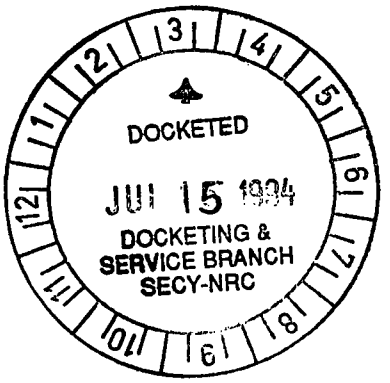

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter Of	
Sequoyah Fuels Corporation and General Atomics	Docket No. 40-8027EA Source Materials License No. SUB-1010
(Gore, Oklahoma Site Decontamination and Decommissioning Funding)	

NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S OPPOSITION TO GENERAL ATOMICS' PETITION FOR REVIEW OF LBP-94-17 AND/OR MOTION FOR DIRECTED CERTIFICATION

Introduction

On June 24, 1994, General Atomics ("GA") filed a petition for review of LBP-94-17, or in the alternative, a motion for directed certification of the decision. General Atomics' Petition for Review and/or Motion for Directed Certification (hereinafter "GA Motion"). Intervenors, Native Americans for Clean Environment and the Cherokee Nation, oppose the motion. GA has not met the Commission's standard for directed certification under 10 C.F.R. § 2.786(g).

Statement of Facts

On June 24, 1994, the Licensing Board issued LBP-94-17, which denied GA's Motion for Summary Disposition for an Order of Dismissal in this enforcement proceeding involving, inter alia, GA's liability for $86 million in decommissioning funding for the highly contaminated Sequoyah Fuels Corporation ("SFC") facility in eastern Oklahoma. Following extensive briefing by all

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parties, the Board found that, contrary to GA's arguments, (1) the parties have raised a material factual dispute as to the extent to which GA has made itself liable for assuring the financing of SFC's decommissioning responsibilities, and (2) GA had failed to meet the federal standard for dismissal for failure to state a claim upon which relief could be granted.[1] Slip op. at 12-15. As a result, the proceeding is continuing toward a trial that will cover, among other things, the factual basis for the NRC's assertion of jurisdiction over GA. GA now seeks directed certification of the Board's decision.

ARGUMENT

I. GENERAL ATOMICS HAS NOT MET THE NRC'S STANDARD FOR DIRECTED CERTIFICATION

Under 10 C.F.R. 2.786(g), a certified question will be reviewed if it either

> 1) Threatens immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or 2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

See also Marble Hill, 5 NRC at 1192.

Directed certification is appropriate only in the most compelling circumstances where an "immediate elimination of the decisional conflict [is] imperative," such as an emergency situa-

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[1] One member of the Board dissented, but only on the ground that he would have given GA an opportunity to reply to the oppositions of the NRC Staff and NACE. Id. at 19.

tion. Public Service Co. of New Hampshire, (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 485 (1975); Toledo Edison Co., (Davis-Besse Nuclear Power Station, Unit 1), ALAB-297, 2 NRC 727, 729 (1975) (hereinafter "Davis Bessie").

Hence, directed certification is not automatically granted where a licensing board makes an interlocutory, non-appealable pronouncement at possible variance with previously expressed views. Seabrook, at 484-85. Likewise, conflicting decisions between two licensing boards does not necessarily justify interlocutory appellate review. Public Service Co. of Indiana, Inc.., (Marble Hill Nuclear Generating Station, Unit 1 and 2), ALAB-405, 5 NRC 1190 (1977) (hereinafter "Marble Hill").

Certification is appropriate "where the ruling below threatens a party with immediate and serious irreparable harm which, as a practical matter, cannot be redressed on appeal at the end of the case." Public Services Co., (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977). If the threatened harm could be alleviated by an appeal to the Commission at the conclusion of the proceeding, then certification is not appropriate. Id. at 1192.

General Atomics makes several arguments as to why directed certification is appropriate in this case. As discussed below, none of them have merit. First, GA claims that the Board's ruling has affected the basic structure of this proceeding in a pervasive or unusual manner. GA Motion at 2, 9. However, GA does not explain how the structure of the proceeding has been

affected by the Board's order; nor is such a pervasive effect evident. As support for this argument, GA contends that this cases raises an issue of "first impression." Id. at 9. However, as the Appeal Board ruled in Commonwealth Edison Co., (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470 (1985), the basic structure of an ongoing adjudication is not changed because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulation.

Second, GA argues that the Board's ruling is "based upon a legal conclusion without governing precedent," and that it "raises a substantial and important question of law and policy." This is the Commission's standard for granting petitions for review, however, and is not properly applied to an interlocutory appeal. GA's disagreement with the outcome of its motion for summary disposition does not constitute grounds for directed certification, however. Even in instances where a party feels that the Licensing Board's action "is in the teeth of the Commission's regulations and the Administrative Procedure Act," and that the issues on which summary disposition was denied raise matters "so remote and speculative as to merit no consideration," directed certification will not automatically be granted where other avenues, such as a motion for reconsideration or appeal of the Licensing Board's decision, are available. Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc., (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13

NRC 550, 552-53 (1981); see also, Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1758 (1982) (licensing board ruling may conflict with Commission case law, policy, or regulations or otherwise may be in error, but unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await issuance of final licensing board decision); Commonwealth Edison Co., (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470 (1985). It is also important to note that the Commission does not favor directed certification of questions of fact. Commonwealth Edison Co., (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19 (1983). In this case, the Board explicitly found that the extent of GA's liability depended on facts that have yet to be developed in this case. LBP-94-17, slip op. at 12.

Finally, GA argues that the Board's ruling will have an "adverse impact" that is not limited to the "substantial costs of litigation," but also includes "substantial risks to General Atomics' credit rating, its ability to obtain financing, and its overall ability to carry on its work." GA Motion at 10. Clearly, additional delay and litigation expenses do not constitute irreparable harm nor the type of unusual delay that warrants interlocutory appeal. Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1758 (1982) (added delay and litigation expense due to Licensing Board's admission of contention - even if erroneous -

does not distinguish case so as to warrant interlocutory appeal); Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc., (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981) (time and money expended in a trial, even for remote and speculative matters, does not meet standard for directed certification).

In addition, General Atomics fails entirely to support its vague assertion that the dismissal of summary disposition ruling on the issue of jurisdiction will cause "substantial risks" to its credit rating, ability to obtain financing, and overall ability to carry on its work. No "unusual" litigation expense has been cited by GA, and any injury caused by ultimate imposition of liability for decommissioning funding may be alleviated through a petition for review of the Presiding Officer's final decision. Public Service Co. of New Hampshire, (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 485-86 (1975).[2]

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[2] Neither of the two decisions cited by GA, in which directed certification was granted, are applicable to this case. In Georgia Power Co., CLI-94-05 __ NRC __ (April 7, 1994), the Commission took review of a licensing board ruling that denied the NRC staff's request to delay disclosure of an investigation report pending possible enforcement action. Because the release of the report would impact the staff immediately, and because the harm would be irreparable, the first prong of 10 C.F.R. 2.786(g) was met. No such irreparable harm is alleged here. In Oncology Services Co., CLI-93-13, 37 NRC 419 (1993), the Commission took certification of a 120 day stay of enforcement proceedings where the stay would cause the licensee's operation to remain shutdown for an extra four months. Again, no such drastic harm is alleged in this case. In addition, petition for review of the Board's final order would provide no relief because the stay would already have expired by its own terms at that time.

II. The U.S. Supreme Court decisions cited by General Atomics are not relevant to the legal and factual issues at hand.

The three recent U.S. Supreme Court decisions cited by General Atomics have no bearing on the issues now pending before the Licensing Board.[3] Two of the decisions, Landsgraf v. USI Film Products, et al., __ U.S. __, 114 S.Ct. 1483 (1994) and Rivers v. Roadway Express, Inc., __ U.S. __, 114 S.Ct. 1510 (1994), address the issue of whether new legislation, specifically the Civil Rights Act of 1991, operates retroactively. The Court held that the new law could not be applied retroactively to conduct that occurred prior to enactment of the 1991 Civil Rights Act absent Congressional intent to apply the law retroactively, as it would violate the Ex Post Facto Clause and other clauses of the U.S. Constitution. The retroactivity of new legislation is not remotely at issue in this case, which involves the application of the 1954 Atomic Energy Act and its implementing regulations. The Licensing Board properly "appl[ied] the law in effect at the time it render[ed] its decision." Landsgraf, 114 S.Ct. at 1501, quoting, Bradley v. Richmond School Board, 416 U.S. 696, 711, 94 S.Ct. 2006 (1974). Moreover, General Atomics has been on notice of the NRC's decommissioning financing requirements since they

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[3] It should also be noted that GA made no attempt to bring these cases before the Licensing Board. As a general rule, certification is disfavored unless the Licensing Board has been afforded a "reasonable opportunity to decide itself the question sought to be certified." Toledo Edison Co., (Davis-Besse Nuclear Power Station, Unit 1), ALAB-297, 2 NRC 727, 729 (1975).

were promulgated in 1988, and this did not deter GA from continuing as owner and active participant in SFC's licensed activities (including SFC's 1990 license renewal application). Thus, General Atomics has indeed had ample "opportunity to know what the law is and to conform [its] conduct accordingly." Landsgraf, 114 S.Ct. at 1497.

The other decision cited by General Atomics, Central Bank v. First Interstate Bank, __ U.S. __, 114 S.Ct. 1439 (1994) held that there is no private right of action under the Securities Exchange Act of 1934 against aiders and abettors, where the statute does not expressly mention aiders and abettors as potential defendants. Again, there is no comparison to this case, which involves the liability under the Atomic Energy Act of non-licensee owners of nuclear licensees, where those owners are substantially invo lved in the day-to-day activities of the licensee.

Conclusion

Accordingly, GA's Petition for Directed Certification And/Or Motion for Directed Certification should be denied.

Respectfully submitted,

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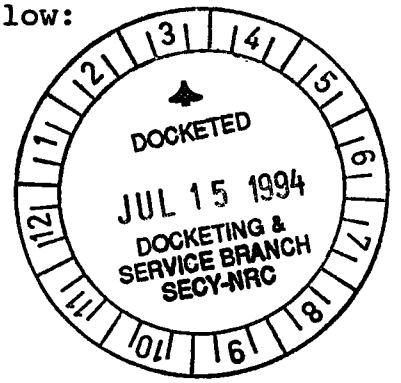
July 15, 1994

CERTIFICATE OF SERVICE

I certify that on July 15, 1994, copies of the foregoing NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S OPPOSITION TO GENERAL ATOMICS' MOTION TO STAY DISCOVERY and OPPOSITION TO GENERAL ATOMICS' PETITION FOR REVIEW OF LBP-94-17 AND/OR MOTION FOR DIRECTED CERTIFICATION were served by fax and/or first-class mail on the following, as indicated below:



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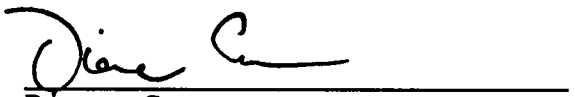

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