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**Agency:** Nuclear Regulatory Commission

**Title:** Sequoyah Fuels Corporation and General  
Atomics (Gore, Oklahoma Site  
Decontamination and Decommissioning  
Funding)

**Docket No.** 40-8027-EA

**LOCATION:** Bethesda, Maryland

**DATE:** Wednesday, January 19, 1994

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In the Matter of: :  
SEQUOYAH FUELS CORPORATION :  
AND GENERAL ATOMICS : Docket No. 40-8027-EA  
(Gore, Oklahoma Site :  
Decontamination and :  
Decommissioning Funding) :  
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Nuclear Regulatory Commission  
Hearing Room 521  
4320 East West Highway  
Bethesda, Maryland  
Wednesday, January 19, 1994

The above-entitled matter came on for prehearing  
conference at 9:32 a.m.:

BEFORE:

JAMES P. GLEASON, Chairman  
THOMAS O. MURPHY, Administrative Judge  
G. PAUL BOLLWERK, III, Administrative Judge

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## 1 APPEARANCES:

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1 APPEARANCES [Continued]:

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3 On behalf of the Nuclear Regulatory Commission:

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## P R O C E E D I N G S

[9:32 a.m.]

1  
2  
3 JUDGE GLEASON: I am Judge James Gleason. With me  
4 presiding here on your right is Judge Paul Bollwerk. On  
5 your left is Judge Tom Murphy, who has just been appointed  
6 as an Alternate Judge in this case. Judge Klein,  
7 unfortunately, is still ill.

8 This is a prehearing conference brought by the  
9 Board which involves an October 15, 1993 order of the  
10 Nuclear Regulatory Commission. That order concerns the  
11 responsibility of the Sequoyah Fuels Corporation and the  
12 General Atomics Corporation to provide assurance and  
13 financing for the decommissioning of the NRC licensed  
14 Sequoyah facility located at Gore, Oklahoma.

15 Both SFC and GA have requested a hearing on the  
16 order. The Native Americans for a Clean Environment has  
17 petitioned for intervention in this proceeding.

18 I think at this time it would be appropriate if  
19 the parties and participants would make their appearances  
20 known for the record. We if could go with the Staff, SFC,  
21 GA, and NACE in that order, I think that would be complete.

22 MR. HOM: Your Honor, I am Steve Hom with the  
23 Staff. Possibly due to the weather, Susan Uttal may be here  
24 later. Dick Bachmann is also counsel for the Staff. He is  
25 away on vacation right now.

1 MS. LONGO: Your Honor, my name is Giovanna Longo.  
2 I am with OGC Enforcement. I am also making an appearance  
3 today.

4 MR. AXELRAD: I'm Maurice Axelrad, appearing today  
5 for Sequoyah Fuels Corporation. I am with the law firm of  
6 Newman & Holtzinger. Appearing with me today is John  
7 Matthews, also from my firm.

8 MR. DUNCAN: I am Steve Duncan of the firm of Mays  
9 & Valentine. I am here today with Brad Davenport. We  
10 represent General Atomics.

11 MS. CURRAN: I am Diane Curran. I represent  
12 Native Americans for a Clean Environment. With me today is  
13 Paula Mesky, who is an attorney with my law firm, but who  
14 will not be making an appearance or making any presentations  
15 to the Board.

16 JUDGE GLEASON: This conference was ordered on  
17 December 17, 1993, and was called for the purposes of  
18 considering various issues and matters involved in the  
19 proceeding, including an intervention petition request and  
20 discovery matters in the timing and location for any  
21 evidentiary hearing.

22 To that end we forwarded to the parties on January  
23 13th a memorandum on a number of questions the Board the  
24 Board had and has concerning the Commission's Rules on  
25 Intervention and the theories of the case that the various

1 participants might care to discuss which relate to the  
2 participation of General Atomics as a subject of the NRC  
3 order and as a party in this proceeding.

4 In this connection, in response to our request for  
5 any additional matters that the parties believe should be in  
6 included in this conference, General Atomics forwarded a  
7 January 14, 1994 request which I assume has been served on  
8 all the participants, calling for the establishment of a  
9 schedule for briefing and oral argument on a jurisdictional  
10 issue concerning GA's participation and also requesting a  
11 delay in discovery until that issue is resolved. At least  
12 that is my interpretation of their motion.

13 The first issue that we wanted to discuss -- and I  
14 think what we will do, since the Staff has the burden of  
15 going forward in the burden of proof of the order that is  
16 the subject of this proceeding, we will have the Staff  
17 respond first, and then that be followed by counsel for the  
18 SFC and then counsel for General Atomics, and then finally  
19 counsel for the Intervenors.

20 Unless I ask, there may be occasions where I will  
21 ask someone else to go forward. I will indicate that at the  
22 time in a different arrangement.

23 Excuse me just a minute.

24 The first issue that we would like to have some  
25 discussion on concerns the rules of the Commission and the

1. nature of this proceeding, whether it falls under -- really  
2. whether it is a Section 189(a) proceeding of the Atomic  
3. Energy Act, or if it is not, what consequences are there for  
4. that conclusion as far as this proceeding is concerned. So,  
5. I would ask the Staff to proceed with their understanding of  
6. that matter, if they would, please.

7. MR. HOM: Your Honor, the Staff's position is that  
8. this proceeding is not a 189(a) proceeding. It does not fit  
9. within the enumerated categories of Section 189(a).  
10. However, the Staff does not believe that there are any  
11. particular ramifications flowing from the fact that it is  
12. not a 189(a) proceeding. For examples, the procedures that  
13. we will be using, as I understand it, in this proceeding are  
14. under subpart (g). I am not sure I can articulate any other  
15. differences that may flow from this proceeding, in our view,  
16. not coming under Section 189(a).

17. JUDGE GLEASON: So then, Mr. Hom, you would not  
18. consider that this proceeding involves an amendment to the  
19. Sequoyah license?

20. MR. HOM: The Staff's view would be that this is  
21. not involving an amendment to the license.

22. JUDGE GLEASON: All right.

23. Mr. Axelrad?

24. JUDGE BOLLWERK: Judge Gleason?

25. JUDGE GLEASON: Just one moment.

1 Judge Bollwerk?

2 JUDGE BOLLWERK: So you are saying then, that  
3 there are no additional conditions that have been put on  
4 Sequoyah Fuels or General Atomics for the time being of  
5 Sequoyah Fuels' licensing in any way, that it incorporates  
6 into their license by reason of that order?

7 MR. HOM: Well, I wouldn't say that there are  
8 necessarily no additional conditions being imposed on the  
9 license to the extent that if you are saying that,  
10 therefore, that implies a 189(a) proceeding.

11 JUDGE BOLLWERK: Well, if you modify the license,  
12 if you add a condition to it, if you want to call it an  
13 amendment or a modification -- I don't know if that is a  
14 distinction without a difference -- if you are modifying a  
15 license in some way, then arguably you are coming under a  
16 189(a); aren't you?

17 MR. HOM: Well, my understanding is that there are  
18 times when the Staff can impose a condition not expressly  
19 laid out in a license. That does not necessarily rise to  
20 the level of triggering a hearing under a 189(a).

21 In any event, in this situation, the Staff's  
22 position would be that we are not imposing an additional  
23 condition on the licensee.

24 JUDGE BOLLWERK: Okay. I will think about that a  
25 little bit. I may be back to you, Mr. Hom.

1 Mr. Axelrad?

2 MR. AXELRAD: Judge Gleason, as we have pointed  
3 out in our pleadings to date, we agree that this is not a  
4 189(a)91) proceeding. The Staff has not termed it into  
5 modifying a license, and as just expressed, it is, in fact,  
6 modifying the license.

7 The NRC has argued in other proceedings in Court  
8 as we have pointed out in the TMI Alert case, for example,  
9 that an order, even though it imposed restrictions on the  
10 licensee -- in that case, that was an order lifting a  
11 suspension -- that even though it imposed numerous  
12 restrictions on the licensee, those did not amount to  
13 amending of the license.

14 The Court went on to point out that if, in fact,  
15 the Staff had intended, if the NRC had intended to amend to  
16 license, they would have stated so explicitly, and they did  
17 not.

18 The only theoretical impact that we can see as to  
19 whether or not that this is an order modifying a license --  
20 let me first say we agree with Mr. Hom that the procedures  
21 that have to be followed in this proceeding will be the  
22 subpart (g) procedures and, therefore, it makes no  
23 difference whether it is a 189(a) proceeding or not.

24 The only possible impact --

25 JUDGE GLEASON: Excuse me. Would you mind repeat

1 that again for me?

2 MR. AXELRAD: The procedures that we will be  
3 following in this proceeding are the procedures of the NRC  
4 that apply to adjudicatory proceedings before an Atomic  
5 Safety and Licensing Board. Those procedures are no  
6 different, whether it is a 189(a) proceeding or not, because  
7 it is a proceeding on an order, and a proceeding on an order  
8 is governed by subpart (g) of Part 2.

9 The only potential difference here is that under  
10 189(a), a Petitioner or an organization is entitled to a  
11 hearing if it is a proceeding to amend a license and if a  
12 person's interest is affected by that proceeding, is  
13 entitled to a hearing.

14 But as we will point out later when we discuss the  
15 actual regulation of the NRC, that is a distinction without  
16 a difference. As will be shown, the Petitioner -- its  
17 interest is not affected by this proceeding, and, therefore,  
18 it would make no difference, even if this was an amendment  
19 to a license.

20 JUDGE GLEASON: All right. I don't want to get  
21 into that part of it because there is another question  
22 dealing with it. I would rather keep these comments  
23 together.

24 Mr. Duncan, let me say that we are aware of the  
25 fact that you are just coming on board in this proceeding.

1 All the other parties have had some background on the case,  
2 and you are trying to get up to speed as you have indicated,  
3 I think, in one of your filings. So, at any time you just  
4 want to pass, it is up to you. We won't hold that against  
5 you in that sense. But we would call on you, if you would  
6 care to respond at this time, we would be glad to hear it.

7 MR. DUNCAN: Thank you, Judge Gleason.

8 I really have nothing to add except to point out  
9 the obvious that we have no reason to challenge that it is  
10 not a 189(a) proceeding. But whether or not an amendment to  
11 the license is involved, General Atomics is not the  
12 licensee. So, we agree with Mr. Axelrad's view of it and  
13 have no reason to challenge what the Staff has said about  
14 the nature of the proceeding.

15 JUDGE GLEASON: All right.

16 Ms. Curran?

17 MS. CURRAN: As we discuss in our brief, we think  
18 this is a proceeding for the amendment of a license. We  
19 looked at the license and compared it to the order. It  
20 seems to us that there are significant changes in the terms  
21 of this license that will be imposed if this order is  
22 carried out.

23 We have laid this out in our brief. I won't go  
24 over all those factual details, but I would like to stress  
25 that the mere fact that the Staff has labeled something as

1 not being a license amendment doesn't fully answer the  
2 question as to whether it is or not.

3 In the Union of Concerned Scientists v. NRC, the  
4 case that we cite in our brief, there the Commission had not  
5 characterized an action suspending a deadline for compliance  
6 with NRC regulations as a license amendment. The Court  
7 applied a standard as to whether this option changed the  
8 binding norms to which the licensee had to comply.

9 In our view, this definitely does significant  
10 change the binding norms to which Sequoyah Fuels and General  
11 Atomics must comply.

12 JUDGE GLEASON: I recall that case. The Court  
13 said they might not have -- their implication was they may  
14 not have intended an amendment, but was, in fact, an  
15 amendment; isn't that correct?

16 MS. CURRAN: That's right. And that that  
17 triggered Section 189(a)(1) hearing rights.

18 JUDGE GLEASON: Mr. Hom, do you have any comments  
19 on that case that Ms. Curran cites?

20 MR. HOM: Your Honor, the only comment I would  
21 have is that, as I understand the terms of the order, they  
22 are essentially imposing requirements that the licensee is  
23 currently subject to, and therefore, is not changing -- I am  
24 not sure if I recall the exact term in the case we are  
25 discussing -- it is essentially changing the terms of the

1 license -- the terms of the license merely may not have a  
2 particular dollar amount that is discussed in terms of  
3 decommissioning funding or anything of that nature.

4 But I see that as just a further extension of the  
5 existing obligation under the regulations and under the  
6 license.

7 JUDGE GLEASON: You would not consider the  
8 changing of the dollar amount to change the nature of that  
9 action?

10 MR. HOM: No, I would not.

11 MR. AXELRAD: Judge Gleason, if I may respond  
12 briefly?

13 JUDGE GLEASON: Yes.

14 MR. AXELRAD: With respect to the particular cite  
15 that was cited by Ms. Curran, that was a situation where the  
16 licensees had a specific deadline as a licensed condition.  
17 What the NRC attempted to do was to adopt a rule which  
18 suspended the specific license condition, the specific  
19 deadline.

20 The Court said, "Well, if the NRC is taking an  
21 action that specifically changes something that is in a  
22 license, that is a license amendment." That was clearly  
23 true in that situation. What is happening here is far  
24 different.

25 The only things that Ms. Curran has mentioned with

1 respect to the current license are items which are not, in  
2 fact, changed by this order. She points out that the  
3 current license has a page on which the name of the  
4 corporation from New Sequoyah Fuel Corporation has not been  
5 changed to Sequoyah Fuel Corporation when that change took  
6 place a few years ago. That was an inadvertent mistake by  
7 the licensee. It has nothing to do with this order or what  
8 is going to happen as a result of the order.

9 Then she cites a provision of the license which  
10 refers to the maintenance of a reserve account that was  
11 committed to as part of the original license. That reserve  
12 account is there. That reserve account remains. The  
13 licensee continues to comply with that provision of the  
14 license, and is not affected by this order.

15 What this order is doing is talking about  
16 something that is completely additional and different that  
17 the Commission is going to require. It doesn't absolve or  
18 change the licensee's existing obligation under a license  
19 condition. Therefore, there is no license amendment in  
20 those two regards.

21 JUDGE GLEASON: Ms. Curran?

22 MS. CURRAN: If I could just respond to that, in  
23 our view an amendment of the license could include the  
24 imposition of new obligations. In fact, an amendment to me  
25 conveys the concept of adding new terms as well as changing

1 the existing terms. So, I fail to see that as a legitimate  
2 distinction.

3 In this case, the significant changes are a  
4 substantial increase in the amount of decommissioning  
5 funding that is required to be set aside and, second, the  
6 use of the guaranteed decommissioning fund as opposed to the  
7 mere speculation by Sequoyah Fuels that the funds will  
8 ultimately be available.

9 Those are significant changes, whether they are  
10 additional or they change the existing condition, they add  
11 significantly to the conditions under which Sequoyah Fuels  
12 can operate at that facility.

13 JUDGE GLEASON: Any response?

14 Mr. Axelrad?

15 MR. AXELRAD: As I pointed out before, the  
16 Commission has argued in Court, and the Court has agreed,  
17 that even though there are additional restrictions or some  
18 kind of restrictions imposed upon a licensee, that is not  
19 necessarily a license amendment.

20 This is a situation where the NRC is not changing  
21 anything that is being imposed by the licensee by its  
22 existing license conditions. It is requiring some  
23 additional things be done on at least an interim basis. To  
24 us, those are not license amendments. Those are apparently  
25 attempts by the NRC to enforce what the NRC believes are

1 existing requirements under the regulations.

2 The merit of the Staff's position with respect to  
3 whether it can properly impose those requirements is what  
4 this hearing is going to be all about. But those are not  
5 license amendments. The NRC clearly can impose restrictions  
6 as has been shown in TMI Alert without having the imposition  
7 of those restrictions considered to be 189(a) amendments of  
8 a license.

9 JUDGE BOLLWERK: Let me just go back to Mr. Hom  
10 for a second.

11 I take it that your argument is not that the Staff  
12 cannot issue an order that modifies a license or adds  
13 conditions, but simply that this order did not do so; is  
14 that correct?

15 MR. HOM: That's right.

16 JUDGE BOLLWERK: Ms. Curran, would you agree that  
17 there are situations where the Staff can issue an order that  
18 doesn't modify the license? I mean, the order imposes some  
19 kind of restrictions that they would have an reason to issue  
20 it, but it doesn't necessarily modify the license to be a  
21 189(a) proceeding, or arguably, does any order that the  
22 Staff issues going to modify their requirements and, as  
23 such, amends a license?

24 MS. CURRAN: Well, I will answer the last part  
25 first. I can envision a situation in which -- well,

1 supposing the Sequoyah Fuels license said, "You will have a  
2 guaranteed decommissioning fund of \$80 million," and  
3 Sequoyah Fuels didn't do it.

4 Then an enforcement order would go out saying,  
5 "This term is in your license and you must comply." That  
6 would not be amendment to the license. That would be an  
7 enforcement order to bring Sequoyah Fuels into compliance  
8 with its license.

9 JUDGE BOLLWERK: Is that what this was, Mr. Hom?

10 MR. HOM: I'm not sure that Staff would agree with  
11 that. I think that the ensuing proceeding would be the  
12 proceeding to enforce the order, period.

13 JUDGE BOLLWERK: So you wouldn't have to issue an  
14 additional order to enforce the license?

15 MR. HOM: I don't believe so. If I understand the  
16 hypothetical, you have an order that is issued that becomes  
17 final, imposing certain conditions. Then there is non-  
18 compliance with that order. I believe the next proceeding  
19 is enforcement of that order, not necessarily enforcement of  
20 something in the license.

21 JUDGE BOLLWERK: Well, I guess one of the things  
22 that is bothering me is your statement that all the order  
23 does is indicate requirements that the licensee is already  
24 subject to. I guess I am trying to figure out why issue an  
25 order that tells the licensee the requirements he is already

1 subject to.

2 MR. HOM: Well, it is not subject to with the  
3 specificity now contained in the order. But it is not  
4 imposing something that is, let's say, not contemplated by  
5 the existing regulatory scheme on decommissioning.

6 As I understand the case, with any licensee over a  
7 period of time in developing a decommission funding plan, et  
8 cetera, there are certain things that become more concrete  
9 and specific during the various stages.

10 This order is becoming, I suppose, more specific  
11 in terms of the amount of money that we are now specifying  
12 be in place, et cetera. But it doesn't go to something  
13 completely beyond what is contemplated in the regulations or  
14 decommissioning funding.

15 JUDGE BOLLWERK: So what you are telling me is you  
16 are flushing out the regulations here rather -- you are  
17 flushing out some of the terms of the regulations in terms  
18 of this specific case rather than modifying their license?

19 MR. HOM: Yes, although -- let me back up for a  
20 second. The Staff would not claim that one could not argue  
21 that almost any order which imposes some type of condition  
22 or requirement on the licensee could not necessarily be  
23 argued as somehow amending the license. I am not going to  
24 sit here that there is a complete -- there is a solid back  
25 and white distinction there.

1           The position here is that the Staff doesn't view  
2 it as clearly in a 189(a) category simply by, at least at  
3 the outset, the terms of 189(a). Probably for that reason  
4 more than any other reason, we do not view this as a 189(a)  
5 proceeding.

6           But there is not a black and white situation in  
7 every case. There may not be one here. I am not sure going  
8 to the next step, the ramifications of whether or not this  
9 is a 189(a) proceeding -- I am not sure if there are any  
10 ramifications that at least the Staff sees that fall from  
11 making this determination.

12           JUDGE BOLLWERK: Well, unless as Mr. Axelrad  
13 suggests -- which we will get to in a minute, the difference  
14 between the language, any interest that may be affected in  
15 the statute and the person whose interest is adversely  
16 affected in the regulations, but we will get to that in a  
17 second.

18           Just so I understand again -- I want to make sure  
19 I am clear on what the enforcement scheme is -- if the  
20 licensee is in violation of a provision of its license, you  
21 would or would not issue an order telling them to comply, or  
22 taking an enforcement action against them? I take it you  
23 would have to do something.

24           MR. HOM: If there is a violation of an expressed  
25 license condition, then there would be an order to require

1 compliance with that particular condition.

2 Contrast that with the situation where there is  
3 not necessarily -- I suppose there could be a situation --  
4 Your Honor, excuse me for consulting.

5 JUDGE BOLLWERK: Sure.

6 MR. HOM: There may be a situation as we believe  
7 it to be here where there is not an express condition in the  
8 license that covers the subject matter of this order, but  
9 yet the Staff has the ability to issue an order to address  
10 these concerns in the order. But there does not necessarily  
11 have to be an expressed condition in the license that gives  
12 rise to a violation leading to an order.

13 JUDGE BOLLWERK: In other words, what you are  
14 saying is that in certain actions that the licensee is  
15 taking, you find to not be consistent with the public health  
16 and safety, and you order them not to do that, or you say,  
17 "We are going to suspend your license because of those?"

18 MR. HOM: Exactly.

19 JUDGE BOLLWERK: All right. Let's keep going the  
20 same way -- to Mr. Axelrad and to Ms. Curran.

21 MR. AXELRAD: Just in further response to your  
22 question, Judge Bollwerk, 2.202(a)(1) in the case, that the  
23 Commission can institute a proceeding to modify, suspend, or  
24 revoke a license, or to take such other actions that may be  
25 proper -- therefore, you know, there may be action other

1 than amending a license.

2 2.202(a)(1) says that it will either allege the  
3 violations with which the licensee or other persons subject  
4 to the Commission's jurisdiction is charged, or the  
5 potentially hazardous conditions or other facts deemed to be  
6 sufficient grounds to the opposed action.

7 So a trigger for a Commission order can either be  
8 an alleged violation of something, or such other conditions  
9 as the Staff deems to be appropriate. They can do that  
10 either by modifying, suspending, or revoking a license, or  
11 taking such other actions.

12 In this particular case, although the situation  
13 isn't precisely clear to us -- and as I indicated that is  
14 part of what will have to be explored in this proceeding --  
15 the NRC apparently believes that Sequoyah is not, I think,  
16 in violation of something, but that needs to do something  
17 -- in violation of a license condition -- but needs to do  
18 something in order to be in compliance with some regulation  
19 of the Commission -- 40.36 or 40.42.

20 That will all be explored in this proceeding,  
21 whether or not, in fact, such actions are needed and whether  
22 in fact, as we dispute, Sequoyah does not have to comply  
23 with provisions of that type beyond its current compliance.

24 JUDGE BOLLWERK: Ms. Curran, do you have something  
25 to say?

1 MS. CURRAN: Well, I think it might help a little  
2 bit to look, in characterizing or determining whether to  
3 characterize this as a license amendment, to look at the  
4 context out of which this comes, and that is when Sequoyah  
5 Fuels submitted its license renewal application, it was  
6 required by Section 40.36 to submit a decommissioning  
7 funding plan which would have a guaranteed fund with funds  
8 in it that were adequate to decommission the plant.

9 Had Sequoyah Fuels continued to operate and have  
10 the license renewal proceeding gone on, that would have been  
11 subject to licensing review, the amount of the money in the  
12 fund. Of course, all that changed and Sequoyah Fuels didn't  
13 continue operating. The license renewal proceeding was  
14 dismissed.

15 But the Staff has now issued an enforcement order  
16 which imposes these requirements on Sequoyah Fuels. But  
17 those factual issues would have been licensing issues had  
18 the license renewal proceeding gone forward.

19 JUDGE GLEASON: They would have been license  
20 amendment issues?

21 MS. CURRAN: Well, they would have been reviewed  
22 in the license renewal proceeding.

23 JUDGE GLEASON: That is not my question. Would  
24 they have constituted license amendments which would then  
25 bring it in -- what we are talking about is whether it would

1. be categorized as a 189(a) proceeding, then?

2. MS. CURRAN: It is not 100 percent clear to me how  
3. they would have been treated, but that could have been the  
4. case, that in the context of the renewal proceeding, whether  
5. additional conditions were put on the license could have  
6. been treated as license amendments?

7. JUDGE GLEASON: All right. So what you are  
8. saying, Mr. Axelrad, is that -- were you finished?

9. MR. HOM: I have one more question. But go ahead.

10. JUDGE GLEASON: What you are saying is that in the  
11. context of the existing conditions, if you will, the fact  
12. that it is an attempt to make GA a co-insurer of producing  
13. the financial plans, the fact that the order calls for being  
14. able to be liable for additional funds even beyond the \$89  
15. million, if that becomes necessary -- none of those things  
16. would constitute an amendment to the license, in your view?

17. MR. AXELRAD: What I am saying is that what the  
18. Commission, what the Staff is proposing in this order, does  
19. not constitute amendments to Sequoyah's license. Whether or  
20. not those requirements that the NRC purposes to apply can be  
21. imposed upon General Atomics, that is a separate question,  
22. but I think it pinpoints even further that this order cannot  
23. be characterized as a license amendment because GA is not a  
24. licensee.

25. JUDGE GLEASON: Well, in some respects if GA is

1 found to be involved in this proceeding, it will have to be  
2 involved in some connection with your license, right,  
3 otherwise they wouldn't have any responsibility?

4 MR. AXELRAD: I think that is very much the case  
5 that is going to be argued by General Atomics. But I would  
6 just say further whether context GA may or may be involved,  
7 it is not as a licensee. The NRC has never treated it as a  
8 licensee. It has never sought to impose any licensee  
9 obligations upon it.

10 JUDGE GLEASON: All right.

11 MR. AXELRAD: Can I respond to just one thing that  
12 Mr. Curran said?

13 JUDGE GLEASON: Go ahead.

14 MR. AXELRAD: With respect to how the  
15 decommissioning plan would or would not have been treated as  
16 part of the license renewal process, the compliance with  
17 Section 40.36, the providing of a decommissioning funding  
18 plan or financial certification by licensees has, in fact,  
19 not been treated as a license amendment, and as a matter of  
20 fact, has been explicitly decided not to be a license  
21 amendment.

22 I was involved in another proceeding where, in  
23 fact, after a licensee had submitted his decommissioning,  
24 either financial certification or decommissioning funding  
25 plan under the regulation, someone had asked for a -- the

1 NRC Staff then issued an amendment incorporating that  
2 requirement into the license. Someone requested a hearing.

3 It was at that point, pointed out that the Section  
4 40.36 is self-implementing. All it does is require somebody  
5 to submit something on a particular time-frame. The Staff  
6 recognized that it made a mistake, and they withdrew its  
7 license amendment and indicated that a license amendment was  
8 not necessary for the implementation of the 40.36. The  
9 request for a hearing was denied because there was no  
10 license amendment to which it could have applied.

11 JUDGE GLEASON: All right. I think we have  
12 probably have had enough discussion on this subject to  
13 exhaust all of us, so let's go on.

14 I think in this case I am going to ask Ms. Curran  
15 to respond first because it is her Petition for Intervention  
16 that is the focus of the question. Then I would ask after  
17 Ms. Curran to respond to this, the Staff to respond, and  
18 then finally SFC and GA.

19 We want to explore your views on NACE's claim for  
20 intervention, whether it meets the judicial standard of  
21 alleging an injury-in-fact, which, of course, means that the  
22 Petitioner will suffer a distinct and palpable harm, that  
23 such injury can be traced to the challenged action, and that  
24 the injury is likely to be redressed by a favorable  
25 decision.

1 Does the issue of standing change where, like  
2 here, the Intervenors support an action, rather than oppose  
3 it?

4 Ms. Curran?

5 MS. CURRAN: Well that's the big question in this  
6 proceeding, I think. In our view, once a proceeding --  
7 well, it is clear from Bellotti and other Commission cases  
8 that we are not entitled to ask for a hearing on whether an  
9 enforcement order is adequate or not.

10 But once a request for a hearing has been lodged  
11 by the licensee, then a question arises as to whether the  
12 enforcement order will be carried out or not, or whether it  
13 will be defeated in the course of that proceeding. That  
14 gives Intervenors, such as NACE, an interest in the outcome  
15 of the proceeding.

16 JUDGE GLEASON: Are we plowing new ground here,  
17 Ms. Curran?

18 MS. CURRAN: Well, I don't think so, because in  
19 the Dairyland case, Intervenors were allowed to come into a  
20 case for the purposes of advocating the order that was  
21 proposed by the Staff and that was challenged by the  
22 licensee. So there is precedent for this within the NRC.

23 JUDGE GLEASON: Mr. Hom, do you have any comments  
24 in this area?

25 There may seem a time that all we are asking you

1. to do is repeat what you have already had in your motions.  
2. I would not want you to go away from this proceeding with  
3. that thought in mind. We read your motions very, very  
4. carefully.

5. I guess what we are trying to indicate is there is  
6. some concern among the Board about these issues. We are  
7. looking, perhaps, for some additional edification, if you  
8. will, on the subject. That is why we are bringing it up.

9. Mr. Hom?

10. MR. HOM: The Staff agrees that the reading of  
11. Bellotti is that in a situation such as this where there was  
12. the issuance of an order, I would say, generally in the  
13. category of affirmatively increasing safety -- let's use  
14. that category -- by sharing decommissioning funds -- that  
15. had there been no request for a hearing by the licensee, the  
16. Intervenors here under Bellotti would not have had an  
17. opportunity to request a hearing, to determine the adequacy  
18. of the measures in the order.

19. However, the Staff views that by reason of the  
20. request that was filed for the hearing, we then go to  
21. another test that maybe referred to as in La Crosse, this  
22. outcome of the proceeding test, where the Staff's position  
23. today is that by reference, or by measuring the outcome as  
24. whether the order is sustained and in place or whether the  
25. order is non-sustained, and, therefore, evaporates, is that

1 it is one of those two possible outcomes, conceivably  
2 detrimental to the Intervenor.

3 JUDGE GLEASON: Well, let me ask you the same  
4 question that I asked Ms. Curran. Are we plowing new ground  
5 here?

6 MR. HOM: I don't believe that it is new ground.  
7 I think the facts are different. There are not many, if  
8 any, commissioning and licensing appeal board decisions that  
9 have this set of facts. But if you use the test that was  
10 used in La Crosse, a situation where the licensee and the  
11 Staff apparently agreed after the issuance of the show-  
12 cause order in that case, that the additional -- I think it  
13 was a dewatering system there -- was not, in fact,  
14 necessary. But the Board said in that case that none of the  
15 Intervenor now have an opportunity to intervene in that  
16 case. I don't think that it is necessarily new ground here  
17 in utilizing that outcome of the proceeding test.

18 JUDGE GLEASON: Well, it is new ground in this  
19 sense, I would presume, or I would suggest, at least.  
20 Bellotti clearly is not applicable to this case, the way  
21 -- at least I view it, reading it.

22 Bellotti involved a Petitioner asking to expand an  
23 order. The licensee did not contest the order, if I recall.  
24 So, he is asking, really, for a new order, if you will,  
25 which is different than the facts of this case.

1           Then the question comes up as to whether La Crosse  
2 has some precedential value here. Of course, as SFC has  
3 argued, it is at best or at worst another licensing board  
4 case. We don't really have to pay too much attention to it,  
5 if I remember what you said, Mr. Axelrad.

6           If that were true, then we really are plowing new  
7 ground; aren't we, because there is no case on the subject?

8           MR. HOM: Well, the phrase -- the test essentially  
9 was articulated in those words in the Sheffield case,  
10 although again the facts were different in that case. I  
11 believe that involved the application for the renewal of a  
12 license and perhaps expansion of the facility.

13           It was not an enforcement proceeding of this  
14 nature. However, the test that was articulated there, as  
15 far as the Staff is aware, has not been overruled or refuted  
16 in some fashion by a later Commission decision.

17           Taking that test and attempting to apply it to the  
18 situation here, one could interpret that test as the  
19 intervenors here having a stake, let's say, in the outcome  
20 of this proceeding, whether, in fact, this order would be  
21 sustained or not.

22           JUDGE GLEASON: You are referring to the Sheffield  
23 case then?

24           MR. HOM: Yes.

25           JUDGE GLEASON: Did you refer to that case in your

1 response?

2 MR. HOM: I believe the case is cited, Your Honor.

3 JUDGE GLEASON: I guess I missed that.

4 JUDGE BOLLWERK: Let me just raise one question  
5 about Sheffield. Sheffield has authority for the  
6 proposition that I guess the Petitioner would assume if  
7 someone can come in without really relevance to the way they  
8 want to participate, on whose side they want to come in, it  
9 cites a case called Association Data Processing Service  
10 Organization where it says "camp," which is a fairly old  
11 standing case.

12 You have cases like Lujan, which are much more  
13 recent and seem to have tightened up the conditions for  
14 standing somewhat to the degree that they seem to require  
15 somewhat more of a direct injury.

16 I mean the injury here -- there is a chain which  
17 you can follow but it is contingent on several things and  
18 the injury strikes me under Lujan is now becoming a somewhat  
19 more direct injury. In other words, the action actually  
20 affects you directly and our action here, I mean one could  
21 say it might at some point but maybe that is when Ms. Curran  
22 comes in, when it does. If the Staff compromises, the order  
23 is at the time that she intervenes?

24 MR. HOM: Your Honor, are you saying that let's  
25 say the potential outcome here, that the order is not

1 sustained, is in your view an indirect injury?

2 JUDGE BOLLWERK: Well, the problem is I mean we -  
3 - the Staff is here to support this order and in theory the  
4 Staff is going to do the best job they can to do that. Now  
5 obviously I guess at the end of the proceeding it might turn  
6 out that we don't agree with the Staff's position. I  
7 suppose Ms. Curran can say, well, maybe I am harmed then.  
8 Maybe that's the point where she comes in, or arguably if  
9 the Staff decides to compromise this order by trying to  
10 settle the case with the Licensee, is that the point that  
11 she comes in?

12 I mean the injury here doesn't occur until the  
13 Staff has failed to do what it appears it is going to do,  
14 which is to support the order.

15 You are not coming in here saying you are not  
16 going to support the order?

17 MR. HOM: Right, but I mean I believe that the  
18 injury is sufficiently, directly potential enough in that I  
19 would not, I don't think the Staff would argue that some  
20 later time if it appears that we are going to lose this  
21 case, somehow that later time is a more appropriate time or  
22 somehow the injury then flows more directly to the  
23 Intervenor.

24 To me, at the outset of the proceeding if you can  
25 determine that there are several outcomes, one of which is

1 the order is wholly unsustainable or even only sustained in  
2 part, by looking at that as a realistic potential outcome  
3 that you would measure the Intervenor's injury by looking at  
4 the realistic potential outcome.

5 JUDGE BOLLWERK: And as far as you are concerned,  
6 Lujan doesn't change that requirement at all or cases like  
7 Lujan which are fairly --

8 MR. HOM: I don't believe that our position today  
9 would be Lujan significantly changes that understanding.

10 JUDGE GLEASON: Mr. Axelrad, in your remarks will  
11 you make some reference to the Sheffield case?

12 MR. AXELRAD: Yes, I certainly will.

13 In response to your basic question as to whether  
14 or not this case ploughs new ground, we certainly believe  
15 that it does in at least several ways.

16 One, it is a post-Bellotti case as opposed to the  
17 other cases which have been cited which are pre-Bellotti.

18 The other cases involve different situations both  
19 in terms of those that were licensing cases versus  
20 enforcement cases and enforcement cases that involve  
21 different kinds of orders than the orders here and it is  
22 also new ground in that it is the first case -- well, not  
23 necessarily, but it is a case now involving the new  
24 regulations which the Commission adopted a couple years ago  
25 with respect to enforcement orders and we think that the new

1 2.202(a)(3), which again we will discuss later under the  
2 Board's agenda, we think provides support for the position  
3 that we are about to describe to you.

4 We understand, Judge Gleason, that Bellotti  
5 involved a situation wherein a Petitioner wanted to have a  
6 more stringent relief than was proposed in an order and  
7 therefore differs from this case in that regard, but the  
8 Court in that case interpreted and then implicitly adopted  
9 the Commission's position as being that only those who  
10 oppose an order have an interest affected that entitles them  
11 to a hearing.

12 We think that is a very sensible rule that  
13 Bellotti expressed and we think it is particularly  
14 applicable here.

15 We have a situation here where Petitioners could  
16 not have asked the NRC to impose a more stringent or any  
17 kind of action upon the licensee. The Petitioners could not  
18 have forced, compelled the NRC to take enforcement action.

19 The NRC has issued an order. If the order is  
20 fully sustained, obviously there will not be any injury to  
21 the Petitioners, but even if the order is not sustained in  
22 whole or in part, the only effect upon the Petitioners is  
23 that they will be in the exact same situation that they are  
24 in right now, namely --

25 JUDGE GLEASON: If the order is not sustained?

1 MR. AXELRAD: Excuse me?

2 JUDGE GLEASON: If the order is not sustained?

3 MR. AXELRAD: If the order is not sustained, they  
4 will be in the same position that they would have been in  
5 before the order was issued. They could not compel the NRC  
6 to take action and they are not entitled to have the NRC  
7 take any particular action.

8 Moreover, this particular order includes a very  
9 specific reservation to the Director of NMSS to relax or  
10 rescind the order upon good cause shown. Even if the order  
11 were fully sustained, the situation could be that after the  
12 order has been sustained the Director still has that  
13 authority and could still take action which would relax or  
14 rescind the order.

15 In other words, what the Petitioners are claiming  
16 apparently is an entitlement to have the order in the form  
17 that it was issued remain in place forever, remain in place,  
18 cast in concrete, and that they cannot have. Those would be  
19 clear violations of the Bellotti principles.

20 With respect to the cases which existed pre-  
21 Bellotti and that might be viewed as possibly inconsistent  
22 with the interpretation of Bellotti, one is the LaCrosse  
23 decision. The LaCrosse decision, as I have pointed out in  
24 our pleading, was a licensing board decision that was never  
25 appealed --

1 JUDGE GLEASON: I don't think you have to discuss  
2 that anymore, because I think you handled -- unless you want  
3 to -- but the Sheffield case I would like to get your  
4 comments on.

5 MR. AXELRAD: Okay. The Sheffield case -- let me  
6 just point out one aspect of the LaCrosse case. It was a  
7 broader order than the order in this case.

8 JUDGE GLEASON: Excuse me, it was a --

9 MR. AXELRAD: Broader order. The order did not -  
10 - the issue specified in the LaCrosse case was not whether  
11 the order should be sustained. The issue specified in the  
12 LaCrosse case was whether the Licensee should install a  
13 dewatering system or whether he should shut down the  
14 facility if he doesn't install the system.

15 That gave a much broader context to the entire  
16 proceeding and of course the LaCrosse case as a issued  
17 decision was issued before Bellotti and was issued under the  
18 regulations as they then existed as opposed to 2.202(a)(3).

19 The Sheffield --

20 JUDGE GLEASON: What you are saying is factually  
21 it is not a precedent because it's a different set of  
22 circumstances.

23 MR. AXELRAD: Well, not only factually but the way  
24 the issue was stated. The issue was --

25 JUDGE GLEASON: That's what I mean by "factual."

1 MR. AXELRAD: Okay, but it's legal question, fine.  
2 If that is what you mean, Judge Gleason, then we agree.

3 JUDGE BOLLWERK: What you are really saying is if  
4 LaCrosse came up now, the Staff would not issue a -- well,  
5 they don't issue a show cause. They would simply issue an  
6 order saying you shall put in the dewatering system. They  
7 would have already made the decision that they are going to  
8 put in that --

9 MR. AXELRAD: Exactly, and the question would be  
10 whether the order should be sustained.

11 JUDGE BOLLWERK: All right.

12 MR. AXELRAD: Which is a narrow issue and, as I  
13 indicated before in the 2.202(a)(3) there would be a  
14 different question as to who can intervene and what the  
15 basis for intervention would be.

16 JUDGE BOLLWERK: Although isn't the -- I mean if  
17 the Intervenor in LaCrosse wanted that dewatering system in,  
18 although the Staff had made a contingent decision to do it,  
19 now that they have reached an actual decision to do it,  
20 arguably, why isn't their interest the same, I mean in both  
21 instances, in having that order sustained?

22 MR. AXELRAD: Well, I think that the decision in  
23 LaCrosse was influenced at least in part by the breadth of  
24 the way the issue was worded and apparently the  
25 encouragement of litigation of all aspects of whether or not

1 the dewatering system should be installed.

2 I think that when the issue is worded as whether  
3 or not an order should be sustained, it puts I think in  
4 starker relief the limited aspect of the proceeding, and, as  
5 we will discuss later, the limited possibility of  
6 Petitioners to intervene in a proceeding on whether the  
7 order should be sustained.

8 With respect to the Sheffield decision, we think  
9 that has a limited value in the Board's reaching a decision  
10 here. The Sheffield decision was a licensing proceeding,  
11 not an enforcement proceeding. It was a pre-Bellotti  
12 decision and, therefore, didn't obviously take into account  
13 the policy aspects of Bellotti and what Bellotti reflects.

14 In addition, the portion of Sheffield that is  
15 relevant here was dicta. The Board in Sheffield had decided  
16 that the Petitioners had not shown injury to either the  
17 organizations involved or to their members that gave them an  
18 entitlement to participate as a matter of right, and it was  
19 after reaching that decision in the language of page 741 of  
20 the decision. They then went on a couple of pages later to  
21 also address the question of whether someone could  
22 participate in a licensing hearing in support of a licensing  
23 action, but that was clearly dicta.

24 The Sheffield decision has also been put in doubt  
25 because of the decision we mention later on in Shoreham

1 where the appeal board, in a subsequent case involving  
2 whether or not someone could participate in support of the  
3 decision, specifically said that they were not reaching that  
4 decision, that that would raise substantial questions which  
5 they didn't have to reach and specifically declined to  
6 decide it. So the appeal board clearly in the Shoreham  
7 decision reflected that the question of whether someone  
8 could intervene, even in a licensing proceeding, to support  
9 a licensing application has not been decided and is open  
10 and, even more so we believe it is open in an enforcement  
11 proceeding, and we will discuss 2.203 later on.

12 JUDGE GLEASON: Did you discuss the Shoreham case  
13 in your briefing paper?

14 MR. AXELRAD: Yes.

15 JUDGE GLEASON: Where is it? That is all I wanted  
16 to know.

17 MR. AXELRAD: It is page 22, Note 11 in our  
18 answer.

19 JUDGE GLEASON: All right, let's go on, please.

20 MS. CURRAN: Judge, could I have an opportunity.

21 JUDGE GLEASON: Yes.

22 MS. CURRAN: There were a number of questions  
23 asked, and I would like a chance to respond also.

24 JUDGE GLEASON: All right, go ahead.

25 MS. CURRAN: I believe Judge Bollwerk asked

1 whether the Lujan decision changed the standard for the NRC.  
2 I don't believe so. I think the language that the Court of  
3 Appeals relied on its brief was basically the Supreme  
4 Court's observation that it was harder for third parties to  
5 achieve standing in a case where the agency was regulating  
6 someone else, but that Lujan didn't change the standard, it  
7 simply made that observation.

8 In this case, I think we have discussed in our  
9 brief the injury that NACE would suffer through its member  
10 Ed Henshaw if the order were not sustained, and I think it  
11 is also important to note here that the very fact that the  
12 NRC itself has determined that this order is necessary in  
13 order to meet its mandate for protecting public health and  
14 safety adds a great deal in terms of the potential injury  
15 that would be caused if the order were not sustained.

16 Judge Bollwerk also asked, why shouldn't NACE wait  
17 until some injury results, for instance if the NRC Staff  
18 withdraws its order? I think, for one thing, that would  
19 very impractical as this is the proceeding in which the  
20 legal obligations are being established between Sequoyah  
21 Fuels and General Atomics and the NRC, and that our wish is  
22 to have an opportunity to influence the outcome of that  
23 proceeding and ensure that the order is fully given effect,  
24 and it would seem to me that it would be very impractical to  
25 wait until something changed and then come in and basically

1 reopen a proceeding that was already very far down the road.

2 As I think Mr. Hom argued, one can easily enough  
3 foresee there are two possible outcomes to this, either the  
4 order is sustained or it isn't, and that if it isn't then  
5 one can reasonably predict what the outcome would be for  
6 NACE.

7 JUDGE GLEASON: Ms. Curran, there is another  
8 outcome and that is potential outcome, possible I should  
9 say, and that is that the order could be changed.

10 MS. CURRAN: I don't want to jump ahead in your  
11 agenda, but I think that gets us into the whole question of  
12 what kind of authority does this licensing board have in  
13 terms of, once a hearing has been started does the NRC staff  
14 have complete authority to change its order without any kind  
15 of input from the licensing board, and I don't think that  
16 that is --

17 JUDGE GLEASON: That gets us into another subject.

18 MS. CURRAN: Yes, and I don't want to go too far  
19 ahead.

20 I believe Mr. Axelrad tried to distinguish the  
21 LaCrosse case by saying that the scope of that hearing order  
22 was much broader than the hearing order in this case, and it  
23 seems to me that as a practical matter it is basically the  
24 same thing. The question of whether the NRC's October 15th  
25 order should be sustained necessarily conveys all those

1 factual issues that are embodied in the order. So I find it  
2 difficult to see a distinction between what happened in the  
3 LaCrosse case and what is happening here. The question is,  
4 should Sequoyah Fuels and General Atomics be required to  
5 make certain changes in order to meet the NRC's regulations.  
6 In LaCrosse the only difference was that the licensing board  
7 articulated the substantive contents of the order in its  
8 hearing order, but I think the result is the same. I don't  
9 think it is a grounds for distinguishing the case.

10 That is all I have.

11 JUDGE GLEASON: Thank you, Ms. Curran.

12 If we could roll on here, we have alluded to some  
13 respect to the standards in 2.714 versus the standards in  
14 2.202 before. Just so we can make our comments more  
15 directed, that any differences and highlight those  
16 differences, we would like to get your comments, starting  
17 once again with the Staff, as to whether the term "person  
18 whose interests may be affected," which is the standard in  
19 2.714, stands in the same position or is it different than  
20 the standard at 2.02 of "persons adversely affected."

21 Is my question clear, Mr. Hom?

22 MR. HOM: I think I understand it, Your Honor.

23 The Staff would more or less consider the two  
24 standards the same. I believe that we would argue that any  
25 person whose interests you would impute adversely affected

1 in 2.714. However, the two regulations contemplate  
2 potentially two different steps in a proceeding as is the  
3 situation here. In 2.202 we are speaking of parties to whom  
4 an order is issued against and by reason of our earlier  
5 discussion, those parties have certain rights if they are  
6 adversely affected by that order. However if there is no  
7 proceeding that follows because of a consent or whatever, if  
8 there is no proceeding that follows, then we do not get into  
9 the 2.714 area with NACE at that time. It is only until we  
10 establish a proceeding by reason of the licensees, for  
11 instance in this case, being adversely affected by the  
12 order, requesting a hearing, beginning a proceeding, at  
13 which time one would consider intervention under 2.714.

14 So the quick answer to your question, I believe,  
15 is that the standards are roughly the same even though the  
16 words are not identical, but they arise in different  
17 contexts.

18 JUDGE GLEASON: Mr. Axelrad.

19 JUDGE BOLLWERK: I guess let everybody go around  
20 and then I have some questions.

21 JUDGE GLEASON: Mr. Axelrad.

22 MR. AXELRAD: The regulations are fairly specific  
23 in this area, we believe. The Board's memorandum identifies  
24 five or six subsections of 2.202(a) and 2.202(b). All of  
25 those refer to the licensee or the other person to whom the

1 NRC has issued the order, namely the subject of the order  
2 except section 2.202(a)(3) which is a subsection which  
3 indicates who can request a hearing, and that section says a  
4 licensee or any other person adversely affected by the  
5 order, 2.202(a)(3) specifically is not, therefore, limited  
6 to just the subject of the order, but also refers to any  
7 other person adversely affected by the order.

8 That language was added by the Commission,  
9 specifically added by the Commission when it changed its  
10 rules with respect to the enforcement orders in 1991, and  
11 we believe that 2.202(a)(3) constitutes the Commission's  
12 interpretation of its obligations under Section 189(a)(1).  
13 In fact, when it adopted that regulation the Commission said  
14 that the final rule continues, the final being 2.202,  
15 continues the hearing rights afforded under Section 189 of  
16 the Act and in saying that it specifically cited  
17 2.202(a)(3). That appeared at 56 Federal Register 40,670 on  
18 August 15, 1991, when the Commission adopted 2.202(a)(3).

19 Later on in its explanation, the Commission stated  
20 that whether or not a licensee consents to an order, "other  
21 persons adversely affected by an order issued under Section  
22 2.202 to modify, suspend or revoke a license will be offered  
23 an opportunity for a hearing consistent with current  
24 practice and the authority of the Commission to define the  
25 scope of the proceeding on an enforcement order," and has

1 cited Bellotti. This was at page 40,678.

2 Our view is that the Commission, therefore, in  
3 adopting 2.202(a)(3) interpreted in an enforcement  
4 proceeding context what they meant when it talks about a  
5 person can request a hearing if its interest is affected by  
6 a proceeding. The Commission decided that in an enforcement  
7 proceeding it is only persons who are adversely affected by  
8 the order who can request a hearing.

9 JUDGE GLEASON: Does this mean, Mr, Axelrad, that  
10 no one can request a petition to intervene in a 202  
11 proceeding?

12 MR. AXELRAD: No. I was going to go on to discuss  
13 that.

14 JUDGE GLEASON: All right. Go ahead.

15 MR. AXELRAD: It is not precisely clear whether  
16 2.714(a) authorizes petitions to intervene in an enforcement  
17 proceeding, but assuming that it does, 2.714(a) talks about  
18 persons whose interest may be affected by a proceeding. As  
19 the Board pointed out, that is the same language that is in  
20 189(a), therefore, when the Commission again in an  
21 enforcement context defined in 2.202(a)(3) what constitutes  
22 a person whose interest is affected by a proceeding as  
23 meaning a person who is adversely affected by the order,  
24 similarly that interpretation must also apply to 2.714(a).

25 If the language at 2.714(a) is any broader than

1 that, then it means that Section 2.202(a)(3) violates the  
2 act because it doesn't provide a sufficient scope of persons  
3 who can request a hearing. So in our view the language in  
4 2.714(a), which is the same language as appears in 189(a)  
5 should be interpreted in the same fashion as the Commission  
6 did adopting 2.202(a)(3), namely somebody who is adversely  
7 affected by the order.

8 Now we later go on to show that it really doesn't  
9 make any difference because, as we have described before,  
10 even if you try to give the language "person affected by a  
11 proceeding" any broader meaning, Petitioners in an  
12 enforcement proceeding are not affected by the order because  
13 they don't wind up having any -- there is a return to the  
14 status quo, even if the order is not enforced. So we don't  
15 think it winds up necessarily having a practical effect, but  
16 we do think that the regulations interpreted as a whole  
17 indicate that only people who can show that they are  
18 adversely affected by the order itself can either request a  
19 hearing or petition to intervene.

20 JUDGE BOLLWERK: Why would the Commission use  
21 different language to express the same thing in two  
22 different spots? You are saying the language is coextensive  
23 then?

24 MR. AXELRAD: Sure. I think the reason is that  
25 2.714(a) is a section which applies to a petition to

1 intervene in all of the various proceedings that (g) might  
2 apply to, including licensing proceedings, for example, and  
3 2.714(a) was adopted well before 2.202(a)(3) was adopted.  
4 It wasn't until the Commission adopted the specific  
5 provision of 2.202 that referred to enforcement orders that  
6 they focused on who can request a hearing in those  
7 proceedings, and there was no need to go back.

8 JUDGE BOLLWERK: If I understand what you are  
9 saying, 2.714 could just as readily be amended now to say  
10 "any person whose interest may be adversely affected" since  
11 interests who may be affected and adversely affected mean  
12 the same thing, correct or not?

13 MR. AXELRAD: I think the emphasis is wrong. I  
14 think we would all agree that the interests affected must  
15 mean interests adversely affected. The question is, is it  
16 an interest adversely affected by the order, or interests  
17 adversely affected by an act under the proceeding? I think  
18 the commission said it is interest adversely affected by the  
19 order.

20 We go on to say that even if you treat the outcome  
21 of the proceeding different than order, it doesn't make any  
22 difference because we don't think the petitioners here are  
23 affected that way, but the language specifically is  
24 interests adversely affected by the order.

25 JUDGE BOLLWERK: So you are saying that Ms.

1 Curran's interest is not adversely affected by the order,  
2 but it may be affected by the outcome of the proceeding?

3 MR. AXELRAD: No.

4 JUDGE BOLLWERK: You are saying no, but you are  
5 saying there is a distinction between the two.

6 MR. AXELRAD: The language is different. The  
7 Commission specifically says, the only people who can  
8 request a hearing are people whose interest is adversely  
9 affected by the order. We think that same language really  
10 in an enforcement proceeding context is an interpretation of  
11 the language in 2.714(a).

12 JUDGE BOLLWERK: But it is not as broad as what is  
13 in 2.714(a)?

14 MR. AXELRAD: No, but if you read 2.714(a)  
15 broader, then you must read Section 189(a) broader also  
16 sand, therefore, 2.202(a)(3) constitutes an improper  
17 interpretation of the act by the Commission, and I think  
18 that the Board should interpret the regulations as  
19 consistent with the statutes as the Commission obviously  
20 wants to comply with statutes when it adopts its  
21 regulations. I don't think this Board should likely decide  
22 that the Commission improperly interpreted Section 189(a) of  
23 the act when it adopted 2.202(a)(3).

24 JUDGE GLEASON: Maybe, and the most that should be  
25 said for 202 is that it is not a model of clarity.

1 MR. AXELRAD: I think 2.202(a)(3) is a model of  
2 clarity.

3 JUDGE GLEASON: You do?

4 MR. AXELRAD: Yes.

5 JUDGE GLEASON: Then I don't understand the  
6 discussion we have been having for the last ten minutes.

7 MR. AXELRAD: Because we went out to 2.714(a),  
8 2.714(a) is not a model of clarity because 2.714(a) does not  
9 distinguish between enforcement proceedings and licensing  
10 proceedings, 2.202(a)(3) specifically addresses enforcement  
11 orders and who can request a hearing. I think it is very  
12 clear.

13 JUDGE GLEASON: I am glad you do.

14 JUDGE BOLLWERK: Ms. Curran, do you have anything  
15 to say, and then I may come back to Mr. Hom, and sort of get  
16 everybody's views here, and then we will to sort this out.

17 MS. CURRAN: It appears to us that Section 2.202  
18 simply sets out the process for a licensee to request a  
19 hearing as a right and an enforcement, or that is issued  
20 against it. The licensee doesn't have to go through 2.714.  
21 That regulation is different. It applies to different  
22 parties. It applies to members of the public. In our  
23 view, it is broader.

24 JUDGE GLEASON: How do you fashion a path, if you  
25 will, for a petition to intervene in .202?

1 MS. CURRAN: Well, the path is created by Section  
2 2.714.

3 JUDGE GLEASON: I didn't ask that question. I  
4 asked it to .202. How do you define the path in .202? You  
5 don't, obviously?

6 MS. CURRAN: Well, .202 is restricted to defining  
7 the rights of persons who are adversely affected by the  
8 order. That is why we weren't able to request the hearing  
9 when the order was issued because we didn't file under  
10 Section 2.202. But Section 2.714 addresses people who are  
11 adversely affected by the proceeding. Then we get back to  
12 the outcome test in Sheffield.

13 So I don't think we ever did file under 2.202, nor  
14 is it necessary for us to file in there in order to request  
15 a hearing under 2.714.

16 JUDGE GLEASON: I agree with you. I am not  
17 disagreeing with you. All I am trying to establish is that  
18 there is no route in .202 for somebody filing a petition for  
19 intervention. You must go to 2.714. I think since .202  
20 came after .714, they could have clarified that.

21 MS. CURRAN: But they didn't.

22 JUDGE GLEASON: Mr. Alexrad seems to think it is a  
23 model clarity. I get confused on it, but since they --  
24 because they had a chance to refer to 2.714 in .202, but  
25 they did not.

1 MS. CURRAN: Or, they could have amended Section  
2 2.714 to say --

3 JUDGE GLEASON: Or they could have done that.

4 MS. CURRAN: -- in an enforcement proceeding, any  
5 person who would be adversely affected by the order, and  
6 then we would be out.

7 JUDGE GLEASON: That's right.

8 Go ahead, Paul. I think she is finished.

9 JUDGE BOLLWERK: Okay. Let me see if I understand  
10 what Mr. Hom is saying. You are saying, in a nutshell, that  
11 2.202 only affects licensees -- those perhaps who perhaps  
12 are not licensees, but the subject of the order -- let me  
13 make a third category -- and perhaps someone who in seeing  
14 the Staff's order says, "The Staff says that this is  
15 consistent with the public health and safety, to fix Widget  
16 A. I think that Widget A, if it is fixed, is going to cause  
17 total destruction of the facility. Therefore, I think my  
18 interest is adversely affected by this order, and I can come  
19 into the proceeding."

20 But this is not what Ms. Curran is saying. She is  
21 saying she wants the order sustained. This person is saying  
22 they do not want the order sustained because, in fact, it is  
23 against the public health and safety to do that.

24 MR. HOM: Judge Bollwerk, if I said that, I  
25 misspoke. What the Staff's position would be, would that

1 that 2.202 affects only licensees against which an order is  
2 issued, or persons other than licensees such as people  
3 falling under the "wrongdoer rule," for instance, which I  
4 believe was the reason for the amendment in 1991 of 2.202 to  
5 cover --

6 JUDGE BOLLWERK: Right, persons who are not named  
7 in the license but whose activities affect the license or  
8 involve the license.

9 MR. HOM: Exactly, exactly. That would be -- the  
10 Staff's understanding of the scope of the parties that would  
11 be addressed by 2.202 --

12 JUDGE GLEASON: Excuse me a minute. Without  
13 trying to get to a new subject, does GA fit within that  
14 category of other persons in this proceeding?

15 MR. HOM: GA, for the purposes of this order, does  
16 fit in that category.

17 JUDGE GLEASON: All right. Thank you.

18 JUDGE BOLLWERK: They're named in the order, I  
19 guess?

20 MR. HOM: They are named in the order. The order  
21 is issued against them. They are adversely affected by that  
22 order.

23 Persons in NACE's position would not come under  
24 2.202, but would have to seek intervention under 2.714.

25 JUDGE BOLLWERK: So, what flows from that, if I

1 understand you, then, is that the order that was issued and  
2 the notice for persons adversely affected to request a  
3 hearing, was not noticed to NACE, because they were not one  
4 of those persons?

5 MR. HOM: That's correct.

6 JUDGE BOLLWERK: So, what follows from that, then,  
7 is the Commission, essentially, has never issued a notice  
8 for people like NACE to come in. We have never issued a  
9 2.714 notice that says, "All Intervenors, now is the time,"  
10 who don't fall under 2.202, but nonetheless are persons  
11 whose interest may be affected?

12 MR. HOM: I don't know what the Commission has  
13 done in the past, Your Honor.

14 JUDGE BOLLWERK: Well, the problem is the  
15 Commission hasn't done any of this in the past. There has  
16 never been any order, any notice issued other than what is  
17 in the enforcement order. Now, maybe the Commission should  
18 have been. I guess the question is: Is that what we should  
19 be doing now?

20 MR. HOM: Well, I think there may be a gap here --

21 JUDGE BOLLWERK: Maybe.

22 MR. HOM: -- in the sense that -- I think it is  
23 fairly, well, at least the Staff's position is that under  
24 2.202, and an order of this nature, the notice goes to those  
25 affected by the order, such as SFC, GA, and other persons

1. adversely affected by that order as the order itself said.

2. If NACE were somehow adversely affected by that  
3. order, then they would --

4. JUDGE BOLLWERK: Well, let's put it in context.  
5. Ms. Curran has said she is adversely affected in some way,  
6. but you are saying she was not adversely affected by the  
7. order, but by the proceeding.

8. MR. HOM: Right. I believe Ms. Curran said in one  
9. of her filings that she was not adversely affected by the  
10. order, and, in fact, that the order would be beneficial to  
11. NACE's interests.

12. But she is saying, as I understand it, that if you  
13. look at the outcome of the proceeding, if there is such a  
14. proceeding which now we have, but stepping back there may  
15. not have been one had GA and SFC consented, but given that  
16. there is a proceeding now, she is arguing that there is one  
17. outcome, and another outcome -- one outcome could adversely  
18. affect NACE's interests.

19. So, you don't get to analyzing NACE's interests  
20. until you have come to the point where a proceeding has  
21. begun on determining whether the order is to be sustained,  
22. and 2.202 only goes to those parties to whom the order is  
23. adversely affecting, not whether the sustaining of the order  
24. not would adversely affect them.

25. JUDGE BOLLWERK: Now, Section 189(a) talks about

1 in any proceeding under this Act for the granting,  
2 suspending, revoking, or amending of any license.

3 Does the proceeding begin when the application  
4 comes in, or does the proceeding begin when the Notice of  
5 Hearing is issued? I mean, we are in a pretty -- I mean,  
6 this has some broad effect from 189(a) in terms of what we  
7 are talking about here.

8 Of course, there is an argument that the 189  
9 doesn't even apply, but given the regulations probably --  
10 the language, anyway, seems to track it.

11 MR. HOM: Your Honor, I believe, that I have seen  
12 the term "proceeding" used differently, unfortunately, in  
13 the work -- in things that I have come across since I have  
14 been in the Commission.

15 JUDGE BOLLWERK: I guess in this context, did the  
16 proceeding begin when you issued the order, or did the  
17 proceeding begin when the Notice of Hearing was issued after  
18 -- or when SFC and GA requested a hearing and then the  
19 Commission then sent it over for the Board to convene in a  
20 hearing?

21 MR. HOM: In this context for the purposes of the  
22 regulations that we are discussing now, the Staff's position  
23 would be that the proceeding did not begin until SFC and/or  
24 GA requested a hearing on the matter.

25 JUDGE BOLLWERK: So, therefore, the notice and the

1 order that was issued did not tell Ms. Curran to do  
2 anything?

3 MR. HOM: That is correct, assuming she was --

4 JUDGE BOLLWERK: So she essentially -- well, she  
5 knows about it, obviously, but other Intervenors that are  
6 out there may not and we should issue a notice saying,  
7 "Intervenors, now come in"?

8 MR. HOM: Assuming she was not adversely affected  
9 by the order, the order did not tell her to do anything.

10 JUDGE BOLLWERK: You are saying someone in her  
11 situation who wants to sustain the order, in fact, is not  
12 adversely affected?

13 MR. HOM: That's correct.

14 JUDGE BOLLWERK: Okay.

15 JUDGE GLEASON: Mr. Axelrad?

16 MR. AXELRAD: In response to your question, Judge  
17 Bollwerk, when the Commission adopted these regulations in  
18 on August 15, 1991, at page 40,678, they talk about this  
19 changed regulation -- and this was a change away from the  
20 Order to Show Cause adopting a new demand for information  
21 regulation, and adopting the explicit provision of 2.202  
22 that applies now.

23 JUDGE BOLLWERK: I have a copy of that in front of  
24 me, but it doesn't have the page numbers on it. Can you  
25 give me a reference or a footnote or something where that is

1 hear? It is undifferentiated in terms of pages.

2 MR. AXELRAD: Well, it is under III, the new  
3 regulations.

4 JUDGE BOLLWERK: Okay. All right. Just a second,  
5 here; III.

6 MR. AXELRAD: Under III(a), Revisions to  
7 Procedures to Issue Orders.

8 JUDGE BOLLWERK: All right. Just a second,  
9 III(a). Okay.

10 MR. AXELRAD: There is a sentence which reads,  
11 "This revision to the regulations governing orders changes  
12 the rules in Dairyland Power Cooperative, and Consumers  
13 Power Company" --

14 JUDGE BOLLWERK: Okay. I have that.

15 MR. AXELRAD: -- by setting the point at which a  
16 proceeding begins for purposes of triggering the  
17 adjudicatory rights under Section 189(a) of the Atomic  
18 Energy Act to the point of issuance of an order compelling a  
19 licensee or other person to take or refrain from certain  
20 actions rather than the point where the Agency merely  
21 demands information to show why no action should be taken.

22 So, I think with respect to your specific  
23 question, the proceeding begins when the order has been  
24 issued.

25 But apart from that, I guess the only response

1 that I have to what the Staff has indicated, is that I  
2 believe that the Staff ignores that 2.202(a)(3) constituted  
3 the Commission's interpretation of the rights under 189(a)  
4 and that by the Commission interpreting the right to request  
5 a hearing as being limited to persons who are adversely  
6 affected by the order, the Commission was interpreting the  
7 language of persons whose interests can be affected by a  
8 proceeding in 189(a).

9 That governs, as far as we are concerned, not only  
10 who can request a hearing under the 2.203(a)(3) provisions,  
11 but also if somebody can somehow request to intervene under  
12 2.714(a), that that person has to be one and the same.

13 Because of the Commission's interpretation and  
14 because of the explanation we have given before, if you  
15 could not request a hearing, you could not petition to  
16 intervene, either.

17 JUDGE BOLLWERK: Well, if this is not a 189(a)  
18 proceeding, are we governed by what this says?

19 MR. AXELRAD: I think we are governed by the  
20 Commission's regulations.

21 JUDGE BOLLWERK: Well, it talks about triggering  
22 the adjudicatory rights under Section 189(a). Now, your  
23 argument is there are not adjudicatory rights under 189(a)  
24 because this isn't a 189(a) proceeding.

25 MR. AXELRAD: No, but it is a proceeding under

1 2.203(a)(3). It is a proceeding under 2.202. What I was  
2 giving was a background of how 2.202 was adopted and what it  
3 means.

4 JUDGE BOLLWERK: Right, but one way to read that  
5 is that in 189(a) proceedings, that is what it now means.  
6 But this isn't a 189(a) proceeding. I mean, in fact, the  
7 Commission didn't speak to this situation.

8 MR. AXELRAD: No, but to the extent that the  
9 issuance of an order triggers a proceeding, I don't perceive  
10 any difference as to when the proceeding will be triggered  
11 under 189(a) versus any other kind of an order. I think the  
12 Commission has issued a regulation talking about --  
13 specifying who can request a hearing. That is what 2.203(a)  
14 provides.

15 Now, theoretically if this is not a 189(a)  
16 proceeding, then no one has a statutory right to a hearing.  
17 However, the Commission has provided a right to a hearing  
18 under its regulation and the order issued here, which  
19 implements -- which is consistent with the regulations,  
20 specified that a hearing could be requested by Sequoyah, GA,  
21 or any other person adversely affected by the order. It  
22 followed 2.203. They are one and the same.

23 JUDGE BOLLWERK: So the bottom line with your  
24 argument is -- let's put aside -- I recognize you don't  
25 agree that Ms. Curran is a person whose interest may be

1 affected, or under 189(a) or under the regulation -- but if  
2 she were to be such a person, if we were to interpret the  
3 statute that way, which you read as consistent with the  
4 language in the regulation, that 189(a) says that any person  
5 whose interest may be affected is the same as .202 saying  
6 any persons whose interest may be adversely affected.

7 MR. AXELRAD: Adversely affected by the order.

8 JUDGE BOLLWERK: By the order.

9 MR. AXELRAD: Right.

10 JUDGE BOLLWERK: All right. If we were to read  
11 those as reaching the same group of people, then in theory,  
12 that her notice was at the time the order was issued, and  
13 that was the only notice she was entitled to?

14 MR. AXELRAD: Yes, and as a matter of fact, the  
15 notice -- the order was published in the Federal Register,  
16 thereby providing notice to the world at large, which is  
17 quite often the way the notices are provided when  
18 unspecified people who may or may not be adversely affected  
19 by any action, that the notice they get is the notice in the  
20 Federal Register.

21 It turns out in this particular case in addition  
22 to that, that the order was sent directly to NACE and  
23 others. So they had actual notice in addition to  
24 constructive notice in the Federal Register.

25 JUDGE BOLLWERK: Right, although as a legal

1 matter, to whom the notice is issued sort of controls who  
2 has notice. I mean, if you are not a person adversely  
3 affected, if there is a difference in the language, if you  
4 read the order and said, "Well, I am not adversely affected,  
5 you never had notice.

6 Well, I don't want to get into that. You heard my  
7 discussion with Mr. Hom.

8 MR. AXELRAD: Let me just add one word. I would  
9 think that if the Commission was specifically aware of  
10 people who were adversely affected by the order, they would  
11 have sent a copy of that to the people adversely affected;  
12 therefore, they sent copies to Sequoyah. They would name  
13 them in the order and issue -- and send them a copy of the  
14 order.

15 The reason for the language in the order, which is  
16 published in the Federal Register that says "other persons  
17 adversely affected by the order can also request a hearing,"  
18 is to make sure that the world at large is aware that they  
19 can also request a hearing if they are adversely affected.

20 JUDGE GLEASON: Let's travel on here.

21 I would like to ask about the governing -- I think  
22 you have already answered this question about the governing  
23 standards for a late filed petitioned under .202 -- and I  
24 presume you just read .714 into that, or how would you  
25 answer that, Mr. Axelrad?

1 MR. AXELRAD: With respect to the late filed  
2 answer, Your Honor?

3 JUDGE GLEASON: The late filed petition, yes,  
4 under .202.

5 MR. AXELRAD: Well, the late filed answer under  
6 2.202, the order is not specific about that, and the 2.202  
7 regulation is not specific. I think that an argument could  
8 be made that late filed answers are not permitted at all,  
9 but it does seem to us that that is not the -- that the  
10 filing time, the 20-day period, is not a jurisdictional-  
11 type requirement. It is not a statute of limitations, and  
12 that, therefore, late filed answers would be permissible.

13 In the absence of a specific regulation that  
14 covers that, I think the NRC would probably use the 2.714  
15 provisions as being the --

16 JUDGE GLEASON: As being the model of clarity that  
17 you are just referring to again, I want to remind you.

18 [Laughter.]

19 JUDGE GLEASON: All right. Thank you.

20 Anyone else want to comment on that?

21 MS. CURRAN: I would.

22 JUDGE BOLLWERK: I think we skipped one question.

23 JUDGE GLEASON: I wanted to.

24 JUDGE BOLLWERK: Well, I would like to get an  
25 answer.

1 JUDGE GLEASON: All right.

2 Yes, Ms. Curran?

3 MS. CURRAN: The question of the application of  
4 the late filed contingent standard, perhaps related to Judge  
5 Bollwerk's question about when the proceeding began. Mr.  
6 Axelrad cited a Federal Register notice that said it began  
7 at the time that the order was issued.

8 But the fact remains that our interests were not  
9 adversely affected until Sequoyah Fuels and GA requested a  
10 hearing on the order. So that in terms of the timeliness or  
11 good cause of NACE's Petition to Intervene, I think that  
12 still has to be to the Judge from the time when the hearing  
13 requests went out.

14 JUDGE BOLLWERK: Aren't you saying that your  
15 interests were adversely affected, but it was a contingent,  
16 it was contingent on them filing their hearing request?  
17 Your interest has always been the same, which is seeing that  
18 the order is sustained. Now, under Bellotti, until they  
19 came in and filed their hearing request, you couldn't act on  
20 the interest, but the interest was still there?

21 MS. CURRAN: I suppose that might be one way of  
22 putting it, but certainly it hadn't come to fruition and  
23 there are many instances in the Sequoyah Fuels licensing  
24 case or previous enforcement proceedings in which Sequoyah  
25 Fuels didn't challenge enforcement orders, and so our

1 interest never really ripened into an adverse --

2 JUDGE BOLLWERK: What is to preclude Intervenor  
3 though from being required to file a petition, and then if  
4 there is no request for hearing by the Licensee the  
5 proceeding is simply over?

6 MS. CURRAN: Well, that might be all right if we  
7 hadn't been told on several other occasions by the NRC that  
8 that wasn't appropriate, that we might as well not bother  
9 because we were not considered to be persons adversely  
10 affected by that order in any respect.

11 JUDGE BOLLWERK: Who told you that? I'm  
12 interested to know who is --

13 MS. CURRAN: Well, in the Bellotti case, for one,  
14 that we had no right to a hearing on that order, period.

15 JUDGE BOLLWERK: Well, in the Bellotti case you  
16 had no right to an order given that the Licensee was not  
17 contesting the order. I mean that --

18 MS. CURRAN: That's right, that's right.

19 JUDGE BOLLWERK: All I am saying is clearly your  
20 interest has a contingency that has to follow, which is they  
21 have to request a hearing, but why does that keep you from  
22 filing an intervention petition in line with the order --

23 MS. CURRAN: Well, we relied on --

24 JUDGE BOLLWERK: -- if your interest was in fact  
25 affected.

1 MS. CURRAN: I think that we did have a right to  
2 rely on the specific language of the order, which said to us  
3 any person whose interest is adversely affected by this  
4 order may request a hearing. That order did not apply to us  
5 by its own terms and I think that we have the right to rely  
6 on the language, the plain language of the order in deciding  
7 what to do.

8 I don't think we were required to guess what  
9 hidden meaning might be there.

10 JUDGE BOLLWERK: So you are saying the problem  
11 with the order and with the regulation is that the word  
12 "proceeding" is what is important to you, not the word  
13 "order." Your interests are adversely affected by the  
14 proceeding but the regulation says "the order," even though  
15 the Commission in this rulemaking in the background  
16 statement seems to define the proceeding as beginning with  
17 the order.

18 MS. CURRAN: Whether or not the proceeding begins  
19 with the order, the proceeding does not begin to affect our  
20 interests adversely until a hearing is requested by the  
21 Licensee, General Atomics.

22 I think that is the key factor for the  
23 intervenors.

24 It doesn't really answer the question of when our  
25 interest is adversely affected to say the proceeding begins

1 when the order issues.

2 JUDGE BOLLWERK: Well, again, unless the  
3 Commission is recognizing that your interests may be  
4 contingent but nonetheless want you to file an intervention  
5 petition when the proceeding begins, which is when the order  
6 is issued.

7 MS. CURRAN: Well, again, that was -- the plain  
8 language of the order did not appear to apply to us.

9 JUDGE BOLLWERK: Okay. Mr. Axelrad?

10 MR. AXELRAD: Just one small point. Even though  
11 NACE relies on the LaCrosse precedent in a number of  
12 respects, I would note that in the LaCrosse situation the  
13 Petitioner there did file within the time specified for  
14 request for a hearing.

15 MS. CURRAN: LaCrosse was also before Bellotti, in  
16 which it was clarified that there was no point.

17 MR. AXELRAD: I'm glad that Ms. Curran admits that  
18 Bellotti changes LaCrosse in a number of respects.

19 MS. CURRAN: At least in that one minor one, Mr.  
20 Axelrad.

21 JUDGE BOLLWERK: Did we get a response from the  
22 Staff on this question?

23 JUDGE GLEASON: No.

24 JUDGE BOLLWERK: One of the things in trying to  
25 understand the way all these regulations work together is

1 the question of what an answer requires in terms of an  
2 answer under 2.202 requires versus what an intervention  
3 petition must contain at some point under 2.714 and 2.202  
4 talks about simply a specific statement of the issues of law  
5 or fact that are raised or controverts it -- I'm sorry. You  
6 have to have bases for contention. Basically for the answer  
7 all you have to do is accept or deny what is in the order.

8 I think the thing that is confusing me or I am  
9 having trouble understanding is when you file contentions,  
10 Ms. Curran, what are your contentions going to say other  
11 than what an answer would say, which is we agree with the  
12 Staff on this point or we don't?

13 MS. CURRAN: Well, I think that in this case that  
14 may be what the contentions amount to, but Section 2.714 is  
15 pretty clear that we do have to file contentions and I think  
16 it may be that the practical result in an enforcement  
17 proceeding in which we are only entitled to raise the issues  
18 that have already been raised by the Staff is that we  
19 identify for you those issues that we want to raise and that  
20 we rely on the Staff's enforcement order as basis for those  
21 issues. It may be that our contentions look a lot like the  
22 enforcement order but Section 2.714(b) does seem to apply to  
23 us, so that's what we would do in response.

24 JUDGE BOLLWERK: So there is really not much  
25 difference between what you would file, if you filed an

1 answer under 2.202 and what you would file under 2.714 to  
2 meet the contention requirement. Is that correct or not?

3 MS. CURRAN: Well, I'm thinking that the answer of  
4 the Licensee was to admit or deny various allegations and  
5 the regulations require us to provide specificity and basis,  
6 so I think we'd probably have to go into some more detail  
7 about the basis for our position, which would rely for the  
8 most part on the enforcement order and might add additional  
9 facts where we felt it was necessary.

10 JUDGE BOLLWERK: Let me just -- this is where I'm  
11 coming from, you understand that -- there are two possible  
12 ways this can be read. One is that 2.202 encompasses this  
13 whole thing, that everything that you needed to do was  
14 within that regulation. In other words, that 2.202 applies  
15 to one set of persons, the Licensee and some others; the  
16 2.714 applies to other folks like you.

17 If 2.202, and I guess what I am trying to  
18 understand is is there a distinction between the two in  
19 terms of the contentions or the answer which would indicate  
20 that 2.714 wants something more from an Intervenor as  
21 opposed to simply what you would file if you were required  
22 to file an answer.

23 MS. CURRAN: Well, I don't think 2.202 applies to  
24 us.

25 JUDGE BOLLWERK: Let's assume it did. Is there

1 something, can you point to anything that is different in  
2 what you have to file in 2.714 with regard to what you have  
3 to file under 2.202 in an answer?

4 MS. CURRAN: Well, I believe 2.714 the  
5 requirements are more specific, requiring specificity and  
6 basis for the allegations, so --

7 JUDGE BOLLWERK: Although you said the basis of  
8 your contention is going to be the Staff's order --

9 MS. CURRAN: Right.

10 JUDGE BOLLWERK: -- which is essentially what the  
11 answer says, which is admit or deny what is in the Staff's  
12 order.

13 MS. CURRAN: Right.

14 JUDGE GLEASON: Except you are going to just  
15 provide more detail in the contentions than just the we  
16 agree, we disagree that you have already supplied.

17 MS. CURRAN: I think that sums it up, what we  
18 would be required to do.

19 JUDGE BOLLWERK: And -- I'm sorry, go ahead.

20 MS. CURRAN: I am not sure that the Commission  
21 anticipated the problem.

22 JUDGE BOLLWERK: That may well be the case.

23 Anybody else have anything on that subject? I  
24 don't want to belabor it if there's --

25 MR. AXELRAD: Only that I do agree. I think, like

1 Ms. Curran was saying implicitly, is that they would have to  
2 provide more information in terms of specificity and basis  
3 for any contention they raise and then just a denial or  
4 admission with respect to any of the allegations by the  
5 Staff.

6 For example, they do have to provide a concise  
7 statement of alleged facts or expert opinions supporting the  
8 contention that they rely upon, and I think they are going  
9 to have to identify what those facts are and what expert  
10 opinion they are relying on and I don't believe they are  
11 just saying they are relying on the Staff would be what's  
12 intended here. They would have to show what they are going  
13 to bring to the party, what kind of expert opinion they are  
14 going to rely on.

15 JUDGE GLEASON: We have already crossed that road,  
16 Mr. Alexrad

17 JUDGE BOLLWERK: Mr. Hom, your position again on a  
18 late-filed answer, is there such a thing and what standards?

19 MR. HOM: On a late-filed answer, I would say  
20 there is no standard expressly applicable in the  
21 regulations.

22 You could make reference to the standards for  
23 late-filing in 2.714, but I believe that the only one that  
24 really is applicable and of any import is good cause for a  
25 late-filed answer and the only thing I would --

1 JUDGE BOLLWERK: We're really talking about the  
2 discretion of the Board, fairly broadly.

3 MR. HOM: Right, okay.

4 JUDGE GLEASON: All right. The next area, the  
5 terms of the October 15th order authorizes that for good  
6 cause the conditions of the order can be relaxed or  
7 rescinded by the Director of the Office of Nuclear Materials  
8 And Safeguards.

9 Since NACE cannot object to the Staff action on  
10 that order, it is contended that NACE's interest is too  
11 illusory to provide its standing, and I guess we would like  
12 some more comments in depth on that.

13 Is not NACE affected? Maybe, Mr. Axelrad, you  
14 could go first on this. Is NACE not affected if in fact  
15 that order is relaxed or changed?

16 MR. AXELRAD: As I indicated before, Judge Gleason,  
17 the order has a specific provision within it that retains  
18 the authority on the part of the Director to relax or  
19 rescind the order.

20 There is good public policy for such a provision.  
21 the Director is the individual who has been delegated by the  
22 Commission the responsibility to enforce the provisions of  
23 licenses and regulations. The Director is the individual  
24 who has to decide whether his enforcement objectives are  
25 being satisfied or have been satisfied. The Director is the

1 individual who has to determine how to allocate his  
2 resources, whether to apply them to in the field enforcement  
3 actions, inspections, or whether to apply them in the course  
4 of legal proceedings, so there are many good public policy  
5 reasons for a Director having that responsibility.

6 Even if the order were fully sustained, that  
7 provision would remain in the order. It is an integral part  
8 of the order.

9 Accordingly, the provision could not be deleted in  
10 the course of the proceeding. It would stay there even if  
11 the order were fully sustained. Now whether the Director  
12 can exercise that function during the proceeding, we believe  
13 that he can and we have cited a recent Commission decision  
14 which recite as background facts in the oncology case where  
15 an order had been issued. The Director lifted part of the  
16 suspension that was provided for in the order even before  
17 the hearing was requested and after the hearing was  
18 requested he lifted part of it again.

19 There were actions taken by the Director both  
20 before and after the hearing began which relaxed the  
21 provisions of the order, and there was no indication that we  
22 could tell that the Presiding Officer, the Board in that  
23 proceeding, had to review or approve in any fashion that  
24 particular action.

25 We agree of course under 2.203, if there is a

1 compromise or a settlement of the order, that would have to  
2 be approved by the Board but there are any number of actions  
3 which we believe the Director could take which would be  
4 short of a compromise or a settlement of the order and we  
5 think that that authority of the Director remains and must  
6 remain as a matter of good regulatory policy.

7 JUDGE GLEASON: Well, I guess the more specific  
8 question is whether that order can impact the Intervenor's  
9 position. You know, it may be good public policy but also a  
10 Director can make a wrong decision in relaxing or changing  
11 the order.

12 Would that not have an impact on the Intervenor's  
13 position?

14 MR. AXELRAD: Well, as I have indicated before,  
15 Judge Gleason, the Director could have made theoretically an  
16 improper decision in deciding not to issue an order in the  
17 first place or in issuing a wrong order and the Intervenor's  
18 were not entitled --

19 JUDGE GLEASON: But, you know, there is no sense  
20 in going back to what was or never happened. We are where  
21 we are and we are with an order with that provision in it.

22 MR. AXELRAD: What I was trying to express, Judge  
23 Gleason, is I don't believe that the Intervenor's have any  
24 greater control or ability to affect the Director's exercise  
25 of his discretion, the discretion he has been granted by the

1 Commission itself, before the order is issued than it has  
2 after the order has been issued.

3 The Board will have the ability to approve any  
4 settlement compromise if anything of that kind takes place  
5 but the Director's ability to exercise his discretion as  
6 specifically retained under the order is not something that  
7 can be influenced by the Petitioners.

8 It is incongruous, it would seem to me, that  
9 somebody who could not have, like the Petitioner, could not  
10 have forced a proceeding in the first place, could not have  
11 forced the Director to take any action in the first place,  
12 somehow would have the ability to force the Director to  
13 participate and be part of a prolonged proceeding when they  
14 had no ability to force him to take action in the first  
15 place.

16 JUDGE GLEASON: This is the next question, but it  
17 relates to this one, so might as well consider it at the  
18 same time. Does the Board itself have any authority over  
19 that Director's activities in that connection? Can the  
20 Board tell the Director "shove off" -- keep your hands off  
21 this case. It's before us now and you've got an order here  
22 and it's either going to go up or down or some other way?

23 MR. AXELRAD: I believe not, Your Honor. The  
24 basic purpose of a hearing on an enforcement order is to  
25 protect the rights of the individuals to whom the order has

1 been issued or individuals who are adversely affected by the  
2 order.

3 This Board will have to decide whether the order  
4 as issued should be sustained. If the Director relaxes the  
5 order in some fashion in the course of this proceeding,  
6 which may or may not happen, then the Board's function would  
7 be to decide whether the order as partially modified,  
8 whether that order should be sustained, but it is the  
9 Director's, the Director who has been granted the authority  
10 by the Commission to make those kinds of enforcement  
11 decisions and that authority has been explicitly retained  
12 under the order.

13 JUDGE GLEASON: All right. Ms Curran?

14 MS. CURRAN: I want to answer your questions  
15 separately because I think they are very distinct.

16 JUDGE GLEASON: They are two different questions.

17 MS. CURRAN: Yes. In the first instance I think  
18 the fact that the Staff can retract or modify its order is  
19 not really what is relevant here.

20 What the purpose of this proceeding is to  
21 determine whether the Staff has the authority to impose  
22 those requirements that it seeks to impose through the  
23 October 15th order.

24 That is what we are seeking to uphold here is  
25 Sequoyah Fuels and General Atomics have challenged the NRC's

1 regulatory authority to impose the decommissioning fund.  
2 It's challenged the adequacy of the amount of the fund.  
3 It's challenged many aspects of that order.

4 We want to see that order fully defended in this  
5 proceeding whether or not the NRC at some later point  
6 chooses to relax or rescind it, the crucial issue here is  
7 whether this Board is going to give full effect to the  
8 provisions of that order and maybe later on the NRC will  
9 choose not to exercise all those, but we still have a  
10 critical interest in seeing that the order is vindicated.

11 JUDGE GLEASON: Let me ask this question a  
12 different way. You are not concerned that the order might  
13 be relaxed by the director for good cause?

14 MS. CURRAN: Well, that gets to your second  
15 question. I think your first question had to do with how  
16 does --

17 JUDGE GLEASON: Well, my second question was  
18 really whether the board itself had any kind of  
19 jurisdictional control over that provision of the order.  
20 That was my second question.

21 MS. CURRAN: All right. Well, we are -- we  
22 certainly would be concerned if the order would be relaxed,  
23 but the point is that whether -- we are not at that point.  
24 The NRC is seeking to enforce that order, and we are in this  
25 -- trying to get in this proceeding for the purpose of

1 defending the contents of that order, so if --

2 JUDGE GLEASON: Excuse me for interrupting, but  
3 isn't one of your positions the fact that you do not want  
4 this order relaxed?

5 MS. CURRAN: Yes, and I think that is -- it is a  
6 harder question as to whether the licensing board has the  
7 authority to -- whether the licensing board has the  
8 authority to prevent the Staff from rescinding the order, or  
9 from relaxing it.

10 And in our reading of the cases which we cited in  
11 our brief, it appeared to us that the NRC rule is that once  
12 a proceeding has started, then the hearing that has been  
13 convened has to encompass the issues raised at the  
14 initiation of the proceeding, and that if -- I believe in  
15 the La Crosse case, the licensing board said that the Staff  
16 could change the terms of the order along the way, through  
17 the proceeding, but that that wouldn't change the scope of  
18 the hearing, so that the issues would still have to be  
19 heard.

20 And then it gets into the difficult question of,  
21 well, if you are making a decision on some aspect of this  
22 order in terms of whether it is required by the regulations  
23 to protect public health and safety, and then the Staff is  
24 also deciding that it wants to rescind that, there is a  
25 conflict there between what you are doing and what the Staff

1 is doing, and I would think that your authority would have  
2 to govern in that situation.

3 But I still don't think that that implicates our  
4 standing in the case.

5 JUDGE GLEASON: I presume that your participation,  
6 if it is granted in this proceeding, is to support the order  
7 except that provision which allows them to relax it, if, in  
8 fact, they go to relax it. You are in there to provide the  
9 reasons why this order should not be relaxed in any degree.  
10 Am I incorrect in that?

11 MS. CURRAN: No, you are correct.

12 JUDGE GLEASON: All right. Thank you. Mr. Hom,  
13 do you have any comments in this general area?

14 MR. HOM: Your Honor --

15 JUDGE GLEASON: I really raised two questions.

16 MR. HOM: Let me see if I -- if I don't answer  
17 both of your questions, please let me know, but the way --  
18 the Staff's position would be that during -- if the -- as I  
19 sort of conceptualize this, if the order is sustained and  
20 there is an order from the board saying that, essentially,  
21 the order is sustained, then that terminates a proceeding.

22 Is the question then whether the board somehow has  
23 continuing jurisdiction over this relaxation provision? The  
24 Staff's position, if that is the question -- if that is a  
25 question, the Staff's position would be no.

1           However, during the proceeding, if there is an  
2 attempt by the director of NMSS or whatever to modify the  
3 order or issue an order that would affect the terms of this  
4 order while we are in litigation, it appears that under  
5 2.717 the board would be able to have the final say in the  
6 matter, 2.717(b).

7           JUDGE GLEASON: I'll have to check to see what it  
8 says. Yes, okay. All right.

9           Paul, do you have any follow-up on this?

10          JUDGE BOLLWERK: Let me take a quick look at  
11 2.717(b).

12          [Pause.]

13          JUDGE BOLLWERK: So, you are essentially saying  
14 that that regulation indicates that Mr. Axelrad's argument  
15 is incorrect?

16          JUDGE GLEASON: I'm not sure if I know exactly  
17 what aspect of Mr. Axelrad's argument you are referring to.

18          JUDGE BOLLWERK: Mr. Axelrad's argument is that we  
19 can't -- that we have no authority to effect anything that  
20 the licensing -- that the Staff, excuse me -- may do in  
21 terms of modifying the order under the terms of the order  
22 that provides that it can be modified.

23          And what you are saying is this regulation says  
24 specifically that, in effect, that's incorrect?

25          JUDGE GLEASON: I believe that the Staff's answer

1 would be dependent upon the time at which the director would  
2 attempt to modify, revoke or rescind the provision of the  
3 order.

4 For instance, if this proceeding has been  
5 concluded and there is later -- the order is in place, and  
6 there is later a time that the director determines some  
7 provision or condition should be relaxed, then the Staff's  
8 position would be that this licensing board here today would  
9 not have continuing jurisdiction to review that director's  
10 relaxation.

11 However, during the pendency of this proceeding, I  
12 believe that the licensing board would have the authority to  
13 review other orders that would impact on this order that the  
14 director would issue, or changes to this order given we are  
15 in litigation over this order.

16 And that -- I believe that the licensing board  
17 would have the ultimate authority to make the final  
18 determination on that.

19 JUDGE BOLLWERK: So -- okay. Let me take two  
20 situations then. We have the situation here where someone  
21 is trying to intervene.

22 If there is no one trying to intervene, does that  
23 mean that the board, sur responte, should review all  
24 modification that the Staff puts out?

25 I'll use the oncology case as an example. Should

1 the board have stopped the Staff from saying, "You can  
2 modify that license, come to us" -- that order, "come to us  
3 now; we need to approve that modification"?

4 JUDGE GLEASON: I would say that the -- that the  
5 board would have the authority and the jurisdiction to  
6 require whatever provision it deems necessary that would  
7 somehow affect the proceeding, if there is, indeed, some  
8 impact on that proceeding.

9 It is not necessary to do so, but that would be in  
10 the discretion of the board.

11 JUDGE BOLLWERK: Okay.

12 MR. AXELRAD: Judge Gleason?

13 JUDGE GLEASON: Yes.

14 MR. AXELRAD: Can I just respond? In our view,  
15 2.717(b) refers to a situation where the director takes  
16 action which is not otherwise explicitly provided for by an  
17 order. For example, the La Crosse situation: there was no  
18 such provision in the order in La Crosse that would  
19 explicitly authorize the director, NMSS, to relax and  
20 rescind through requirement of the order.

21 I think in the situation where an order explicitly  
22 retains that authority to the director, that authority is an  
23 independent retention by the director, and, therefore, would  
24 not be subject to 2.717(b) review by the board.

25 The board's review would be limited to the 2.203

1 provisions in the case of a settlement or compromise, and  
2 there would have to be a decision on the facts of any  
3 particular circumstance as to whether it is a relaxation or  
4 recision, or whether it is a compromise or settlement.

5 JUDGE GLEASON: Okay. The next question is --

6 JUDGE BOLLWERK: Let me just ask Mr. Hom. You  
7 don't agree with that interpretation, however?

8 MR. HOM: If Mr. Axelrad is saying that the terms  
9 in the order that is being litigated are free from  
10 interference by the board in every respect during the  
11 pendency of the litigation, I believe the Staff's position  
12 would be that is not true. That the licensing board, given  
13 the pendency of the litigation, would have ultimate  
14 authority to take it upon review of a decision within that  
15 order given that the order has not finally been determined  
16 to be a final order, and has -- there has been no issuance  
17 of an order saying that the order is finally sustained.

18 JUDGE BOLLWERK: Even where the order allows us to  
19 have to modify the order, which is the situation here?

20 MR. HOM: Yes. Yes. Although, again, with the  
21 understanding that there is no -- I believe all the Staff is  
22 saying: that the licensing board does not have to exercise  
23 any particular authority in that respect, but it is not  
24 restricted or it is not -- that authority has not been  
25 withheld from him.

1 JUDGE GLEASON: The final question in this area -  
2 - I don't think it has been answered -- and Mr. Axelrad, we  
3 will ask you again to go first, if you don't mind.

4 The question is whether discretionary intervention  
5 is permissible at all in enforcement cases?

6 MR. AXELRAD: I didn't read that as being the  
7 question, but we -- I don't think we would argue that  
8 discretionary intervention is not possible at all. However,  
9 we believe that in an enforcement proceeding, the standard  
10 would be quite different and more stringent than our  
11 licensing proceeding.

12 The Pebble Springs decision, which has been cited  
13 as the hallmark of discretionary -- how the Commission views  
14 discretionary intervention, specifically referred to broad  
15 participation and domestic licensing proceedings. That's at  
16 page 616.

17 In our view, even though discretionary  
18 interventions may be possible in licensing situations, in  
19 those cases, a licensee is going to be given new or  
20 different authority to conduct activities not previously  
21 authorized, and, therefore, the interest of the public, may  
22 be -- should be allowed to participate through broad grants  
23 of rights.

24 An enforcement proceeding, however, we think the  
25 situation is different. As I mentioned before, the basic

1 purpose of the hearing rights in an enforcement action is to  
2 protect those that are adversely affected by the order.

3 The issue in a enforcement proceeding -- it could  
4 be this one -- is limited to whether the order should be  
5 sustained. The NRC Staff has the burden of proof in an  
6 enforcement proceeding, and is well-equipped to protect the  
7 public interest.

8 There is no need for a duplicate prosecutor,  
9 particularly Petitioner, who, presumably, has not been able  
10 to show that he can intervene as a matter of rights, since  
11 he is requesting only limited participation.

12 As known in Pebble Springs, discretionary  
13 intervention is more readily available when the Petitioner  
14 shows a significant ability to contribute on issues -- and I  
15 will quote -- "Which would not otherwise be properly raised  
16 or presented," closed quote.

17 That often can be the case in a licensing  
18 proceeding where the Petitioner and the Staff might be in -  
19 - taking different positions. However, it is not at all  
20 true in an enforcement proceeding where a Petitioner is  
21 simply trying to support the Staff. And since the Staff  
22 issued the order, knows the spaces, and can be relied upon  
23 to properly raise and present the basic issues, there is  
24 much less of a need and much less of a reason to provide for  
25 discretionary intervention.

1 JUDGE GLEASON: So your bottom line is that in 202  
2 Proceedings it is much more difficult to meet the Pebble  
3 Springs intervention test?

4 MR. AXELRAD: Particularly by someone who just  
5 supporting the Staff. If someone, you know, can't quite  
6 meet the test of he's adversely affected by the order, but  
7 can show that the order can have some potential impact on  
8 him which doesn't entitle him, as a matter of right, to  
9 participate, then obviously he should have an opportunity to  
10 present that. But someone who is just trying to duplicate  
11 what the Staff is doing, that certainly is not a proper  
12 basis for discretionary intervention.

13 JUDGE GLEASON: Ms. Curran?

14 MS. CURRAN: I was trying to find the page in my  
15 brief. We cited a case where I think it was the licensing  
16 board that said, in terms of the standing standards, the  
17 Commission doesn't apply a different standard to enforcement  
18 proceedings than it does to licensing cases, and I would  
19 assume the same type of logic would apply to discretionary  
20 intervention.

21 I would also note that although discretionary  
22 intervention was not allowed, and the factual circumstances  
23 were different, in Public Service Company of Indiana Marble  
24 Hill Nuclear Generating Station, CLI 80-1011 NRC 438 (1980),  
25 the Commission did discuss the prospect of allowing

1 discretionary intervention to some intervenors who had  
2 requested a hearing at an enforcement action, and it was  
3 denied. So it hasn't -- it hasn't been ruled out.

4 In terms of whether -- whether or interests would  
5 be fully satisfied by the Staff's work in this case, I think  
6 there are many issues that are raised in this enforcement  
7 proceeding, and I would assume that some may get higher  
8 priority, or more emphasis than other, and I don't think  
9 that one can presume that the Staff is going to fully  
10 address, to the extent that we would, all of the issues, and  
11 that we may have a different perspective on some of these  
12 issues, and have additional information that would be  
13 helpful to the board. So I don't think it can be presumed  
14 that the Staff will fully carry out all our interest in this  
15 case.

16 JUDGE GLEASON: All right. Mr. Hom?

17 MR. HOM: In terms of whether there is some  
18 different standard that should be applied for discretionary  
19 intervention in enforcement proceedings versus licensing  
20 proceedings, the Staff's position would be that there really  
21 is not significant distinction to be made so long as the  
22 intervenor would satisfy Pebble Springs requirements with  
23 specificity to warrant granting discretionary intervention.

24 But other than the distinction between licensing  
25 versus enforcement, the Staff does not have a strong view

1 that there should be any distinction.

2 JUDGE GLEASON: All right.

3 MR. DUNCAN: Could I speak to the issue just  
4 briefly, Judge Gleason?

5 JUDGE GLEASON: I thought you had? Oh, excuse me.

6 MR. DUNCAN: No.

7 JUDGE GLEASON: You realize that I've not been  
8 calling on you, and taking the position that if you wanted  
9 to intervene at any time, you would.

10 MR. DUNCAN: I appreciate that. My comment will  
11 be brief, and since I'm new to the case -- since we are new  
12 to the case, I've not gotten involved in the conversation on  
13 some of the distinctions of the cases, but I do bring to  
14 this issue some experience as a former federal prosecutor,  
15 and I will simply observe, as a personal matter -- I hope I  
16 am not improper here -- that I was waiting to hear the  
17 proposed intervenors assert that they could do something  
18 that the Government could not do. But when I used to stand  
19 up in a courtroom with the entire resources of the United  
20 States government behind me, it never occurred to me that I  
21 needed someone from outside the Government to come in and  
22 help me do my job.

23 And I guess, as I read the Atomic Energy Act, and  
24 with the whole legislative purpose to bring private  
25 companies in to the nuclear industry for a whole variety of

1 reasons, I can't conceive that Congress ever contemplated  
2 that there would come a time where, not only would a private  
3 company who might be involved in some way, direct or  
4 indirect in the nuclear industry, would have to come under  
5 the jurisdiction of federal agencies, which we all accept in  
6 the scope of the law, but they would have to be looking over  
7 their shoulders at private entities coming in and asserting  
8 that the Government can do it job, and, therefore, it needs  
9 this private entity's help in an enforcement proceeding.

10 I've waited, and I've listened with thirsty ear  
11 this morning for something that would distinguish what the  
12 NACE that the Government can't do. All I hear is that NACE  
13 wants to come in to see that the order is fully defended,  
14 and I have heard nothing that would suggest that the Staff  
15 is incapable in any way of fully enforcing whatever it  
16 decides to enforce.

17 I guess, just from our standpoint, leaving aside  
18 the cases that affect the issue -- and Mr. Axelrad has  
19 eloquently addressed those, and we joined in those arguments  
20 -- I just can't believe it is in the public interest, or was  
21 ever contemplated by Congress to be in the public interest,  
22 that we would have to defend against anyone who might want  
23 to intervene, even though they purport to do nothing more  
24 than to help the Government defend the order.

25 Thank you.

1 JUDGE GLEASON: Thank you, Mr. Duncan. I might  
2 say just very briefly that, of course, a whole Atomic Energy  
3 Act, at least the licensing sections in Section 189(a),  
4 provides opportunities for members of the public to be  
5 involved in these proceedings, even though, as often is the  
6 case, the Staff is on the other side of the issue, so that  
7 we do have cases here where interests are, in that sense,  
8 adverse, and they are not like your typical Government case.

9 We appreciate having your comments, and will  
10 consider them.

11 MR. DUNCAN: Thank you.

12 JUDGE GLEASON: What I would like to do is take  
13 about a five minute recess now, and then we will go into the  
14 other questions we have regarding the theories of the case.

15 [Recess.]

16 JUDGE GLEASON: I would like to say at the outset  
17 that I would like to get this prehearing conference over in  
18 a relatively short time because of the severity of the  
19 weather out there. People tell me it is even worse than it  
20 was, if that is possible, and I don't think we have that  
21 much more, so we won't recess for lunch.

22 We have decided that we will, contrary to what I  
23 had assumed in our last get-together, we will not be making  
24 an oral decision today, or decision announced orally on the  
25 intervention petition. We have received today a motion for

1 leave to file by NACE, and we hope to be making our decision  
2 known on that in the near future. We may be giving an oral  
3 ruling in several days and followed-up by a written opinion  
4 supporting it.

5 I will say this also, Ms. Curran, that in the  
6 event, and I don't want to predict it or cast it one way or  
7 the other, in the event that you are provided an opportunity  
8 to intervene, I think that time period of 30 days is too  
9 much for the presentation in contention or the submission of  
10 a contention because you have had this time period and I  
11 presume you have done some work on it, so we will be cutting  
12 that time period down to a two-week period at most.

13 MR. AXELRAD: Judge Gleason?

14 JUDGE GLEASON: Yes.

15 MR. AXELRAD: May I ask just one question?

16 JUDGE GLEASON: Yes.

17 MR. AXELRAD: Ms. Curran did file a motion for  
18 leave to file something which she handed to us this morning.  
19 Will we have an opportunity to respond to whether or not the  
20 motion should be granted?

21 JUDGE GLEASON: Yes, if you would like to. Yes,  
22 certainly.

23 MR. AXELRAD: I haven't had a chance to read it.

24 JUDGE GLEASON: Absolutely.

25 MR. AXELRAD: How long do we have?

1 JUDGE GLEASON: I would like you to do that in as  
2 much a hurry as possible, certainly by three or four days,  
3 that kind of thing.

4 JUDGE BOLLWERK: Can you get it in by Friday,  
5 close of business?

6 MR. AXELRAD: Until I read it, I can't tell you,  
7 Judge Bollwerk.

8 JUDGE GLEASON: We wanted to get some discussion  
9 going about, if you care to present it, we don't want to be  
10 interfering in the deliberations of your case, but we do  
11 have some questions in our own mind about the theories  
12 supporting this case with respect to the participation of  
13 General Atomics and, in that connection, we all have  
14 received the request by GA asking it to be discussed at this  
15 conference asking for the scheduling of a briefing and oral  
16 argument session on a jurisdictional question and postponing  
17 discovery until that issue is resolved.

18 In your comments, you can -- I will hold off the  
19 latter question until we get to discussion on the theory of  
20 the case and make those separate matters for comment.

21 Mr. Hom, as I indicated before, of course as we  
22 know the NRC will have the burden of proof on this issue.  
23 Could you give us some understanding of your theory of this  
24 case, would you care to give us some information on that  
25 subject?

1 MR. AXELRAD: Judge Gleason, could I just raise  
2 one threshold question before Mr. Hom responds?

3 JUDGE GLEASON: Yes.

4 MR. AXELRAD: This is an unusual situation because  
5 there has been no ruling with respect to NACE's motion to  
6 intervene.

7 JUDGE GLEASON: That's right.

8 MR. AXELRAD: I would assume, or at least strongly  
9 suggest that any discussion, substantive or otherwise with  
10 respect to the theory of the case or anything else would be  
11 limited to just the parties in this case, and would not  
12 include NACE which has not yet been admitted. I don't think  
13 it is appropriate for a Petitioner who has not yet achieved  
14 any formal status in this case to be able to discuss the  
15 substantive matters.

16 JUDGE GLEASON: He's right.

17 MR. DUNCAN: I join in that request, if it is a  
18 request.

19 JUDGE GLEASON: I beg your pardon?

20 MR. DUNCAN: I simply said, Judge, I said I would  
21 join in that request if it is a request.

22 JUDGE GLEASON: I think you are giving more  
23 substance to this thing than it deserves, Mr. Axelrad,  
24 because all we are trying to do is really get some  
25 discussion on the theory of the case, and we can treat her

1 as amicus for this purpose or as to anything else, but I  
2 don't think we want to preclude her from making any comments  
3 if she has some to make.

4           Essentially, I think this is a matter that goes  
5 between you and the Staff -- or not between you and the  
6 Staff but between General Atomics and the Staff, and those  
7 are the comments we would like. In fact, if you didn't want  
8 to even discuss your theory, that would be all right with  
9 me, but there are some members of the Board that are  
10 concerned about it, and it is my responsibility to raise it.

11           Mr. Hom?

12           MR. HOM: Your Honor, without getting into very,  
13 very specific matters and, again, with the caveat that the  
14 Staff's theory can be developing based upon facts that are  
15 later discovered, I think the Staff is willing to make some  
16 comments in this area.

17           We do have the three theories so to speak that  
18 came with the January 13 memorandum and the Staff will say  
19 that the theory of this case will not be based on, as I read  
20 Item Number 2, we are not charging deliberate misconduct on  
21 the part of any party at this time and, therefore, that does  
22 not provide a basis in support of the Staff's theory.

23           With respect to Item Number 3, the Staff at this  
24 time is not relying upon a contract or quasi-contract theory  
25 stemming from purported reliance by the Commission on

1 statements of General Atomics.

2 The Staff's theory is more akin to, with obvious  
3 factual distinctions, but more akin to the common law,  
4 corporation/contract, sometimes tort action involving  
5 parent-subsubsidiary relationships where a claimant attempts to  
6 pierce the corporate veil between the subsidiary and the  
7 parent to reach the parent based fundamentally on day-to-  
8 day or intimate control of the parent over the subsidiary.

9 JUDGE GLEASON: Does that do it, Mr. Hom?

10 MR. HOM: Pardon me?

11 JUDGE GLEASON: Does that do it?

12 MR. HOM: Yes.

13 JUDGE GLEASON: Mr. Duncan, I think we will ask  
14 you to go next, please.

15 MR. DUNCAN: You will appreciate, Judge Gleason,  
16 as you already have twice and I thank you for that, that we  
17 are relatively new to the case and I am not prepared to  
18 argue the merits of the jurisdictional issue this morning  
19 except to say that thus far I can represent that we have  
20 searched diligently in all of the statutes that we can find  
21 that would appear to be relevant at all as well as all other  
22 applicable law, and we can find nothing that poses  
23 jurisdiction in the NRC to make this kind of claim against a  
24 non-licensee and to purport to oppose non-civil penalty  
25 financial liability upon a non-licensee in the circumstances

1 of this case, whether the theory being common law theory, or  
2 whether it be a Federal statutory theory. We simply don't  
3 think the Commission has jurisdiction over General Atomics i  
4 the circumstances of this case. So we are prepared to  
5 submit arguments to that effect at a later date in writing  
6 and orally as the Board would wish.

7 JUDGE GLEASON: Mr. Axelrad?

8 MR. AXELRAD: I don't have any comment with  
9 respect to the theory of the case with respect to General  
10 Atomics.

11 JUDGE GLEASON: Ms. Curran?

12 MS. CURRAN: I don't have any comment at this  
13 time, Your Honor.

14 JUDGE GLEASON: Thank you.

15 MR. DUNCAN: Judge, if I could have one other  
16 comment. As we understand what the Staff has just said it  
17 looks to us like the Staff has conceded that the order has  
18 been narrowed considerably, that is to say that there is no  
19 theory based on contract or quasi-contract or reliance by  
20 anyone, and that the theory is based exclusively, to the  
21 extent that it exists at all on some form a common law  
22 piercing the corporate veil. If that is the case, and this  
23 may be premature, but at some point we would certainly want  
24 to see the scope of the order narrowed then so that we know  
25 what we are dealing with here, because it appears to be much

1 broader than was represented by the Staff this morning.

2 JUDGE GLEASON: Mr. Hom?

3 MR. HOM: Your Honor, I am not sure. I might need  
4 to address my question ultimately to Mr. Duncan, but I am  
5 not sure what broader legal theory that we may have -- if I  
6 did propose that there was a broader legal theory underlying  
7 this case, I may have misspoken. I don't remember  
8 discussing any legal theory this morning underlying the  
9 case, but I would agree that to the extent that there is  
10 conceivably a quasi-contractual reliance theory, I will say  
11 again that that is not one that the Staff at this time  
12 intends to pursue, but I am not sure what need be done with  
13 the order, the order to the Staff clearly put General  
14 Atomics on notice that we were concerned with the day-to-  
15 day control of GA as we have alleged over the licensee, and  
16 that that principally is the angle that we were taking.

17 MR. DUNCAN: Maybe I misspoke, the order seems to  
18 be much boarder than the theories being asserted by the  
19 Staff this morning. The order is replete with comments and  
20 allegations about purported reliance upon comments, upon  
21 letters, upon things. If that is irrelevant to what is the  
22 nature of the order, then it seems to me that should be  
23 withdrawn from the order so that if we ever get to the point  
24 of discovery that we are under no illusion that we have to  
25 be going into those kinds of areas.

1 JUDGE GLEASON: Mr. Duncan, I don't interpret Mr.  
2 Hom's comments as saying anything in that order is  
3 irrelevant to his basic theory, and I think what he is doing  
4 is trying to satisfy the Board's request that they are  
5 leaning in one direction or certain directions rather than  
6 the other, but they are not being tied to any theory at the  
7 present time.

8 MR. HOM: That's correct, Your Honor.

9 JUDGE GLEASON: So it nothing that you can really  
10 sink your teeth in at this point.

11 MR. DUNCAN: I apologize, perhaps I was premature,  
12 perhaps we do need to sharpen the issue then by written  
13 reason and so forth as I have proposed.

14 JUDGE GLEASON: All right.

15 MS. CURRAN: Judge Gleason, I just wanted to ask a  
16 clarifying question. Are you now considering Mr. Duncan's  
17 request that a briefing be scheduled in order to --

18 JUDGE GLEASON: That is the next item I was going  
19 to raise.

20 MS. CURRAN: Okay, because I would like to have a  
21 chance to address that.

22 JUDGE GLEASON: I was discussing something else  
23 with Judge Bollwerk. Let's hold it a minute.

24 Let's go to the other item that is before us and  
25 that is the General Atomics' request regarding scheduling a

1 briefing and oral argument session on the jurisdictional  
2 question and postponing discovery until that issue is  
3 resolved.

4           Would you want to comment on that further than  
5 your motion, Mr. Duncan?

6           MR. DUNCAN: I don't have much to add, Judge,  
7 except to say that it seems to me that this is such a  
8 fundamental issue to this proceeding with respect to General  
9 Atomics. It's at least a threshold issue.

10           If this Commission has no jurisdiction, no  
11 personal or other kinds of jurisdiction over General Atomics  
12 in the circumstances of this case, I can't imagine why we  
13 should be forced to engage in what by any standard is going  
14 to be expensive discovery or other prehearing proceedings  
15 until that issue is resolved, so I was simply suggesting as  
16 a matter of, frankly, trying to hold down unnecessary costs  
17 which may prove ultimately to be unnecessary, that we delay  
18 discovery some reasonable amount of time until the Board has  
19 had an opportunity to have the issues crisply and sharply  
20 presented to it for decision on the jurisdictional issues,  
21 understanding that that should not take forever but while  
22 that is going on it seems like it's sufficiently important  
23 and sufficiently a threshold issue that we should focus on  
24 that before we proceed.

25           Now one could say, well, then perhaps General

1     Atomics shouldn't have to engage in discovery but discovery  
2     by the other parties should proceed. That puts me in an  
3     impossible position because obviously to represent General  
4     Atomics adequately I can't permit discovery to proceed in  
5     the abstract and not know what is going on and not  
6     participate, and since the length of time we are asking is  
7     limited only by the time that it takes to brief or present  
8     the issues to the Board, which should not take all that  
9     long, I think it is a reasonable request and that is why I  
10    requested that all discovery be temporarily delayed until  
11    such time as we can resolve the threshold and fundamental  
12    issue of jurisdiction.

13           JUDGE GLEASON: Well, the difficulty that I have  
14    with your request is you seem to be supporting a proposition  
15    that discovery into facts relevant to jurisdiction is not  
16    permissible, because you are asking to withhold any  
17    discovery until after that issue is decided.

18           JUDGE BOLLWERK: Are you saying permissible or  
19    necessary? I guess that's the question.

20           MR. DUNCAN: I believe that it is not necessary.  
21    I don't think it is necessary for the Board -- see, right  
22    now --

23           JUDGE GLEASON: Excuse me, Mr. Duncan. Right now  
24    as far as I am concerned, as far as this Board is concerned,  
25    discovery could -- and I told Mr. Duncan or Mr. Axelrad this

1 several weeks ago, discovery could be under -- being  
2 undertaken.

3           There is something holding it up, so I am not sure  
4 that I am understanding why discovery should be prohibited  
5 from an inquiry into jurisdictional facts.

6           MR. DUNCAN: Well, I can only liken it, Judge, to  
7 a pure motion on the pleadings in a civil action in a  
8 federal court where you don't get to issues of fact; that on  
9 the face of the allegations of the complaint that it is  
10 clear that a claim has not been stated.

11           It might be a 12(b)(6) motion, it might be a  
12 motion for judgment on the pleadings, but that there are  
13 certain issues of law that the Board can rule upon without  
14 even addressing any facts, and that it is unnecessary for  
15 the parties to seek facts. I mean, just looking at the face  
16 of the order itself, and what is the basis, the legal basis,  
17 for the assertion of jurisdiction over General Atomics in  
18 the circumstances of this case.

19           You don't have to get to issues of whatever the  
20 theory may be involving piercing a corporate veil. What is  
21 the -- what is the threshold jurisdiction that would permit  
22 the Commission to even assert such claims over someone who  
23 is an admitted non-licensee, someone who is in the  
24 circumstances set forth in the Commission's own pleading.  
25 So you don't have to reach the facts.

1 JUDGE GLEASON: Are you entitled to -- are you  
2 entitled to seek discovery of those jurisdictional facts  
3 underlying their claim? Underlying their order?

4 MR. DUNCAN: What I was proposing is that we would  
5 not take discovery. No one would take discovery. We would  
6 simply --

7 JUDGE GLEASON: Well, I realize what you are  
8 proposing. But what I'm -- well, let's let the Staff  
9 respond. Excuse me.

10 MR. HOM: Your Honor, I can -- the only situation  
11 I can see where something of the nature, I believe, Mr.  
12 Duncan is proposing is where, perhaps, we assume for the  
13 purposes of the pleadings to be filed or the argument that  
14 certain facts exist such as -- not necessarily limited to  
15 this, but such as General Atomics has defacto day-to-day  
16 control over SFC.

17 I mean, to the extent that we could assume  
18 arguendo certain facts that would be more or less  
19 jurisdictional facts in this case in lines with the theory  
20 underlying the case, then I can see, perhaps, a benefit in  
21 that respect. But it would have to -- I believe that we  
22 would have to assume certain facts exist and GA, as I would  
23 see it, would be arguing notwithstanding the existence of  
24 any set of facts that exist, that Staff did not have somehow  
25 the authority to issue this order.

1 MR. DUNCAN: That's correct. That is correct,  
2 Judge. That is to say the issue that would be presented in  
3 the briefing while discovery was held temporarily in  
4 abeyance would be under any of the facts asserted by the  
5 Staff in its October 15, 1993 Order.

6 Assuming them all to be true, has it stated a  
7 claim that establishes that the NRC has jurisdiction over  
8 General Atomics. Assuming the facts as stated in the  
9 October 15, 19 -- so we don't need to go into discovery on  
10 those facts, for the purposes of the first motions that  
11 would address the jurisdiction of the Commission.

12 JUDGE GLEASON: So you, in effect, are making a  
13 motion for summary judgment?

14 MR. DUNCAN: Summary disposition. Something of  
15 that nature.

16 JUDGE BOLLWERK: Well, there are not affidavits  
17 involved. There is nothing -- I mean, in theory you are  
18 making a straight motion to dismiss under 12(b)(b) if you  
19 look --

20 MR. DUNCAN: It's accurate. Yes, sir.

21 JUDGE BOLLWERK: -- to the federal practice. That  
22 would be it.

23 MR. DUNCAN: Yes, sir.

24 MR. HOM: Your Honor, if I can comment. I would -  
25 - the order itself gives some facts as illustrations, but by

1 no means has the Staff enumerated every fact that it intends  
2 to rely upon to meet its burden, and if there is some  
3 understanding that there may be facts that the Staff may  
4 rely on not explicitly laid out in the order, then I can see  
5 some benefit, perhaps.

6 But if it is a situation where the pleadings are  
7 based purely on the specific facts alleged in the order, we  
8 would not agree that that would be an appropriate limitation  
9 because there are certainly -- there is certainly a  
10 potential of facts that the Staff is unaware of that we  
11 believe would properly be potentially admissible in this  
12 case to prove our case.

13 MR. DUNCAN: Judge, the outrageousness of that  
14 argument is apparent on its face. Under that theory, which  
15 we think the law under no circumstances permits, any federal  
16 agency could file an order of any form and say, "By the way,  
17 we are not bound by this order. There are probably a lot of  
18 facts we don't know about, and you can't even attack to the  
19 jurisdiction until we are able to complete discovery, and  
20 since we almost go through an evidentiary proceeding, but at  
21 least complete discovery."

22 Obviously, I think the Commission is bound by the  
23 facts as stated in the October 15, 1993 Order. They were  
24 the one that initiated the order.

25 If there are additional facts they wish to

1 discover, perhaps that is appropriate for the parties that  
2 are subject to that order, but the threshold question for us  
3 is: do they, on the facts that they plead themselves, have  
4 jurisdiction over General Atomics? We believe they don't,  
5 and we believe that they are legally obligated -- purely a  
6 question of law -- to state those facts in the order.

7 And to the extent they have not stated them, that  
8 is not our problem. We are entitled to attack the  
9 jurisdiction of the Commission on the facts, as stated in  
10 the order, assuming those facts to be true for the purposes  
11 of the legal question that would be presented to the Board,  
12 the narrow legal question of jurisdiction.

13 JUDGE GLEASON: Well, I don't concur with you, Mr.  
14 Duncan, that that order would outline the entire case that  
15 one would want to present, and that is what you seem to be  
16 saying.

17 MR. DUNCAN: If it did not, Judge, we would be  
18 bound to essentially having to go through an entire  
19 litigation proceeding to find out what facts it was upon  
20 which the Staff based the originally order to assert  
21 jurisdiction over General Atomics.

22 JUDGE GLEASON: I don't think that is necessary  
23 either, but let me pause for just a minute here.

24 [Brief pause for Board to confer.]

25 JUDGE GLEASON: The proper resolution, it seems to

1 us, Mr. Duncan, for the issues that you've raised here --  
2 and we concur that it is a primary issue in the case, the  
3 question of jurisdiction, is for you to file a motion to  
4 dismiss, and you would have to support that, of course, and  
5 then the Staff would have the responsibility to respond.

6 And barring that, I don't think we could -- we  
7 would be willing to issue an order, you know, having some  
8 kind of briefing schedule because I think it would be better  
9 to file this in the context of your motion, and I certainly  
10 do not think that we should or would want to stop any  
11 discovery until that matter is done because every party is  
12 entitled to find out the basis for a lot of things in any  
13 proceeding, as you know. So I think that would be our  
14 ruling.

15 Are there any other matters that can be -- of kind  
16 of giving us some kind of a feeling as to what your  
17 intentions are, could you disclose those?

18 MR. DUNCAN: Well, we will be filing an  
19 appropriate motion, and I guess we are already commencing  
20 work on it. I guess -- I am not quite sure -- I didn't  
21 anticipate that we'd be also having to deal with  
22 discoveries, so I am not quite sure what is a reasonable  
23 time, but we're working as fast as we can on it, and we will  
24 commit to continuing to do that.

25 JUDGE GLEASON: All right. The earlier the

1 better.

2 MS. CURRAN: Judge Gleason?

3 JUDGE GLEASON: Yes?

4 MS. CURRAN: I'd like to ask that if General  
5 Atomics is going to file a motion to dismiss, if we are to  
6 be admitted to the proceeding, that we be given an  
7 opportunity to respond as well.

8 JUDGE GLEASON: I think that we will have a  
9 decision, at least orally, on your standing issue prior to  
10 that motion being decided, certainly.

11 Whether we will have something on the contention  
12 issue, I just don't know. I can't foresee that far in  
13 advance because I don't know what you are going to have.

14 All right. Let's see. I am not sure whether  
15 there are any other matters that can really be  
16 satisfactorily discussed at this prehearing conference  
17 because -- excuse me a minute.

18 [Brief pause.]

19 JUDGE GLEASON: As I have indicated to you, you  
20 are free to start discovery at any point. You understand  
21 that? Is that right? You understand that, Mr. Hom?

22 MR. HOM: Yes. Yes, Your Honor.

23 JUDGE GLEASON: Okay, fine. Until that is started  
24 -- and I presume there will be -- we really can't get into  
25 discussing a hearing schedule, evidentiary hearing. So the

1 quicker that is done, why, the better off the proceeding  
2 will be as far as pacing is concerned and timeliness is  
3 concerned.

4 I think the Board would like to receive -- even  
5 though it is not, you know, four-square involved in the  
6 issue of the order and is certainly behind the order,  
7 receive some kind of a report on what is going on in the  
8 decommissioning of this Sequoyah facility, the status of it;  
9 and if we could get something from SFC and also something  
10 from that Staff on that, we would appreciate it. It just  
11 keeps us advised as to what's going on.

12 MR. HOM: Your Honor, would this be a periodic  
13 report?

14 JUDGE GLEASON: No, just an initial report as to  
15 what is going on.

16 MR. HOM: Is there a particular date that you  
17 would like this by?

18 JUDGE GLEASON: Anytime in the next month would be  
19 fine.

20 All right. I think we are ready to recess this  
21 hearing, unless somebody else has something.

22 JUDGE BOLLWERK: Just as a general matter, does  
23 anybody have a feeling for how long they think discovery is  
24 going to take in this case?

25 MR. HOM: Your Honor, I believe discovery could be

1 fairly extensive in this case, and to give you a ball park,  
2 I would -- I would -- to be safe, to err on the side of  
3 being too long, I would err on the side of saying well into  
4 the summer, potentially.

5 JUDGE BOLLWERK: We are talking at least six  
6 months?

7 MR. HOM: Yes. The reason being we are talking  
8 about a case that potentially may need to rest heavily on a  
9 number of sworn statements, and it is not a matter of one  
10 round of document production or interrogatories, anything of  
11 that nature.

12 The Staff believes it will be needing to speak to  
13 a number of employees at various entities. As you may know,  
14 there are -- there is a fairly complex corporate structure  
15 surrounding General Atomics, its parent, major stockholders  
16 of the parent, intervening holding companies between SFC and  
17 GA.

18 Also, there is -- I've been informed by the latest  
19 filing, or at least one of the answers filed by one of the  
20 parties -- that there is a new arrangement in connection  
21 with the ConverDyne joint venture, and that there has been a  
22 transition in stock ownership and partnership arrangements  
23 there. I mean, we are looking at a fairly complex number of  
24 different entities involved that could very likely bear on  
25 the issue of control. We don't have simply GA and SFC

1 involved in this proceeding.

2 JUDGE GLEASON: All right.

3 JUDGE BOLLWERK: Mr. Axelrad, do you have anything  
4 to add on that?

5 MR. AXELRAD: No. I agree with Mr. Hom that it  
6 would probably take a lengthy period for discovery. Six  
7 months is probably a minimum.

8 JUDGE BOLLWERK: Any settlement negotiations  
9 between the parties?

10 MR. HOM: None have been undertaken at this time  
11 as far as I'm aware. I believe that, hopefully, all parties  
12 would always be receptive to any reasonable proposals.

13 JUDGE GLEASON: Anything anyone else wants to add?

14 MR. HOM: As a housekeeping matter, Your Honor --

15 JUDGE GLEASON: Yes?

16 MR. HOM: Mr. Bachmann is not here, but he has  
17 informed me to request, if appropriate and reasonable, that  
18 for any applicable filings that are made between the parties  
19 where a computer disk, the transfer of a computer disk might  
20 be helpful in speeding things along in terms of responses to  
21 particular questions or whatever, that I would just like to  
22 request cooperation and perhaps your approval of such a  
23 procedure.

24 JUDGE GLEASON: We certainly approve of such a  
25 procedure. It is up to the parties as to whether they will

1 cooperate on it.

2 Anything else, Mr. Hom?

3 MR. HOM: Not at this time, Your Honor.

4 JUDGE GLEASON: Any of the parties want to respond  
5 to that request?

6 MR. AXELRAD: I don't have any response right now.

7 MS. CURRAN: Sounds reasonable.

8 JUDGE GLEASON: All right. The prehearing  
9 conference will adjourn, and we thank you very much.

10 [Whereupon, at 12:21 p.m., the prehearing  
11 conference was adjourned.]

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**REPORTER'S CERTIFICATE**

**This is to certify that the attached proceedings  
before the United States Nuclear Regulatory  
Commission  
in the matter of:**

**NAME OF PROCEEDING:** Sequoyah Fuels Corporation

**DOCKET NUMBER:** 40-8027-EA

**PLACE OF PROCEEDING:** Bethesda, MD

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

*Jon Hundley*  
\_\_\_\_\_  
Official Reporter  
Ann Riley & Associates, Ltd.