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

'99 AUG 20 P2:54

**Before Administrative Judges:
Charles Bechhoefer, Presiding Officer
Thomas D. Murphy, Special Assistant**

OFFICE OF THE
RULES AND
ADJUDICATIONS STAFF

In the Matter of)
)
SEQUOYAH FUELS CORPORATION)
Gore, Oklahoma)
_____)

**Docket No. 40-8027-MLA-4
ASLBP No. 99-770-09-MLA**

August 19, 1999

SEQUOYAH FUELS CORPORATION'S MOTION FOR RECONSIDERATION

Sequoyah Fuels Corporation (SFC) moves the Presiding Officer for reconsideration of the Memorandum and Order dated August 12, 1999 (Memorandum and Order). The Memorandum and Order authorizes the Attorney General of Oklahoma to supplement his Request for Hearing (Request) dated July 7, 1999. SFC urges the Presiding Officer to reconsider this ruling because there is inadequate basis for extending to the Attorney General an additional opportunity to satisfy the requirements of 10 C.F.R. §2.1205 for a hearing request.

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Argument

The Nuclear Regulatory Commission published a notice of opportunity to request a hearing in the Federal Register on June 9, 1999, 64 Fed. Reg. 31,023, which required that any request for hearing must be filed by July 9, 1999. The Attorney General of Oklahoma filed a timely request for hearing on July 7, 1999. SFC filed an answer (Answer) to the Request on July 19, 1999 and the NRC Staff responded (Staff Response) on August 6, 1999. Both SFC's Answer and the Staff's Response oppose the Request. SFC argues that the Request does not provide adequate information to show that the Attorney General has standing because it (1) failed to allege any particularized injury-in-fact; (2) did not identify any "causal connection" between the alleged injury and approval of the Decommissioning Plan; (3) failed to show that the alleged injury would be addressed by a decision in its favor in this proceeding; and (4) failed to identify areas of concern that are germane to the proceeding. Answer at 4-13. Although the Staff argues that the Attorney General "has established injury in fact to interests within the zone of interests protected by the Atomic Energy Act and the National Environmental Policy Act" in certain respects (Staff Response at 10), the Staff position is essentially the same as that of SFC. Both argue that the Request fails to identify any issues germane to the proceeding and does not show that the Attorney General's concerns are redressable in this forum.

In a Motion for Leave to Supplement Request for Hearing and to Reply to Sequoyah Fuels Corporation and NRC Staff (Motion to Supplement), dated August 12, 1999, the Attorney General of Oklahoma seeks leave to respond to the legal arguments of SFC and the Staff, and to provide details supporting its claims of standing and areas of concern. In the Motion to Supplement, the Attorney General alleges that the "Request for Hearing was a brief document that contained only the allegations required by 10 C.F.R. §2.1205(e) and (h) (1999)." Motion to Supplement at ¶ 7. This statement suggests that the Attorney General believes that the Request was sufficient under NRC practice to demonstrate standing and identify the issues that the Attorney General seeks to have decided in this proceeding.

The Memorandum and Order, by way of analogy, cites 10 C.F.R. §2.714(a)(3), which permits an intervenor in a Subpart G proceeding to amend a request for hearing.

Memorandum and Order at 2. This is a Subpart L proceeding. SFC respectfully suggests that the omission of such a provision in Subpart L is deliberate, and that the Commission did not intend for Presiding Officers in Subpart L proceedings to import such provisions from Subpart G. In adopting the Subpart L informal hearing procedures, the Commission stated that the purpose of such procedures is to reduce the cost and delay for parties and the Commission that would result from the use of formal, trial type procedures. 54 Fed. Reg. 8269, 8275 (Feb. 28, 1989). Where it decided that certain aspects of Subpart G

should apply to informal hearings, the Commission specifically incorporated those provisions by reference in Subpart L, e.g., § 2.1237(a). The Commission clearly decided that, except as specifically enumerated, Subpart G provisions are not applicable to informal hearings under Subpart L.

The Memorandum and Order also states that “[t]his supplementation is specifically allowed under the general power of a Presiding Officer. 10 C.F.R. § 2.1209.”

Memorandum and Order at 2. Section 2.1209 states that

[a] presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. The presiding officer has all powers necessary to those ends, including the power to -- (a) Regulate the course of the hearing and the conduct of the participants;

Section 2.1209 does not specify that supplementation of requests for hearing may be allowed. In any event, this general provision must as a matter of law give way to the more specific provisions of Subpart L, particularly where a contrary result would frustrate the express policy of the Commission.

The Memorandum and Order cites Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149 (1992). Id. There the Presiding Officer concluded that he had discretionary authority to permit the pro se petitioners who were in the process of seeking counsel to amend or supplement their hearing request. Babcock

and Wilcox, 36 NRC at 154. Here, the Oklahoma Attorney General is an experienced attorney who has been involved in prior NRC proceedings. See Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-97-13, 46 NRC 195 (1997). As mentioned above, after reviewing the pleadings of SFC and the Staff, the Attorney General has declared that the statements in the Request meet the requirements of §2.1205(e) and (h). This case does not involve an in-artful or inexperienced petitioner. Consequently, there is no basis to permit a further round of pleadings.

Finally, the Memorandum and Order states “[i]n any event, I believe Oklahoma’s request not to be so far from acceptability to deprive it of an opportunity to amend.”

Memorandum and Order at 2. We know of no precedent in NRC jurisprudence for the application of such a subjective criterion. This statement does not identify a meaningful or reviewable standard for considering whether a petitioner should be granted an opportunity to supplement a request for hearing. Moreover, the Memorandum and Order does not identify any statements in the Request that are not clear and require clarification. As pointed out by both SFC and the Staff in their respective responses to the Request, the Request does not identify any issues that are germane to this proceeding or show that any alleged injury to Oklahoma is redressable in this proceeding. No elaboration or explanation by the Attorney General could convert this failed pleading into a statement of

issues germane to this proceeding. Since the Request does not identify any issue for the Presiding Officer to decide, there is no basis for granting the Request for Hearing, or for the Memorandum and Order.

The August 12, 1999 Motion to Supplement filed by the Attorney General apparently was written before receipt of the Memorandum and Order, and does not rely on it.

Consequently, it was incumbent upon the movant to identify the grounds or bases for the motion. The Attorney General's motion, however, does not do so. It simply states that the Attorney General's Request for Hearing was brief, and unlike the answer filed by SFC and the response of the NRC Staff, contains no legal argument. The Attorney General, a skilled practitioner, must live with that choice. The presiding officer orders cited by the Attorney General are not adequate authority for the requested relief. The three orders in Babcock and Wilcox Company cases involved petitioners who appeared pro se or were represented by counsel inexperienced in NRC proceedings. The unreported order in the International Uranium Corp. case provides no analysis to support the result. The Attorney General does not claim that anything argued by SFC or the NRC Staff was a surprise, that either party mischaracterizes the facts or even that the Attorney General failed to appreciate the legal requirements for a hearing request. The Motion simply states the Attorney General would like an opportunity to file a supplemental pleading that is not authorized by Subpart L.

Conclusion

As noted by the Commission in adopting Subpart L, litigation entails expense. In this case, the additional expense of a hearing will further erode SFC's limited resources and may jeopardize its ability to complete decommissioning. The informal hearing procedures of Subpart L are intended to avoid such a result. Motions such as the Attorney General's Motion to Supplement frustrate this purpose by seeking to add pleadings and extend deadlines. Allowing further pleadings will add expense and delay to the detriment of SFC and the public, for whom timely decision-making is a matter of urgency in order to avoid waste and assure the timely and safe decommissioning of the Sequoyah facility. The record is ripe for decision on whether the Request for Hearing provides an adequate basis for requiring a hearing on SFC's decommissioning plan.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Sequoyah Fuels Corporation's Motion for Reconsideration have been served upon the persons listed below by U.S. mail, first class, postage prepaid, this 19th day of August, 1999.

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