UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

**DOCKETED 5/3/00**

COMMISSIONERS:

**SERVED 5/3/00**

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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| In the Matter of | ) | Docket No. 40-3453-LT |
| MOAB MILL RECLAMATION TRUST | ) | |

CLI-00-07

# MEMORANDUM AND ORDER

This license transfer proceeding involves a challenge by Mr. John Francis Darke to a staff order transferring Source Material License SUA-917 from Atlas Corporation ("Atlas") to the Moab Mill Reclamation Trust ("the Trust"). Neither Atlas nor the Trustee (PricewaterhouseCoopers, LLP) has filed a response to Mr. Darke's request for hearing,[1] nor has the NRC staff sought to become a party. Consequently, we have before us only Mr. Darke's initial request, together with his supplements to those documents. For the reasons set forth below, we deny Mr. Darke's request for hearing and terminate the case.

## BACKGROUND

The instant case differs from prior license transfer proceedings in that it was initiated by an agency notice and staff order acting on a licensee's proposal made in a separate bankruptcy proceeding rather than by a standard, formal application for a license transfer. This peculiar procedural posture stems from the fact that, on September 22, 1998, Atlas filed for Chapter 11 bankruptcy protection and subsequently reached a Settlement Agreement with the NRC, the State of Utah and other entities to transfer its Moab Mill Site to the newly-established Trust. Under that agreement, the NRC was obliged to transfer Atlas's License SUA-917 to the Trust, and the Trust was in turn obliged to carry out the remediation of the site consistent with the terms of that license. The United States Bankruptcy Court for the District of Colorado approved the Settlement Agreement on December 1, 1999.[2]

In accordance with its obligations under the Settlement Agreement, and pursuant to the Atomic Energy Act ("AEA") and Commission regulations,[3] the NRC staff issued the transfer order on December 27, 1999, and published in the Federal Register a notice of the issuance of that order as well as an opportunity for a hearing, under 10 C.F.R. Part 2, Subpart M, on the question whether the order transferring the license should be sustained. The notice explained that the agency had agreed to accept the Settlement Agreement in satisfaction of Atlas's regulatory responsibilities for remediation of the Moab site, to transfer the license to the Trust, and to limit the Trustee's liability to certain of Atlas's assets which had been or would be transferred to the Trust. The notice concluded that the Trustee's maintenance and remediation of the site would adequately protect the public health and safety and provide reasonable assurance of compliance with the Commission's regulations. On January 24, 2000, Mr. Darke filed a timely Request for Hearing under our Subpart M procedural regulations and subsequently supplemented that Request on February 9th, 11th, 22nd, and March 8th.

## ANALYSIS

To intervene as of right in a Subpart M license transfer proceeding, a petitioner like Mr. Darke must raise at least one admissible issue (and must also demonstrate standing). To demonstrate that issues are admissible under Subpart M, a petitioner must

(1) set forth the issues (factual and/or legal) that petitioner seeks to raise,

(2) demonstrate that those issues fall within the scope of the proceeding,

(3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,

(4) show that a genuine dispute exists with the applicant regarding the issues, and

(5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; Nine Mile Point, CLI-99-30, 50 NRC at 342 (and cited authority).

We conclude that Mr. Darke has failed to proffer an admissible issue.[4] His request for a hearing turns largely, if not exclusively, on a claim that only "applications," not staff transfer orders, can trigger the Subpart M hearing process. We reject Mr. Darke's position. The hearing notice in this case both explained that the NRC was acting in accordance with the court-approved settlement agreement and made it clear how and when a petitioner could seek a hearing.

Before reaching the admissibility of Mr. Darke's issues, we first examine his efforts to avoid our regulatory requirements to demonstrate standing and to proffer at least one admissible issue. Mr. Darke's argument appears to be that the case's peculiar procedural posture (described above) excuses him from satisfying these two requirements. Mr. Darke appears to reach this conclusion by pointing both to the fact that this proceeding was initiated by a staff order rather than a license transfer application[5] and to the staff's purported failure to support its order with "full information."[6] Mr. Darke apparently assumes that these two factors combine to prevent him from fulfilling his obligation to satisfy the filing (standing and issue) requirements of Subpart M (particularly 10 C.F.R. § 2.1306) and at the same time support his argument that the order should not be sustained.[7]

Mr. Darke's argument places form over substance. Although this case admittedly arises from a staff order acting on a licensee proposal in a bankruptcy proceeding rather than a standard, formal license transfer application, this fact hardly suspends, or even calls into question the applicability of, the procedural rules requiring a demonstration of standing and a proffer of at least one admissible issue. The intent of the Commission in promulgating Subpart M was to provide a set of procedures to be used in hearings on license transfers. Subpart M was intended to apply to all license transfer proceedings unless the Commission directed otherwise in a case-specific order. 10 C.F.R. § 2.1300. The presence or absence of a standard, formal application for license transfer is irrelevant.

Nor does the absence of a standard license transfer application render compliance with such rules impossible, as Mr. Darke suggests. Indeed, Mr. Darke has pointed to no filing requirement in 10 C.F.R. § 2.1306 with which he could not comply. The staff's order provides sufficient information to formulate issues pursuant to section 2.1306 and, thus, as a practical matter, Mr. Darke was in the same position as a petitioner confronted with a typical license transfer application, i.e., he could challenge the staff order on the same grounds that a petitioner could have challenged a typical license transfer application.

Nor does the absence of a formal application support Mr. Darke's assertion that the transfer order should not be sustained. Although Subpart M and Part 40 (as the latter applies to specific licenses) assume that an "application" has been filed, nothing in the AEA or our regulations actually requires that a transfer be implemented through the grant of an "application." See AEA § 184; 10 C.F.R. § 40.46. Rather, the requirements for approving a transfer provide merely that the Commission, after securing "full information" and determining that the order is in compliance with the regulations and the AEA, "shall give its consent in writing." See AEA § 184; 10 C.F.R. § 40.46. Here, the staff order detailed the reasons and bases for granting the transfer. Specifically, the order described the provisions of the trust and pointed out that the remediation of the Moab Mill site will be conducted in accordance with the terms and conditions of License SUA-917. The staff order also set out the current assets and receivables available to the trustee for site remediation. In sum, the order provided sufficient information to put the public on notice of the named trustee, the amount of the trust, and the requirements and duties of the trustee. The form in which the details of the transfer were set out, i.e., in documents other than a formal application, is irrelevant for purposes of determining whether the transfer order at issue here should be sustained. Mr. Darke points to nothing specific that would lead us to a different conclusion.

Having disposed of Mr. Darke's threshold argument, we turn now to the three issues he raises.

### A. Inexperience of New Management Imposes Increased Risk

Mr. Darke claims that he is more reluctant than before to enter the Moab facility's 1.5-mile wide exclusion zone for fear of both radiological and non-radiological exposure. He believes that the Settlement Agreement's installation of inexperienced new management has increased the danger of such exposure:

> "[i]f the NRC does it [i.e., transfers the license,] I will be excluded from the exclusion zone described herein without due process.... [T]he proposed new management at the Moab, Utah, facility and site would be responsible to a 'learning curve' where stepping into the Atlas Corporation's shoes, as a trustee. Such a learning curve would allow added risk to myself if I were to sojourn in the exclusion zone.... [T]he radiological and non-radiological exposure pathways found at the exclusion zone will be under new management if the ... order is sustained.... The resultant added incremental risk of exposure I find forbidding, not reassuring. Learning curves have their ways.[8]

However, the only factual, expert or documentary support (as required by 10 C.F.R. § 2.1306(b)(2)(iii)) which Mr. Darke offers for his concern about the new management's "learning curve" is a recent letter from this agency's Office of Nuclear Material Safety and Safeguards ("NMSS") transmitting a Notice of Violation and an Inspection Report to the Trustee. The NMSS letter states in relevant part that:

> The NRC has determined that two violations ... occurred. The first violation involved your failure to take

> corrective actions within 30 days to repair erosion damage on the tailings impoundment. This finding was a concern ... because of the potential for further degradation and subsequent release of licensed material outside of the confines of the restricted area. It appears that the onsite staff could not repair the damaged interim cover because you do not have earth-moving equipment needed to perform these types of repairs.
>
> The second violation involved your failure to implement the lower limits of detection specified in the license for environmental and effluent monitoring program samples. This issue is of concern ... because the same problem was identified and cited during a previous inspection. Long-term corrective actions taken in response to the previous violation were not effective in preventing a repeat of the problem.
>
> * * * * * *
>
> [Moreover,] the NRC inspectors could not confirm whether or not you have adequately demonstrated compliance with the dose limit for individual members of the public as required by 10 CFR 20.1302.

See Second Supplement at 2-3, quoting NMSS Letter, dated Feb. 4, 2000.

The NMSS letter does not support the admissibility of this issue. The inspection on which Mr. Darke relies was conducted December 14-15, 1999, prior to the December 30 date on which the Trustee became the licensee of the Moab facility. The asserted violations were thus clearly attributable to Atlas rather than the Trustee. Consequently, we cannot conclude that the violations asserted by the NRC staff in the Notice of Violation (and in the cover letter quoted by Mr. Darke) reflect in any way on the competence of the Trustee. Given the absence of any other support for Mr. Darke's issue, we find it inadmissible.

### B. Inapplicability of Part 40

Mr. Darke next asserts that Part 40 is inapplicable to this proceeding. See Third Supplement at unnumbered page 1 and passim. In this regard, he first suggests that Part 40 cannot apply to this case because the Trust "may not be a person to which ... Part 40 would apply, if the trustee were an NRC contractor." See Third Supplement at unnumbered page 3. Mr. Darke ignores the fact that the definition of "person" in 10 C.F.R. § 40.4 includes "trust." Moreover, Mr. Darke never explains the relevance of this argument, nor do we see any.

Second, Mr. Darke criticizes the staff order for failing to indicate whether the license at issue was "general" or "specific." Mr. Darke considers this purported omission relevant because 10 C.F.R. § 40.20 permits general licenses to become effective without the filing of applications but requires that specific licenses be issued upon the filing of an application. See Third Supplement at unnumbered page 4. Mr. Darke's second argument fails. This case does not involve a grant of an initial icense; it involves only the transfer of an existing one. Moreover, as we stated above, a formal application is not required for an approval of a transfer.

Third, Mr. Darke asserts generally that the repeated references in Part 40 to "'application' [and] 'applicant,' ... provokes the question whether or not such parts of [Part 40] would apply." See Request for Hearing at 13 (handwritten addition); First Supplement, dated Feb. 9, 2000, at 2; Third Supplement at unnumbered page 1. But the fact that the license transfer is not the result of an application does not negate the fact that the license itself was issued under Part 40. Further, the new licensee is subject to both the terms of the license and the applicable sections of Part 40.

### C. Legal Bar to Implementing the Settlement Agreement

In his final argument, Mr. Darke asserts that implementation of the Settlement Agreement is unauthorized by law. See Fourth Supplement at 3. We disagree. Under the circumstances in which one of our licensees files for bankruptcy, there is no question that we may step in to secure, to the maximum extent possible, assets to be used eventually to remediate a contaminated site, including intervening in bankruptcy proceedings and entering into settlements. As is typically the situation in bankruptcy proceedings, there were many creditors vying for Atlas's limited assets. See AEA § 184 ("The Commission may give consent to the creation of a mortgage, pledge, or other lien upon any property ... owned ... by a licensee, and the rights of creditors so secured may be enforced by any court order subject to the rules and regulations established by the Commission to protect public health and safety and promote the common defense and security") (emphasis added).

At any rate, our actions with respect to the bankruptcy proceeding, including the terms of the Settlement, are simply not at issue in this proceeding. As a signatory to the Settlement Agreement -- an agreement blessed by a United States Bankruptcy Court -- the Commission is obliged to implement those conditions of the agreement which fall within the Commission's charge.

### D. Procedural Irregularities

Subpart M clearly mandates that hearing requests, intervention petitions, answers, replies and accompanying documents in a license transfer adjudication must be served on the applicant or licensee, the NRC's General Counsel, the Secretary of the Commission and any participants and that proof of service must accompany the filing. See 10 C.F.R. § 2.1313 (a), (b), (d). The NRC staff's December 27, 1999, order (which was both noticed and published in the Federal Register) reiterated this service requirement and provided a specific listing of the identities and addresses of those who must be served. By letter dated February 10, 2000, the Commission's Office of the Secretary reminded Mr. Darke of these service-related obligations

and provided him with a copy of a complete service list. (The Office of the Secretary also served Mr. Darke's Request for Hearing and First Supplement on those entities that were on the official service list.)

Despite these repeated notices of his obligations, Mr. Darke failed to provide proof of service of his Second, Third and Fourth Supplements. Indeed, we have no basis to believe that he ever served these Supplements on any of the required entities other than the Office of the Secretary. Moreover, Mr. Darke not only failed to provide proof of service for a Freedom of Information Act ("FOIA") Request that he submitted into the record by letter dated March 11, 2000, but he also went so far as to ask the Office of the Secretary to serve the last of these documents for him (which that Office has done, albeit with some reluctance).[(9)]

This is not the first proceeding in which this agency has admonished Mr. Darke regarding service. The NRC's Licensing Board in an earlier adjudication involving the same Moab facility instructed Mr. Darke "that henceforth each filing he submits in this proceeding should be accompanied by a certificate of service (such as the certificate of service attached to this memorandum and order) that lists all those served with the document and states when and how service was made. " See Atlas Corp. (Moab, Utah Facility), Docket No. 40-3453-MLA, unpublished Memorandum and Order (Initial Order) at n.2 (Feb. 12, 1997). Because of Mr. Darke's pro se status, the Board admitted the unserved pleadings (just as we have in this proceeding). Id. However, our patience with Mr. Darke's consistent flouting our service regulations is at an end.[(10)] We are instructing the Office of the Secretary to reject and return to Mr. Darke any filings in any future proceedings that do not comply with our service requirements.

## CONCLUSION

For the reasons set forth above, the Commission

(1) grants Mr. Darke's request for additional time to supplement his initial Request for Hearing,

(2) admits his four supplemental submissions into the record,

(3) concludes that he has proffered no admissible contentions,

(4) denies his request for hearing, and

(5) terminates the proceeding.

IT IS SO ORDERED.

For the Commission

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 3rd day of May, 2000.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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| In the Matter of | ) | Docket No. 40-3453-LT |
| MOAB MILL RECLAMATION TRUST | ) | |
| (Moab Mill Site) | ) | |

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-00-07) have been served upon the following persons by U.S. mail, first class or through internal NRC distribution.

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[Original signed by Adria T. Byrdsong]

_____
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 3rd day of May 2000

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1. Given that Mr. Darke is unrepresented by counsel, we will assume that his Request for Hearing was also intended to be construed as a petition to intervene. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546 (1980); Kansas Gas & Electric Co. (Wolf Creek Generating Station), ALAB-279, 1 NRC 559, 576-577 (1975); Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Units 1 & 2), ALAB-136, 6 AEC 487, 489 (1973). For this same reason, as well as for the personal reasons set forth in Mr. Darke's Request for Hearing at 8 and Exhibit B, we grant his request for additional time to supplement his initial Request and admit his four supplemental submissions into the record.

2. Although there was not a formal application for license transfer in the usual sense, Atlas did propose, in the bankruptcy settlement context, that the Moab site and assets be transferred to a trust and that the trust proceed to implement the surface reclamation and groundwater cleanup required by the NRC license. As a practical matter, this was an "application (or "license transfer request" -- 10 C.F.R. § 2.1300), and the substance of this "application" was reflected in the Notice of Order and Opportunity for Hearing and in the Order Transferring License that were published in the Federal Register on January 3, 2000. 65 Fed. Reg. 138.

3. Sections 62, 63, 81, 84, 161b, 161i, 161o, and 184 of the AEA; 10 C.F.R. Part 40.

4. Based on Mr. Darke assertions regarding his many activities in the immediate vicinity of the Moab facility, he appears to have satisfied the agency's requirements for standing in license transfer proceedings. However, because we rest our decision on the patent inadmissibility of the issues Mr. Darke seeks to raise, we need not inquire closely into the question of his standing.

5. Request for Hearing at 2-3; Third Supplement, dated Feb. 22, 2000, passim.

6. See Request for Hearing at 3, 4, 6; Third Supplement at 7 [misnumbered as page 4]. Mr. Darke's Request for Hearing (at 3, 4) quotes both the Proposed Subpart M Rule, 63 Fed. Reg. 48,644 (Sept. 11, 1998), and Section 184 [miscited as Section 84] of the Atomic Energy Act, 42 U.S.C. § 2234, to the effect that "no license ... shall be transferred ... unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act." (Emphasis added.) Mr. Darke attributes this purported failure to the absence of an application. Request for Hearing at 4.

7. Request for Hearing at 2 ("Apparently, [section] 2.1306(a) does not apply"), 3 ("Apparently, [section] 2.1306(b)(2)(i) does not apply"), 4 (the staff order "should reflect, via its findings, 'full information' .... The ... order does not reflect such and, thus, should not be sustained"), 6 ("That order was not based on "full information" ... and, thus, does not provide the information required to address the interrogatories contained in 10 C.F.R. § 2.1306"), 7 (sections "2.1308(a) ... and 2.1306(b)(3) both presuppose an application and ... [t]hus I cannot fully connect the perceived harm done with the proposed NRC action except in general terms despite the fact that I have shown above why the ... order should not be sustained (no 'full information' as required by Sec. 84 [sic])"), 7 (sections "2.1306(c)(1) and (2) would not apply given the apparent absence of an application").

8. Request for Hearing at 7-8 (emphasis in original). See also Request for Hearing, Exhibit A; Second Supplement, dated Feb. 11, 2000, at 1 ("the learning curve would allow added [incremental] risk to myself if I were to sojourn in a [hazardous] exclusion zone. I don't dare go to the hazard." (internal quotation marks omitted; brackets in original)), 2 ("The [staff] order proposes, in that it allows new management at the exclusion zone, a new incremental risk that aggravates the present

hazard").

9. In the FOIA request, Mr. Darke sought a copy of the Bankruptcy Court's December 1st order and an April 29, 1999 "Moab Uranium Mill Transfer Agreement."

10. We note that Mr. Darke has ignored other instructions from this agency in the past. See Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 427 n.4 (1997), aff'd, CLI-97-8, 46 NRC 21 (1997):

> In my initial order, I also advised Petitioner Darke that it generally is the practice for participants making factual claims regarding the circumstances that establish standing to do so in affidavit form that is notarized or includes a declaration that the statements are true and are made under penalty of perjury. See Initial Order at 3. As Licensee Atlas notes, Petitioner Darke apparently has made no effort to comply with this guidance. See Atlas Response at 5. Providing this assurance of the accuracy of factual representations about standing is important; nonetheless, because Petitioner Darke appears pro se and generally is making representations about himself (rather than about other individuals), I am not dismissing this case because of his failure to comply with this instruction.

Cf. Atlas Corp., CLI-97-8, 46 NRC at 22:

> "Here, we see no legal error or abuse of discretion in the Presiding Officer's refusal to grant standing to Mr. Darke, given his failure to offer more than general responses to the Presiding Officer's reasonable and clearly articulated requests for more specific information about Mr. Darke's proximity-based standing claims. The four opportunities that Mr. Darke had to specify his claims were entirely adequate."