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April 21, 1997

'97 APR 24 P4:59

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Presiding Officer  
Atomic Safety and  
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U.S. Nuclear Regulatory  
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Washington, D.C. 20555

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Administrative Judge  
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Atomic Safety and  
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Washington, D.C. 20555

OFFICE OF SECRETARY  
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BRANCH

In the Matter of  
Moab, Utah Facility, License No. SUA-917  
(Request for Extension of Site Reclamation Plan Milestone)  
Docket No. 40-3453-MLA  
ASLBP No. 97-723-02-MLA

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Dear Administrative Judges:

Presented below is a response to the Presiding Officer's  
April 11, 1997, Order (Permitting Reply Filing).

Background

Previous Orders in the present proceeding, Presiding Officer's  
Memorandum and Order (Initial Order) dated February 12, 1997,  
and Memorandum and Order (Permitting Additional Filing) dated  
March 11, 1997, suggested that the undersigned might wish to  
supplement the undersigned's January 30, 1997, hearing request.

The undersigned responded, as allowed, to such orders on  
February 24, March 3, March 13, and March 24, 1997.

Such responses discussed the undersigned's standing to inter-  
vene and areas of concern regarding the December 20, 1996,  
license amendment application at issue in this proceeding.

The undersigned also discussed certain appropriate procedural  
concerns.

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The undersigned's February 24 first response to the February 12 Initial Order responded in part to the Initial order's suggestion at page 3, item 4. that the undersigned address in detail the special factual circumstances or issues involved in this proceeding that support the use of the formal hearing procedures set forth in 10 C.F.R. Part 2, Subpart G.

The undersigned's February 24 first response indicated that the general rules of Subpart L govern procedure in any adjudication initiated by a request for a hearing in a proceeding for a licensee-initiated amendment of a Part 40 source material license.

Further, the undersigned's February response offered that the proceeding as it stood on February 24, 1997, contained no information that would indicate that the December 20 application, at issue herein, was a licensee-initiated amendment request.

The record of the proceeding as it stood then failed to provide appropriate contextual information required to make such a determination, as required by 10 C.F.R. 2.1201(a)(1), where the NRC Staff contemplated offering a Subpart L proceeding.

Given such a situation, the undersigned's first impression - upon viewing the record of the proceeding as it stood - was that the proceeding did not belong in Subpart L, and that it would take a Subpart G hearing to show that the proceeding does not belong in Subpart L.

As it happened, the undersigned's January 30, 1997, hearing request hopefully not entirely intuitively had requested just such a Subpart G hearing. Subpart L does not apply.

Various Arguments in an April 7 Response

The Presiding Officer's Order (Permitting Reply Filing) of April 11, 1997, indicates that the undersigned, if he wishes, may file a reply pleading addressing the "various arguments" in the April 7, 1997, response to the February 12 Initial Order as carried forward by the March 11 Order (Permitting Additional Filing).

The April 11 Order offers that the undersigned's submissions of February 24 and March 13 have been considered.

The undersigned would respectfully request that the Presiding Officer reconsider the February 24, as corrected by the March 13, and as supplemented herein by way of the undersigned addressing certain arguments in the April 7 response.

Some April 7 Arguments

The April 7, at page 3, under "II. Petitioner has not established a right to a hearing" (underscore removed) argues that the rules of practice applicable to the present proceeding are found within 10 C.F.R. Part 2, Subpart L; and that such rules apply to the present proceeding because such proceeding was "initiated by a request for a hearing for a licensee-initiated amendment" of a materials license.

The April 7, at page 11, under "III.C. [undersigned] is not entitled to a formal hearing" (underscore removed), argues that the Applicant/Licensee is the relevant licensee, and that, further, the relevant licensee applied for an amendment to "its license". And thus, it necessarily follows that "this matter is a licensee-initiated amendment".

The last partial quote above is footnoted.

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The April 7, by way of such footnote, argues that the undersigned "is aware that the licensee initiated this request for an amendment".

Response to Some April 7 Arguments

The above April 7 arguments are not persuasive. Such arguments lack factual or legal basis. The undersigned would offer that there continues to be nothing on the record to show that the Applicant/Licensee license amendment request is a licensee-initiated request as contemplated by the applicable rules of practice. (See 10 C.F.R. 2.1201 which delineates the scope of Subpart L.)

In order for the undersigned to make a determination as to whether or not the December 20 application is a licensee-initiated application, the undersigned must review the context (province, or foundation) of such application.

In order for the Presiding Officer to make a determination as to whether or not the December application is a licensee-initiated application, the Presiding Officer would be required to review the province, or foundation - as found upon the record of the present proceeding - of the application at issue herein.

As it stands, the record of this proceeding fails to offer proper province, or foundation of such an application.

Where such province, or foundation, or context is not otherwise forthcoming, the undersigned would be pleased to offer such province, or foundation, or context - or show lack thereof - to the extent that the Presiding Officer might require, upon the re-establishment of the NRC Local Public Document Room near the Moab facility.

Fed.Evid.R. 104

The "initiated" issue, however imperfectly argued above, is probably a threshold issue which should be resolved before the proceeding proceeds. (See 28 U.S.C.A. §§ 2071, 2072.)

As stated elsewhere in this proceeding, the Presiding Officer has the power to grant such remedy. (See 10 C.F.R. 2.1209, particularly (b), (d), (e), and (k), or (l).)

Affirmant



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John Francis Darke

At Moab, Grand County, Utah  
Monday, April 21, 1997

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Moab, Utah Facility  
License SUA-917

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Docket No. 40-3453-MLA  
ASLBP No. 97-723-02-MLA

(Request for License

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CERTIFICATE OF SERVICE

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Washington, D.C. 20555-0001

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I hereby certify that copies of the foregoing response to Order Permitting Reply Filing have been served on the above persons by U.S. mail, first class, in accordance with the requirements of 10 C.F.R. 2.1203(c), 2.701(b), and 2.1203(e).

Dated at Moab, Utah this  
21st day of April 1997



John Francis Darke