING ON
STAY APPLICATION) (LBP-04-02)

Daryl M. Shapiro, Esq.
ShawPittman, LLP
2300 N Street, NW
Washington, DC 20037

Neil J. Newman
Vice President and General Counsel
Nuclear Fuel Services, Inc.
1700 Rockville Pike
Rockville, MD 20852

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of February 2004