

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
G. Paul Bollwerk, III
Nicholas G. Trikouros

In the Matter of

RARE ELEMENT RESOURCES, INC.

(Bear Lodge Project)

Docket No. 40-38367-ML

ASLBP No. 16-945-01-MLA-BD01

March 23, 2016

MEMORANDUM AND ORDER

(Granting Defenders of the Black Hills' Request to Withdraw Hearing Request
and Terminating Proceeding)

I. BACKGROUND

A. PROCEEDING INITIATION

On May 4, 2015, Rare Element Resources, Inc. (RER), filed an application under 10 C.F.R. Part 40 to possess and use source material associated with the processing of rare earth elements as part of the proposed Bear Lodge Project in Crook and Weston Counties, Wyoming.¹ On November 16, 2015, notice of RER's application to the Nuclear Regulatory Commission (NRC) was published in the *Federal Register*, allowing anyone with interests

¹ [RER] License Application for Source Material Possession Submitted to the Nuclear Regulatory Commission, 1 at § 5.0, 2 at § 6.0 (May 4, 2015) (ADAMS Accession No. ML15134A434).

affected by the application to petition to intervene and request a hearing.² Defenders of the Black Hills (Defenders or Petitioner) filed a timely request for hearing.³

On January 21, 2016, RER sent two requests for suspension to the NRC. Citing financial difficulties, RER sent one request to the NRC Staff to suspend all permitting and licensing efforts,⁴ and one request to the Commission to suspend adjudicatory proceedings until the Staff's licensing process resumes.⁵ The NRC Staff granted RER's request to suspend licensing review on February 4.⁶

The Commission on February 1 referred Petitioner's hearing request, along with RER's suspension request, to the Atomic Safety and Licensing Board Panel.⁷ On February 9, the Chief Administrative Judge established this Atomic Safety and Licensing Board to conduct any adjudicatory proceeding regarding Defenders' petition.⁸ That same day, the NRC Staff and RER filed timely answers opposing the petition to intervene and request for a hearing.⁹ Both the

² [RER]; Bear Lodge Project, 80 Fed. Reg. 70,846 (Nov. 16, 2015).

³ Letter from Charmaine White Face, Coordinator for Defenders of the Black Hills, to Kenneth Kalman, NRC Office of Nuclear Material Safety & Safeguards (Jan. 14, 2016).

⁴ Letter from Jaye Pickarts, RER Chief Operating Officer, to Andrew Persinko, Deputy Dir., NRC Div. of Decommissioning, Uranium Recovery, & Waste Programs (Jan. 21, 2016) (ADAMS Accession No. ML16022A191).

⁵ Letter from Tyson R. Smith, RER Counsel, to NRC Commissioners (Jan. 21, 2016) (ADAMS Accession No. ML16021A468).

⁶ Letter from Michael A. Norato, Acting Deputy Dir., NRC Div. of Decommissioning, Uranium Recovery & Waste Programs, to Jaye Pickarts, RER Chief Operating Officer (Feb. 4, 2016) (ADAMS Accession No. ML16032A140).

⁷ Memorandum from Annette L. Vietti-Cook, NRC Office of the Secretary (SECY), to E. Roy Hawkins, Chief Administrative Judge, Atomic Safety and Licensing Board Panel (Feb. 1, 2016).

⁸ [RER]; Establishment of Atomic Safety and Licensing Board, 81 Fed. Reg. 7834 (Feb. 16, 2016).

⁹ NRC Staff Response to [Defenders'] Petition to Intervene and Request for Hearing (Feb. 9, 2016) [hereinafter NRC Staff Response]; [RER] Response to Petition to Intervene Filed by [Defenders] (Feb. 9, 2016) [hereinafter RER Response].

NRC Staff and RER argued that Petitioner did not provide sufficient information to demonstrate standing, nor put forth an admissible contention.¹⁰

The Licensing Board then suspended any pending procedural dates, in particular the deadline for Defenders to file a response to NRC Staff's and RER's already-submitted answers to its request for a hearing,¹¹ and scheduled a February 22, 2016 conference call with the participants regarding RER's pending request to suspend any adjudicatory proceeding.¹²

B. THE FEBRUARY 22, 2016 CONFERENCE CALL

During the February 22 conference call, RER requested that the Board continue the adjudicatory proceeding, effectively seeking to withdraw its pending request for suspension.¹³ In support of this change in position, RER noted that it had already incurred the expense of filing its response to Defenders' petition. RER asserted that the most efficient way for the Board to proceed would be to complete the only remaining steps necessary to determine whether a hearing on Defenders' petition should be convened, i.e., the submission of Petitioner's reply and the Board's ruling on the viability of Defenders' hearing request.¹⁴ The NRC Staff also stated that it had no objection to moving forward with the adjudicatory proceeding rather than suspending it.¹⁵ Petitioner stated that it preferred to suspend the proceeding as originally requested by RER.¹⁶

¹⁰ NRC Staff Response at 1, 13; RER Response at 1, 10.

¹¹ Licensing Board Order (Suspending Deadline for Filing Reply Pleading under Section 2.309(i)(2) and Scheduling Telephone Conference Call to Establish Further Procedures) (Feb. 11, 2016) (unpublished).

¹² Licensing Board Notice (Scheduling Conference Call) (Feb. 17, 2016) (unpublished).

¹³ Tr. at 7–8 (Mr. Smith).

¹⁴ Tr. at 16–17 (Mr. Smith).

¹⁵ Tr. at 8 (Mr. Carpenter).

¹⁶ Tr. at 8–9 (Ms. White Face). Also in response to a Board inquiry, the representatives for Defenders and RER indicated they were not inclined to enter into settlement discussions with an

During that conference, the Board also discussed with the participants the permitting review process related to the Bear Lodge Project through which RER has been working with the United States Forest Service (Forest Service) to obtain permission to operate a rare earth elements mining operation.¹⁷ The Forest Service has also suspended review of the Bear Lodge Project at RER's request.¹⁸

In an Order issued February 24, 2016, the Licensing Board directed that the adjudicatory portion of this docket would resume. The Board granted RER's February 22, 2016 oral request to withdraw its January 21 request to suspend the adjudicatory proceeding and directed Defenders to file its reply pleading by March 7, 2016.¹⁹ The Board also indicated that Defenders' reply should address RER's and NRC Staff's answers in the areas of (1) Defenders' standing to participate in this proceeding under 10 C.F.R. § 2.309(d)(1); and (2) the admissibility of Petitioner's contention under 10 C.F.R. § 2.309(f).²⁰

eye toward possibly dismissing this adjudication, subject to re-noticing at an appropriate time in the future. See Tr. at 24–26.

¹⁷ See Tr. at 10–11. The Forest Service is responsible for preparation of an environmental impact statement for the actual mine site.

¹⁸ U.S. Forest Service, News Release, "Bear Lodge Project – Rare Earth Mine – Suspended," (Jan. 22, 2016), available at http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/84481_FSPLT3_2669840.pdf.

¹⁹ Licensing Board Order (Addressing Request to Suspend the Proceeding) (Feb. 24, 2016) (unpublished).

²⁰ Id. at 5.

C. DEFENDERS' REPLY PLEADING

On March 4, 2016, Defenders filed its reply by e-mail.²¹ Defenders' Reply alleged, without further explanation, that the "NRC was improperly implementing NEPA"²² and that Defenders has "met the legal standing burden."²³ The reply neither addressed the admissibility of Petitioner's contention under 10 C.F.R. § 2.309(f) nor responded to the standing and admissibility challenges raised by NRC Staff and RER in their respective answers. Defenders' Reply concluded that "[t]o avoid any further expenditure of public resources on this suspended Application, we hereby formally withdraw our Request for Hearing of January 14, 2016. We reserve the right to resubmit such a Request for Hearing at such time as the suspension of this Application may be lifted."²⁴

II. ANALYSIS AND FINDINGS

It generally is in the public interest to avoid the expense of an adjudicatory hearing when NRC Staff review of a docketed license application has been suspended.²⁵ A licensing board determination about whether an adjudicatory hearing regarding a license application can go forward, regardless of such a suspension, is governed by whether a petitioner sets forth with particularity both the interest of the petitioner and how that interest may be affected by the

²¹ Reply of Defenders of the Black Hills to ASLB Order Dated Feb. 24, 2016 (Mar. 4, 2016) [hereinafter Defenders Reply]. During the February 22, 2016 conference call, Defenders assured the Board that it would be able to utilize the agency's E-Filing system. See Tr. at 13–14 (Ms. White Face). However, Defenders' Reply was only served on the parties and the Licensing Board's members and law clerk by e-mail, which failed to reach the Board Chairman because an incorrect e-mail address was used.

²² Defenders Reply at 1.

²³ Id. at 3.

²⁴ Id.

²⁵ See Tenn. Valley Auth. (Bellefonte Nuclear Power Plant Units 3 & 4), LBP-16-01, 83 NRC ___, ___ (slip op. at 2) (Feb. 29, 2016) (Staff license review suspension, entered at applicant's request, had effect of suspending associated adjudicatory proceeding).

proceeding. A petitioner must also provide sufficient detail for proposed contentions to demonstrate that the issues raised are admissible and that further inquiry is warranted.²⁶ Atomic Energy Act section 189a.(1)(A),²⁷ the statutory basis for affording an adjudicatory hearing to challenge a materials license application like that submitted by RER, requires that an intervenor specify one or more cognizable health, safety, or environmental concerns to obtain a hearing at which the validity of such concerns can be litigated.²⁸ In this instance, while noting that the concerns expressed by RER and the NRC Staff regarding Defenders' standing and the admissibility of its sole contention are not insubstantial, given Defenders' requested withdrawal of its hearing petition, we need not reach the question of whether those challenges would be sufficient to require that Defenders' petition be dismissed.

Because Defenders has not requested, and we see no basis for mandating, that the withdrawal of its hearing petition be "with prejudice" (so as to have the effect of precluding a subsequent refiling on the same grounds), Defenders' assertion that it reserves the "right to resubmit such a Request for Hearing at such time as the suspension of the Application may be lifted" is consistent with longstanding agency case law.²⁹ At the same time, should Defenders seek to refile,³⁰ it must comply with the requirements of 10 C.F.R. § 2.309(c)(1) for showing

²⁶ Me. Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199, 206 (1982); see also Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234-35 (2006); Phila. Electric Co. (Limerick Generating Station, Unit 1), LBP-86-9, 23 NRC 273, 277 (1986).

²⁷ 42 U.S.C 2239(a)(1)(A).

²⁸ BPI v. AEC, 504 F.2d 424, 428-29 (D.C. Cir. 1974).

²⁹ See Miss. Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), LBP-73-41, 6 AEC 1067, 1057 (1973) (granting request to withdraw hearing petition, without prejudice).

³⁰ Citing computer equipment incompatibility, Defenders initially requested an exemption from the requirement in the agency's rules of practice to submit pleadings via the agency's E-Filing system. See Letter from Charmaine White Face, Defenders Coordinator, to Rulemaking and Adjudications Staff, SECY (Jan. 6, 2016); see also 10 C.F.R. § 2.302(g)(4). As we observed previously, see supra note 21, during the February 22 prehearing conference, Defenders Coordinator Ms. White Face indicated that with the assistance of the NRC's E-Filing Help Desk,

good cause for filing any future request to intervene and request for hearing.³¹ Additionally, Petitioner must follow NRC requirements for establishing standing and an admissible contention. For an organization to show standing on a representational basis, these requirements include providing (1) a statement as to whom the organization represents; (2) a sworn statement indicating where the represented individuals reside or how far they reside from the alleged threat and that the organization has the individuals' permission to represent their interests; and (3) a plausible scenario concerning how the individuals may suffer health or safety consequences.³² A petitioner must also submit at least one admissible contention that satisfies all six criteria in 10 C.F.R. § 2.309(f)(1). If any one of these admissibility requirements is not met, a contention must be rejected.³³

she had been able to connect with the system, meaning that the pending exemption request had become moot. Tr. at 14. If Defenders should decide to make any additional hearing-related filings with the agency, we urge it to use the E-Filing system to ensure those filings are properly received and served. If Defenders has any issues with the E-Filing system, it should contact the Help Desk for assistance.

³¹ See Grand Gulf, LBP-7-41, 6 AEC at 1057–58 (petitioner seeking to reinstate a withdrawn intervention request must show good cause under agency's then-existing late-filing requirements). Under the agency's current regulations, § 2.309(c)(1) provides that hearing requests and intervention petitions filed after the initial Federal Register hearing opportunity notice date regarding a requested licensing action must demonstrate good cause by showing that (i) the information upon which the filing is based was not previously available; (ii) the information upon which the filing is based is materially different from information previously available; and (iii) the filing has been submitted in a timely fashion based on the availability of the subsequent information.

³² See Int'l Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250–51 (2001); see also Int'l Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-97-12, 46 NRC 1, 6 (1997). Alternatively, an organization can assert that it has standing to intervene in its own right, i.e., organizational standing, but to do so successfully it must establish a discrete institutional injury to the organization's interests, which must be based on something more than a general environmental or policy interest in the subject matter of the proceeding. See White Mesa, CLI-01-21, 54 NRC at 252.

³³ Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), CLI-91-12, 34 NRC 149, 155 (1991).

We thus conclude that Defenders' March 4 request to withdraw its pending hearing petition should be granted, without prejudice to Defenders' subsequent submission of a hearing request regarding the still-pending RER application.³⁴ Further, this proceeding being "one in which a hearing is not required in the absence of a hearing/intervention petition, when only a single intervenor is participating, 'its withdrawal serves to bring the proceeding to an end.'"³⁵

III. LICENSING BOARD ORDER

1. Defenders of the Black Hills' March 4, 2016 request to withdraw its January 14, 2016 request for hearing is GRANTED.
2. The adjudicatory proceeding associated with this docket is TERMINATED.
3. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon an

³⁴ The Staff indicated during the February 22 conference that if the current license review suspension is lifted, this would only be reflected in the public record by a letter from the NRC Staff to RER, not by another Federal Register notice. See Tr. at 29–30. Upon inquiry from the Board, however, RER committed to providing Petitioner with a copy of any RER request to resume the Staff's review process, while the Staff agreed to provide Petitioner with a copy of any determination regarding the resumption of that process. See NRC Staff and [RER] Joint Response to Board Memorandum (Mar. 22, 2016) at 2; see also Licensing Board Memorandum (Regarding Information Concerning Status of License Review Suspension) (Mar. 17, 2016) at 2 (unpublished).

³⁵ Int'l Uranium (USA) Corp. (Receipt of Additional Material from Tonawanda, New York), LBP-00-11, 51 NRC 178, 180 (2000) (quoting Hous. Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985)).

intervention petition, any appeal to the Commission from this memorandum and order must be taken within twenty-five (25) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 23, 2016

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Granting Defenders of the Black Hills' Request to Withdraw Hearing Request and Terminating Proceeding)** in the above-captioned proceeding have been served upon the following persons by Electronic Information Exchange.

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Docket No. 40-38367-ML

MEMORANDUM AND ORDER (Granting Defenders of the Black Hills' Request to Withdraw Hearing Request and Terminating Proceeding)

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[Original Signed by Clara Sola _____]
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Dated at Rockville, Maryland
this 23rd day of March, 2016