

LBP-94-8

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III
Thomas D. Murphy

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In the Matter of

SEQUOYAH FUELS CORPORATION
and GENERAL ATOMICS

(Gore, Oklahoma Site
Decontamination and
Decommissioning Funding)

Docket No. 40-8027-EA

Source Material License
No. SUB-1010

ASLBP No. 94-684-01-EA

March 22, 1994

MEMORANDUM AND ORDER

(Supplemental Petition to Intervene)

Native Americans for a Clean Environment (NACE), on February 8, 1994, filed a supplemental petition to intervene in this proceeding in which it proposed two contentions for litigation. The proceeding involves a challenge to an NRC Staff Order directing the Sequoyah Fuels Corporation (SFC) and its parent corporation, General Atomics (GA), to provide decommissioning funding for SFC's licensed facilities near Gore, Oklahoma. By prior order, the Board found that NACE had standing to intervene as a party in the case, contingent on the admission of at least one qualified contention.¹

¹ See LBP-94-5, 39 NRC ____ (Feb. 24, 1994). A part of that order dealing with NACE's standing to intervene has been referred to the Commission for review.

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NRC regulations require that an admissible contention consist of (1) a specific statement of the issue to be raised or controverted; (2) a brief explanation of the bases for the contention; (3) a concise statement of the alleged facts or expert opinion supporting the contention on which the petitioner intends to rely in proving the contention at any hearing; and (4) sufficient information to show a genuine dispute exists on a material issue of law or fact. See 10 C.F.R. § 2.714(b)(2). A failure to comply with any of these requirements is grounds for dismissing the contention.

NACE has submitted the following two contentions:

1. The NRC has enforcement authority over General Atomics.
2. Guaranteed decommissioning financing by GA is required by NRC regulations, and is necessary to provide adequate protection to public health and safety.²

The other parties to the proceeding -- SFC, GA, and the Staff -- raise no objections to NACE's first contention but oppose the second.³

² [NACE] Supplemental Petition to Intervene, February 8, 1994 [hereinafter NACE Supplemental Petition].

³ [SFC's] Answer to [NACE's] Supplemental Petition to Intervene, February 18, 1994 [hereinafter SFC Answer]; [GA's] Answer to [NACE's] Supplemental Petition to Intervene, February 18, 1994; NRC Staff's Response to [NACE's] Supplemental Petition to Intervene, February 23, 1994.

SFC, GA, and the Staff raise essentially identical challenges to the second contention in asserting that the bases proposed fail to support NACE's claim: The bases for the contention by the petitioner is alleged SFC deficiencies in meeting regulatory requirements, but the contention is directed against GA, not SFC. In this view, by merely detailing SFC's alleged inadequacies, NACE has not provided facts to support a claim or establish the existence of a dispute with GA on a material issue of law or fact.

CONTENTIONS

NACE offers a number of bases in support of its first contention regarding NRC's alleged enforcement authority over GA. These include a showing that the agency's regulatory authority extends to non-licensees; that oversight and other management responsibilities concerning SFC were exercised by GA; that GA allegedly consented to guarantee decommissioning funding in exchange for resuming suspended SFC operations. According to NACE, as a result of GA's close working relationship with the licensee, NRC was entitled to claim jurisdiction and authority over GA. In addition, in support of its allegations NACE references certain documents including a 1988 Safety Evaluation Report, SFC's license, and a previous Staff enforcement order. Based on all these items, it is evident that NACE's first

contention meets the procedural requirements of the agency's regulations and, accordingly, is admitted for litigation.

In contrast, because the foundations for NACE's second contention have not been set forth with as much clarity, it is not so apparent that they establish a genuine dispute warranting further consideration in this proceeding. NACE has, however, filed a motion for leave to reply to the responses from the parties opposing admission of this contention and an accompanying reply in which it attempts to provide some further explanation about the bases for the contention.⁴

Agency precedent suggests that a contention's proponent must be afforded the opportunity to be heard in response to objections to the contention.⁵ While we are disturbed by an otherwise experienced counsel's lack of clarity in formulating this contention initially, this authority makes it clear that proposed contentions must be dealt with fairly. This, in conjunction with the lack of any

⁴ See [NACE's] Motion for Leave to Reply to [SFC's], [GA's], and NRC Staff's Responses to NACE's Supplemental Petition to Intervene, March 2, 1994; [NACE's] Reply to [SFC's], [GA's], and NRC Staff's Responses to NACE's Supplemental Petition to Intervene, March 2, 1994 [hereinafter NACE Reply].

⁵ See Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

substantive opposition to NACE's reply arguments,⁶ convinces us that consideration of NACE's reply is warranted. Accordingly, we grant NACE's motion for leave to file a reply.

The basis for petitioner's second contention is that SFC has failed to meet NRC's regulatory requirements in 10 C.F.R. § 40.36 and 10 C.F.R. § 40.42(c)(2)(iii)(D) that call for the submission of a decommissioning financing plan. NACE recites that GA has denied that SFC has any responsibility to comply with the first of these regulations and that GA alleges SFC has complied with the second. See NACE Supplemental Petition at 11. Pointing to a number of purported deficiencies in the proposed costs and revenue estimates in SFC's preliminary plan for decommissioning (id. at 11-15) and GA's denial of the inadequacy of these revenues ([GA's] Answer and Request for Hearing, November 2, 1993, at 8 [hereinafter GA Request for Hearing]), NACE contends that GA must be held to guarantee and supplement such funding shortages. See NACE Reply at 2.

Inasmuch as GA denies any obligation for providing financial decommissioning assurance (GA Request for Hearing

⁶ See Response of [SFC] to [NACE's] Motion for Leave to File Reply to [SFC's], [GA's] and NRC Staff's Response to NACE's Supplemental Petition to Intervene, March 4, 1994; Response of [GA] to [NACE's] Motion for Leave to Reply to [SFC's], [GA's] and NRC Staff's Responses to NACE's Supplemental Petition to Intervene, March 7, 1994. For its part, the Staff did not file an objection.

at 7), it cannot be realistically argued that NACE has failed to establish the foundation for a genuine dispute on a material issue. Because the petitioner's first admitted contention sets forth NACE's proposition that the NRC has enforcement authority over GA, the fact that NACE omits repeating this support for its second contention should not be considered fatal to its admission. Moreover, from a reading of the allegations made by the petitioner concerning both contentions, it is clear, although not emphatically stated, that NACE is arguing that GA must be responsible for the decommissioning funding requirements because the license holder SFC does not meet them.

The obvious intent of the procedural requirements on contentions is to ensure the identification of bona fide litigative issues. A concern has been expressed in Commission adjudicatory directives about not utilizing pleading "niceties" to exclude parties who have a clear, albeit imperfectly stated, interest.⁷ This suggests that NACE's identification of a legitimate issue should not be negated because of its use of somewhat imperfect phraseology. NACE's second contention is accordingly admitted to the proceeding.

One remaining matter deserves comment here. In its response, SFC argues that even if part of Contention 2 is

⁷ See Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979).

admitted, NACE should not be permitted to contest the adequacy of SFC's \$86 million cost estimate for decommissioning of the Gore site. See SFC Answer at 2. NACE in its reply asserts that SFC has placed this matter in contention by denying a Staff allegation that there was uncertainty concerning SFC's projected decommissioning costs. NACE Reply at 3-4. It is not apparent that there is an issue here for the Board to resolve, however, because the controversy before us involves whether the Staff Order will be sustained and that Order does not call for more financing than the current SFC decommissioning costs of \$86 million. In fact, NACE's supplemental petition, even though citing that figure as the bare minimum that should be set aside for decommissioning, concludes that the measures called for by the Staff Order are required to satisfy NRC's decommissioning financing regulations. See NACE Supplemental Petition at 15.

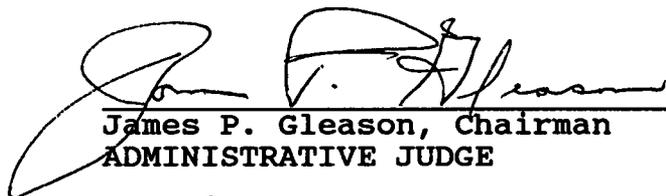
For the foregoing reasons, it is this 22nd day of March 1994, ORDERED that:

1. NACE's March 2, 1994 motion for leave to file reply to SFC's, GA's, and the Staff's responses is granted.

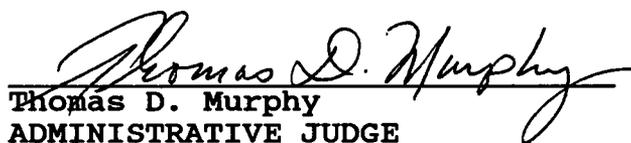
2. Contentions 1 and 2 in NACE's February 8, 1994 supplemental intervention petition are admitted.

3. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as this Memorandum and Order and the Board's February 24, 1994 Memorandum and Order, LBP-94-5, 39 NRC ____ (Feb. 24, 1994), rule upon an intervention petition, these rulings may be appealed to the Commission within ten days after this Memorandum and Order is served.

THE ATOMIC SAFETY AND
LICENSING BOARD*


James P. Gleason, Chairman
ADMINISTRATIVE JUDGE


G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE


Thomas D. Murphy
ADMINISTRATIVE JUDGE

Bethesda, Maryland

March 22, 1994

*Judge Klein, a Member of this Board, due to an illness, did not participate in this Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
SEQUOYAH FUELS CORPORATION
(Sequoyah Facility)

Docket No.(s) 40-8027-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (SUPPLEMENTAL PETITION) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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LB M&O (SUPPLEMENTAL PETITION)

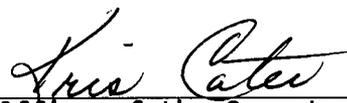
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Dated at Rockville, Md. this
23 day of March 1994


Office of the Secretary of the Commission