

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
E. Gail de Planque

OFFICE OF SECRETARY
DOCKETING & SERVICE
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! SERVED JUL 21 1994

In the Matter of)
)
SEQUOYAH FUELS CORPORATION)
and GENERAL ATOMICS)
)
(Gore, Oklahoma Site))

Docket No. 40-8027-EA
(Decontamination and
Decommissioning Funding)

ORDER

CLI-94-09

Pursuant to 10 C.F.R. § 2.730, General Atomics filed a motion with the Commission on July 6, 1994, seeking to stay discovery in this proceeding until (1) the Commission determines whether it will grant General Atomics' June 24, 1994 Petition for Review of LBP-94-17 and/or Motion for Directed Certification; and (2) assuming that the Commission grants the June 24th Petition/Motion, the Commission determines with finality the issues raised in General Atomics' February 17, 1994 Motion for Summary Disposition or for an Order of Dismissal. Sequoyah Fuels Corporation ("Sequoyah Fuels") supports General Atomics' motion, while Native Americans for a Clean Environment (NACE), the Cherokee Nation and the NRC staff all oppose the motion. For the reasons set forth below, we deny General Atomics' motion for stay.

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Background

NRC Staff initiated this proceeding on October 15, 1993, by issuing an order ("Staff Order") holding both Sequoyah Fuels and its parent company, General Atomics, jointly and severally liable for providing (1) the necessary "funding to continue remediation" of the contamination at Sequoyah's facility in Gore, Oklahoma; (2) "financial assurance for decommissioning" of that facility; and (3) "an updated detailed cost estimate for decommissioning and a plan for assuring the availability of adequate funds for completion of decommissioning." Staff Order at 23-24.

On February 17, 1994, General Atomics filed with the Licensing Board a motion for an order granting summary disposition in its favor regarding all issues in this proceeding or, in the alternative, for an order of dismissal. In that motion, General Atomics asserted that the statutes relied upon in the Staff Order do not authorize the staff either to assert jurisdiction over General Atomics in this proceeding or to impose upon General Atomics the non-civil penalty financial liability set forth in the Staff Order.

On April 28, 1994, the Licensing Board denied General Atomics' February 17th Motion, and set forth its reasons in a Memorandum issued June 8, 1994 (LBP-94-17). On June 24, 1994, General Atomics filed a Petition for Review of LBP-94-17 and/or Motion for Directed Certification ("June 24th Petition/Motion") -- a pleading which is currently pending before the Commission.

Positions of the Parties

General Atomics asserts in its stay motion that discovery in this proceeding is expected to be both lengthy (at least six months) and expensive, and that a Commission decision accepting General Atomics' jurisdictional arguments would render such expenses unnecessary. According to General Atomics, a delay of one to two months (within which the Commission purportedly could resolve the jurisdictional issue) would not have a significant detrimental impact on the length of this proceeding. General Atomics also points out the Staff Order was not issued "effective immediately" and is not urgently required to protect the public interest or the public health and safety. General Atomics further asserts that the continuation of discovery would impose substantial unrecoverable litigation expenses on all parties and would also result in an unrecoverable diversion of Sequoyah Fuel's assets away from decommissioning activities. Stay Motion at 4-5.

Sequoyah Fuels supports General Atomics' position and briefly reiterates its parent company's arguments regarding the minimization of litigation costs and the diversion of Sequoyah Fuels' assets. Sequoyah Fuels' Reply to General Atomics' Motion to Stay Discovery (July 15, 1994).

NRC staff opposes General Atomics' motion on the grounds that such a stay may delay discovery well beyond the "one or two months" asserted by General Atomics. Staff also asserts that it does not intend to serve further discovery requests on Sequoyah

Fuels or General Atomics until staff completes its review of those two parties' responses to staff's first round of discovery, and that the delay inherent in this review may render unwarranted the concerns of General Atomics regarding substantial litigation costs. NRC Staff's Answer in Opposition to General Atomics' Motion to Stay Discovery at 2 (July 15, 1994).

NACE and the Cherokee Nation oppose General Atomics' motion on two grounds. First, they argue that the Commission looks with disfavor upon motions for stay pending the outcome of a Motion for Directed Certification. In support of this position, they point to section 2.730(g) of our regulations which provides that "[u]nless otherwise ordered, neither the filing of a motion nor the certification of a question to the Commission shall stay the proceeding or extend the time for the performance of any act." NACE/Cherokee Nations' Opposition to General Atomics' Motion to Stay Proceeding at 1 (July 15, 1994), quoting 10 C.F.R. § 2.730(g). Second, these intervenors argue that General Atomics meets none of the standards for a stay set forth in 10 C.F.R. § 2.788(e), and enumerated immediately below. NACE/Cherokee Nation's Opposition at 2-4.

Discussion

General Atomics appropriately cites 10 C.F.R. § 2.730 ("Motions") as the authority under which it filed its stay motion. However, because section 2.730 contains no standards by which to decide stay motions, we turn instead for guidance to the

general stay standards in section 2.788 ("Stays of decisions of presiding officers pending review"), subsection (e) of which provides that:

In determining whether to grant or deny an application for a stay, the Commission or presiding officer will consider:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

Interlocutory appeals or petitions to the Commission are not devices for delaying or halting Licensing Board proceedings. The stringent four-part standard set forth in section 2.788(e) makes it difficult for a party to obtain a stay of any aspect of a Licensing Board proceeding. Therefore, only in unusual cases should the normal discovery and other processes be delayed pending the outcome of an appeal or petition to the Commission. Cf. 10 C.F.R. § 2.730(g) (quoted supra at page 4).

1. Irreparable injury to movant if stay request is denied.

General Atomics' principal assertion regarding irreparable injury is that the "substantial" and "unrecoverable" litigation expenses which General Atomics would incur due to the continuation of discovery in this proceeding might ultimately

prove unnecessary were the Commission to rule that it lacks jurisdiction over General Atomics. Stay Motion at 5. We disagree with General Atomics that the incurrence of such costs constitutes "irreparable injury."

The Commission does not consider the incurrence of litigation expenses to constitute irreparable injury in the context of a stay decision. As we have previously held, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984), quoting Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 779 (1977), in turn quoting Renegotiation Board v. Bannerkraft, 415 U.S. 1, 24 (1974). "[I]njuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to render an injury irreparable. Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Accord Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621 (1977). Finally, were General Atomics subjected to overly burdensome discovery, the Licensing Board has full authority to prevent or modify unreasonable discovery demands. 10 C.F.R § 2.740(c).¹

¹ Under normal circumstances, motions for a stay of discovery should be filed with the Licensing Board rather than the Commission. See 10 C.F.R. § 2.730(a) ("All motions shall be addressed to the Commission or, when a proceeding is pending before a presiding officer, to the presiding officer" (emphasis added)). However, we will exercise "our inherent supervisory
(continued...)

General Atomics also proffers a second argument which could be construed as an "irreparable injury" contention -- that the continuation of discovery would result in the "unrecoverable diversion of the licensee's [i.e., Sequoyah Fuel's] assets from decommissioning activities." Stay Motion at 5. See also Sequoyah Fuels' Reply at 2. This argument at least implies that the denial of a stay would render Sequoyah Fuels less able to meet its decommissioning obligations, and that this would result in an irreparable injury to Sequoyah Fuels. We reject this argument on the ground that General Atomics fails to provide any tangible evidence to support its argument.

Indeed, the current record suggests a contrary conclusion. NRC staff represents that it does not intend to serve further discovery requests upon General Atomics and Sequoyah Fuels until staff has completed its review of those two parties' responses to its first round of discovery (NRC Staff's Answer at 2), and the two intervenors have not yet even sought a first round of discovery (see NACE/Cherokee Nation's Opposition at 4 n.4). Consequently, the record does not support the conclusion that, during the pendency of General Atomics' June 24th Petition/Motion to the Commission, Sequoyah Fuels will potentially be burdened

¹(...continued)
powers over adjudicatory proceedings" and will address the stay motion ourselves, rather than either dismiss it or refer it to the Licensing Board. Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), CLI-91-15, 34 NRC 269, 271 (1991), recon. denied, CLI-92-6, 35 NRC 86 (1992).

with such heavy discovery expenses that its decontamination funds would be meaningfully diluted.

2. Strong showing that it is likely to prevail on the merits.

Irreparable injury is the most important of the four factors set forth in section 2.788(e). Public Service Co. of N.H. (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990), aff'd on other grounds sub nom. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir.), cert. denied, 112 S. Ct. 275 (1991). Consequently, where a movant (as here) fails to show irreparable harm, then it must make an overwhelming showing that it is likely to succeed on the merits. See e.g., Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), ALAB-928, 31 NRC 263, 269 (1990) (absent a showing of irreparable harm, movant must demonstrate that the reversal of the Licensing Board is a "virtual certainty"). General Atomics has made no such showing here.

General Atomics' June 24th Petition/Motion may well raise significant jurisdictional issues of first impression. Nevertheless, the importance and novelty of those issues are, in and of themselves, insufficient to justify a stay. Cf. id. at 270. General Atomics has simply failed to demonstrate a sufficiently high probability of success on the merits so as to justify the grant of a stay.

3. Other Factors.

Given that the movant has failed to meet its burden on the two most important factors, we need not give lengthy consideration to the other two factors. Id.

We do not believe that a grant of the requested stay would harm other parties to this proceeding. In fact, we agree with General Atomics that a stay might even benefit the other parties by saving them unnecessary litigation costs in the event that the Commission rules in favor of General Atomics on the jurisdiction issue. However, this mere possibility is insufficient to offset General Atomics' failure to demonstrate irreparable injury and a strong likelihood of success on the merits. Moreover, the NRC staff, NACE and the Cherokee Nation all oppose the stay request, despite their potential cost savings.

Finally, we see no "public interest" factors which would mitigate either for or against a grant of the requested stay. Although General Atomics is correct that the Staff Order was not issued "effective immediately" and is not urgently required to protect the public interest or the public health and safety, these facts merely support the conclusion that the requested stay would not actually contravene the public interest. They do not demonstrate that such a stay would be in the public interest.


Conclusion

For the reasons set forth above, General Atomics' motion for stay is denied.

It is so ORDERED.



For the Commission



John C. Hoyle
Acting Secretary
of the Commission

Dated at Rockville, Maryland,
this 21st day of July 1994.

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Docket No.(s) 40-8027-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM ORDER (CLI-94-9) DTD 7/21 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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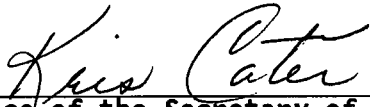
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Dated at Rockville, Md. this
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