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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Presiding Officer

In the Matter of	)	
	)	Docket No. 70-143
Nuclear Fuel Services, Inc.	)	Special Nuclear Material
	)	License No. SNM-124
(Blended Low Enriched Uranium Project)	)	

APPLICANT'S REPLY TO THE SIERRA CLUB RESPONSE REGARDING CLARIFICATION OF THE ISSUES TO BE HEARD AND APPLICANT'S STATEMENT OF POSITION ON THE SCOPE OF THE HEARING

Pursuant to the Presiding Officer's order, by e-mail, of July 6, 2004, Applicant Nuclear Fuel Services, Inc. ("NFS") files this reply to the July 1, 2004 response of the Sierra Club et al. to NFS's June 3, 2004 request for clarification of the issues to be heard and statement of its position on the scope of the hearing.[1] NFS requested that the scope of this proceeding, now at its written presentation stage, be focused on the environmental effects and the safety of the operations to be conducted at NFS's Erwin, Tennessee facilities as authorized by the Blended Low-Enriched Uranium ("BLEU") Project license amendments at issue here. NFS Req. at 1. As NFS discussed in its request, limiting the scope of the issues to those truly relevant to the BLEU Project will be of benefit to the parties in focusing their written presentations and to the Presiding Officer in ultimately making the licensing decision for the NRC.

The Sierra Club's response mischaracterizes NFS's request for clarification as a motion for reconsideration of the Presiding Officer's decision admitting "areas of concern" for the proceeding and wrongly asserts that NFS's arguments are barred by the law of the case. It erroneously asserts that NFS's substantive arguments lack merit. And it

[1] Response by Sierra Club et al. to Nuclear Fuel Services' Request for Clarification of the Issues to Be Heard and Statement of Position on the Scope of the Hearing (July 1, 2004) ("Sierra Resp."); Applicant's Request for Clarification of the Issues to Be Heard and Statement of Position on the Scope of the Hearing (June 3, 2004) ("NFS Req.").

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erroneously asserts that NFS is asking that the issues truly relevant to the license amendment applications in question be decided before the hearing. Therefore, NFS's request should be granted.

I. NFS'S ARGUMENTS ARE NOT BARRED BY THE LAW OF THE CASE OR REQUIREMENTS FOR MOTIONS FOR RECONSIDERATION

The Sierra Club asserts that NFS's arguments that (1) "areas of concern may not raise issues relating to past or ongoing licensee activities" and (2) "unsupported allegations that a license applicant will violate its permit cannot form the basis for litigation," should not be considered because NFS has already made them "unsuccessfully" and because NFS has not satisfied the claimed requirements for reconsideration of the Presiding Officer's decision admitting areas of concern.[2] Sierra Club Resp. at 2-4. It claims that NFS's third argument, that "allegations concerning past violations or management character may not be considered unless they have a direct and obvious relationship with the licensing action in dispute" is barred because NFS did not raise it in response to the Sierra Club's areas of concern. Id. at 4.

The Sierra Club is incorrect. NFS is not request reconsideration of the decision on the Sierra Club's areas of concern.[3] Rather, NFS notes that the proceeding has moved beyond the filing and consideration of areas of concern to the preparation of written presentations by the parties. See NFS Req. at 6. The Commission has clearly stated that at this stage of the proceeding, once the hearing file is available to intervenors,"[t]he applicable regulations authorize the Presiding Officer to order the parties to narrow the issues prior to the hearing." Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 17 (2001) (emphasis added). Under NRC

[2] Nuclear Fuel Services, Inc. (Erwin, Tennessee), LBP-04-5, 59 NRC 186 (2004), aff'd in part, CLI-04-13 (May 20, 2004).

[3] The Sierra Club's case law, see Sierra Club Resp. at 2-4, concerns motions for reconsideration, where merely repeating old arguments or raising new arguments that could have been raised at the time of the party's original pleading is inappropriate.

CLI-01-2, 53 NRC 9, 17 (2001) (emphasis added). Under NRC regulations requiring written presentations to be detailed and specific and providing the Presiding Officer the power to strike parts of presentations that are "cumulative, irrelevant, immaterial, or unreliable," 10 C.F.R. §§ 2.1233(c) and (e), the Presiding Officer can require petitioners to focus their presentations on issues that are directly relevant to the activities to be conducted under the proposed BLEU Project license amendments. NFS Req. at 6-7.

Regulations concerning written presentations did not apply at the area of concern phase of the proceeding but they do apply now. Similarly, the key cases that NFS cites in its request, Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349 (2001); Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185 (1999), did not apply at the area of concern stage because they are not 10 C.F.R. Subpart L area of concern cases, but they do apply now, where issues are actually being litigated through the parties' written presentations. As NFS stated in its request:

> Furthermore and more importantly, the Millstone standard is intended to ensure that, in a Subpart G, Subpart L, or any other NRC proceeding, that the issues litigated truly bear on the potential effects of the proposed activities on the public health and safety and the environment. Compare 10 C.F.R. §§ 2.1233(c) and (e) . . . . The Commission has recognized that merely describing alleged past offenses and then insinuating without support that the applicant is unfit to conduct the proposed activities or that it will violate NRC regulations constitutes logically flawed reasoning. Without a direct and obvious relationship between the past events and the proposed action, there is no basis for believing that the past events are relevant at all to the licensing decision the NRC must make.

NFS Req. at 11. Finally, on a practical level, the Sierra Club now has the NRC hearing file, which includes the license application and supporting documents and the NRC EAs and safety evaluations for all three amendments. Thus, it has much more information about the proposed BLEU Project than it had at the time it filed its areas of concern. See Sequoyah Fuels, CLI-01-2, 53 NRC at 16-17.

Therefore, NFS's request relies on points of law that were not applicable and information (the hearing file) that was not available at the time of the admission of the Sierra Club's areas of concern. NFS is not rearguing the admission of areas of concern but rather is requesting the focusing of the Sierra Club's written presentation. Because the Sierra Club's areas of concern are stated in very broad terms that encompass issues both relevant and irrelevant to the license amendments in question, it is entirely appropriate, at the written presentation stage of the proceeding, to require it to focus its presentation on issues truly relevant to the amendments and leave behind everything else.

II. NFS'S ARGUMENTS ARE MERITORIOUS

The Sierra Club claims that even if NFS's arguments are procedurally appropriate, they lack merit. Sierra Club Resp. at 4-7. In particular, the Sierra Club challenges NFS's points that (1) areas of concern in a license amendment proceeding must concern the activities to be conducted under the amendment and not the underlying license, Energy Fuels Nuclear, Inc., LBP-94-33, 40 NRC 151 (1994); (2) intervenors cannot litigate in a license amendment proceeding allegations of past regulatory violations under the rubric of management character unless there is a "direct and obvious relationship between the character issues and the licensing action in dispute." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365 (2001); and (3) the Commission "ha[s] long declined to assume that licensees will refuse to meet their obligations under their licenses or our regulations." Pacific Gas & Electric Co. (Diablo Canyon Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 29 (2003).

It is the Sierra Club's claims that lack merit. The Sierra Club first argues that Energy Fuels Nuclear is inapposite because it is permissible for intervenors to raise management character issues in license amendment proceedings by citing alleged past regulatory violations. See Sierra Club Resp. at 4-5. Contrary to the Sierra Club's assertion, Energy Fuels Nuclear is the law—NRC license amendment proceedings concern the

amendments and not the underlying license. See also NFS Req. at 7-9. While intervenors can cite past violations to support an allegation of inadequate management character, they can only do so if there is a "direct and obvious relationship between the character issues and the licensing action in dispute." Millstone, CLI-01-24, 54 NRC at 365.[4] Alleged improprieties "must be of more than historical interest: they must relate directly to the proposed licensing action." Id. at 366. "License amendment proceedings are not a forum 'only to litigate historical allegations' or past events with no direct bearing on the challenged licensing action." Id. Moreover, simply alleging that a license amendment applicant's management is of bad character does not give intervenors free reign to litigate, in the license amendment proceeding, actions conducted under the existing license. Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 189-91 (1999). It is "much too open-ended" and an inappropriate expenditure of agency resources to allow a petitioner to "insert management integrity issues into all license amendment proceedings, no matter the nature of the amendment, simply by (1) alleging that management character is bad; and (2) then claiming that no license amendments should be granted because of the alleged bad character." Id. at 190-91.

Next, the Sierra Club claims that Diablo Canyon does not support NFS's purported argument that "Intervenors' concerns are inadmissible" because the Sierra Club has proffered "concrete assertions regarding environmental contamination by NFS." Sierra Club Resp. at 5-6. As stated, NFS is not arguing that the Sierra Club's concerns are inadmissible—that issue has already been decided. NFS is arguing, however, that the scope of the proceeding at this written presentation stage should be limited to exclude the litigation of mere bare assertions by the Sierra Club that NFS will violate applicable regulations. See NFS Req. at 12-13.

[4] While it goes beyond this decision on the scope of the proceeding, it should be noted that NFS flatly denies that any past incidents or events render it unfit to conduct the BLEU Project safely.

Finally, the Sierra Club claims that Millstone is inapposite here because (1) the Millstone application concerned only "procedural changes" at the plant, while NFS's application concerns a "major new operation" in the form of the BLEU Project facilities, (2) the management of the Millstone plant had changed between the time of the violations and the time of the petition in that case, and (3) the Millstone petitioners did not allege any ongoing violations. Sierra Club Resp. at 6-7. The Sierra Club's argument is misplaced.[5] The fundamental holding of Millstone is that intervenors cannot litigate, in a license amendment proceeding, management character issues assertedly arising from improprieties that occurred under the existing license, unless there is a "direct and obvious relationship between the character issues and the licensing action in dispute." CLI-01-24, 54 NRC at 365.[6] That holding applies to all NRC license amendment proceedings and intervenors must demonstrate the "direct and obvious relationship" on the basis of the facts pertinent to the particular license amendment application in question. Millstone is not an absolute bar to the litigation of management character issues, but it does prevent their litigation where they are merely historical, i.e., they do not have the requisite "direct and obvious relationship" with the license amendment(s) in question. Thus, NFS requests here that the scope of the proceeding be limited to exclude allegations of poor management character or past regulatory violations unless the Sierra Club shows that they have a direct and obvious relationship with the BLEU Project. As NFS stated in its request, at a minimum, the Millstone holding should exclude the litigation of "[e]vents

[5] The Sierra Club is also incorrect in asserting that management had changed between the time of the violations and the time of the petition in the case. The Millstone license was transferred after the commencement of the proceeding. Millstone, CLI-01-24, 54 NRC at 351 n.2.

[6] The Sierra Club's citation, Sierra Club Resp. at 7, of Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-85-9, 21 NRC 1118, 1136-37 (1985), is inapposite because that case involved the Unit 1 restart proceeding the Commission established after the Unit 2 accident in which it specifically directed the licensing board to evaluate whether the licensee had sufficient management capability and resources to operate Unit 1 safely. Id. at 1135; see id. at 1122. Unlike Millstone, Three Mile Island did not concern an intervention petition on a license amendment application. Furthermore, it predates Millstone by over 15 years.

that occurred five, ten, or more years ago and events that involve activities different than those to be conducted in support of the BLEU Project." NFS Req. at 13.[7] Thus, the mere citation to or allegation of some past violation is insufficient to bring it within the scope of this proceeding unless the violation directly and obviously relates to the BLEU Project.

III. NFS IS NOT SEEKING THE DECISION OF RELEVANT ISSUES PRIOR TO THE HEARING

The Sierra Club's final objection to NFS's request for clarification of the issues to be heard is that it is a "thinly veiled attempt to decide the merits of this case before the hearing." Sierra Club Resp. at 7. That is not what NFS is requesting. As noted above, the Commission has stated that the Presiding Officer has the power "to order parties to narrow the issues prior to the hearing." Sequoyah Fuels, CLI-01-2, 53 NRC at 17. That is all that NFS asks—that the scope of the hearing be narrowed to the environmental effects and the safety of the operations to be conducted at NFS's Erwin, Tennessee facilities as authorized by the BLEU Project license amendments. Those issues would be decided only after the hearing. On the other hand, it is appropriate now that the scope of the Sierra Club's very broadly written areas of concern be narrowed to exclude claims regarding the environmental effects of NFS's current or past operations at its Erwin facilities, or elsewhere, and claims regarding the safety or the history of NFS's current or past operations at Erwin or elsewhere. The Presiding Officer's determination that the Sierra Club's areas of concern on this subject were "marginally germane," LBP-04-5, 59 NRC at 199 n.13, does not mean that the Sierra Club's allegations satisfy the more rigorous Millstone "direct and obvious relationship" test that applies now.[8] Hence, the issues for hearing should be appropriately narrowed.

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[7] While the Sierra Club asserts that it is advancing only recent events to support its claims, Sierra Club Resp. at 6-7, its petitions cite the EA section on contamination at the NFS site, which discusses activities taking place as long ago as from 1957 to 1978. See, e.g., Request for Hearing by Friends of the Nolichucky River Valley, State of Franklin Group of the Sierra Club, Oak Ridge Environmental Peace Alliance, and Tennessee Environmental Council, (Nov. 27, 2002) at 11 (citing 1st EA § 3.9).

[8] The Sierra Club's citation to the Appeal Board decision in the Three Mile Island restart proceeding, Sierra

IV. THE SUB-ISSUES ON WHICH THE SIERRA CLUB DID NOT RESPOND SHOULD BE EXCLUDED FROM THE PROCEEDING

Finally, NFS stated in its request that certain specific sub-issues within the Sierra Club's areas of concern should be excluded from further consideration in this proceeding because they are not relevant to the BLEU Project. See NFS Req. at 13-16. In particular, alleged incidents of contamination and alleged decommissioning obligations at West Valley, New York and alleged decommissioning obligations at Erwin other than those regarding the BLEU Project should be excluded from this proceeding as simply irrelevant to the NRC's licensing decision. Id. at 16. Because the Sierra Club's response did not even claim that those sub-issues were relevant, they should simply be excluded.

V. CONCLUSION

In accordance with its request and the foregoing reply to the Sierra Club's response, NFS requests clarification of the scope of the issues in this proceeding.

Respectfully submitted,

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Dated: July 20, 2004

Club Resp. at 7 (citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177 (1983)), is inapposite to this case. See supra note 6.

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Reply to the Sierra Club Response Regarding Clarification of the Issues to Be Heard and Applicant's Statement of Position on the Scope of The Hearing were served on the persons listed below by electronic mail or by facsimile and deposit in the U.S. mail, first class, postage prepaid, this 20th day of July, 2004.

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