

DOCKETED 04/07/04

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SERVED 04/07/04

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

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

In the Matter of

NUCLEAR FUEL SERVICES, INC.

(Erwin, Tennessee)

Docket Nos. 70-143-MLA, 70-143-MLA-2,
70-143-MLA-3ASLBP Nos. 02-803-04-MLA, 03-810-02-MLA,
04-820-05-MLA

April 7, 2004

MEMORANDUM AND ORDER
(Referring Filing to the Commission)

A. This proceeding involves three license amendment applications submitted by Nuclear Fuel Services, Inc. (Licensee) in connection with 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. That project is part of a Department of Energy program designed to reduce stockpiles of surplus high-enriched uranium through reuse or disposal as radioactive waste. This objective would be accomplished by downblending that uranium into low-enriched uranium.

In LBP-04-05, 59 NRC __ (March 17, 2004), Judge Cole and this presiding officer ruled upon the acceptability of a number of hearing requests addressed to one or another of the license amendment applications associated with the BLEU Project. Among those requests were those filed by Kathy Helms-Hughes with regard to each of those applications. Basing her standing to challenge the project on her ownership of three parcels of land located approximately 20 miles from the Erwin site, Ms. Helms-Hughes maintained that the carrying out of the proposed project would pose a health risk to her and her family, as well as to the

community at large. In that connection, she relied exclusively on disclosures in the NRC Staff's June 2002 Environmental Assessment respecting the airborne emissions that would be associated with the project.

For the two independent reasons set forth therein (59 NRC at ___, slip op. at 10-14), LBP-04-05 reached the conclusion that Ms. Helms-Hughes' averments did not constitute the requisite showing on the injury-in-fact component of judicial standing. First, she does not now reside on the Tennessee property but, rather, is living and working in Arizona. In this regard, although she expressed a current intent to return to Tennessee within five years, "whether her return actually occurs within any time period must be regarded as a matter of substantial conjecture." Id. at ___ (slip op. at 12). Second, Ms. Helms-Hughes' hearing request provided no basis for believing that the airborne emissions referred to in the Environmental Assessment might prove harmful at a distance of 20 miles and, indeed, the assessment itself provided cause to reach the opposite conclusion. Id. at ___ (slip op. at 12-14).

LBP-04-05 ended by calling the attention of Ms. Helms-Hughes (among others) to the appellate remedy that was provided by the then applicable Commission's Rules of Practice. Specifically, if dissatisfied with the denial of her hearing requests, she could file an appeal within ten days of service of the order. Id. at ___ (slip op. at 21).

Rather than file an appeal directly with the Commission, Ms. Helms-Hughes submitted to this presiding officer on April 1 a document labeled a "Motion for Appeal" of LBP-04-05. Although so characterized, as thus presented, it had the obvious effect of being a motion for reconsideration of his and Judge Cole's denial of her hearing requests. In the filing, she maintained that for standing purposes it should not be thought significant that she currently resides in Arizona rather than on her Tennessee property. Beyond that, she expressed

disagreement with the determination in LBP-04-05 that airborne emissions generated by the BLEU project had not been shown to have a possible harmful impact at a 20 mile distance.

B. The Commission's Rules of Practice applicable to this proceeding do not specifically authorize the filing with the presiding officer of motions for reconsideration of the denial of a hearing request. Nonetheless, there seems to be good reason why such a motion should be countenanced at least in circumstances where the aggrieved hearing requestor can demonstrate that the presiding officer overlooked or misapprehended facts having a pivotal bearing upon the correctness of his or her decision. By the same token, however, where the requestor is merely expressing disagreement with the conclusions undergirding the denial of the request, the appropriate course is to put that disagreement before the Commission by invoking the remedy specifically provided for that very purpose.

In this instance, Ms. Helms-Hughes plainly should have presented her "Motion for Appeal" to the Commission rather than to this presiding officer. In the final analysis, her filing does no more than set forth her reasons for believing that Judge Cole and I were wrong both in attaching significance to her current place of residence and in determining that, given the considerable distance between her property and the Erwin site, those currently on that property had not been shown to be threatened with injury-in-fact as a result of airborne emissions attributable to the BLEU project. In that regard, our attention has not been directed to any fact that was either overlooked or misapprehended in LBP-04-05, thereby warranting a reexamination of what was decided on the standing issue in that issuance.

C. Although, in the circumstances, a summary denial of the "Motion for Appeal" was one possible outcome, in the exercise of our discretion Judge Cole and I have decided instead to refer the Helms-Hughes filing to the Commission for such consideration as it might wish to provide it. Our reason for doing so is that Ms. Helms-Hughes obviously intended to seek

appellate review of LBP-04-05, as is reflected by the caption of her filing. Moreover, the document was filed within the period provided in the Rules of Practice for seeking such review. There thus is no room for doubt that the filing of the document with the presiding officer, rather than with the Commission, was occasioned by a lay person's misunderstanding regarding to whom the appeal should be addressed. That being so, we believe the ends of justice to be best served by a referral that will enable the Commission, should it be so inclined, to entertain Ms. Helms-Hughes' challenge to LBP-04-05.

The April 1, 2004 "Motion for Appeal" of Kathy Helms-Hughes is hereby referred to the Commission.

It is so ORDERED.

BY THE PRESIDING OFFICER¹

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 7, 2004

¹ Copies of this memorandum and order were sent this date by e-mail transmission to the counsel or other representative of each of the participants in the proceeding.

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NUCLEAR REGULATORY COMMISSION

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)	70-143-MLA-3
(Erwin, Tennessee))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (REFERRING FILING TO THE COMMISSION) (LBP-04-06) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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70-143-MLA-2
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LB MEMORANDUM AND ORDER (REFERRING
FILING TO THE COMMISSION) (LBP-04-06)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of April 2004