

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

Docket No. 40-8076A)
OFFICE OF SECRETARY)
DOCKETING SERVICE)
BRANCH)
June 24, 1994

GENERAL ATOMICS' PETITION FOR REVIEW OF LBP-94-17
AND/OR MOTION FOR DIRECTED CERTIFICATION

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June 24, 1994

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In the Matter of)
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SEQUOYAH FUELS CORPORATION) Docket No. 40-8027-EA
and GENERAL ATOMICS)
)
(Sequoyah Facility in) June 24, 1994
Gore, Oklahoma))

**GENERAL ATOMICS' PETITION FOR REVIEW OF LBP-94-17
AND/OR MOTION FOR DIRECTED CERTIFICATION**

INTRODUCTION

Pursuant to 10 C.F.R. § 2.718(i) and 10 C.F.R. § 2.786(g)(1), (2), General Atomics petitions the Nuclear Regulatory Commission ("NRC" or "Commission") for review of the April 28, 1994 Order and the June 8, 1994 Memorandum (LBP-94-17)¹ of the Atomic Safety and Licensing Board ("Licensing Board") or, in the alternative, to direct certification of all issues raised in General Atomics' Motion for Summary Disposition or for an Order of Dismissal, including the fundamental threshold issue of jurisdiction. The question of the jurisdiction of the NRC (and preliminarily, of the Licensing Board) was originally raised in General Atomics' Answer and Request for Hearing to the NRC Staff's October 15, 1993 Order. It was raised again in the motion.

In the April 28, 1994 Order, and the June 8, 1994 Memorandum, a majority of the Licensing Board denied the General Atomics'

¹ According to its Certificate of Service, LBP 94-17 was served on all parties by first class mail on June 9, 1994.

motion. In their June 8, 1994 Memorandum, the majority ruled that even though this proceeding "is a significant one, being one of first impression, ... a resolution of the jurisdictional matter must await the development of the litigative factual issues before us."² In so ruling, the Board erred.

Commission review of the Board's ruling is appropriate and necessary now because it affects the basic structure of this proceeding in a pervasive or unusual manner. See 10 C.F.R. § 2786(g)(1). Moreover, the ruling is (1) based upon a legal conclusion without governing precedent, and (2) raises a substantial and important question of law and policy. See 10 C.F.R. § 2.786(b)(4)(ii), (iii). It is clearly in the public interest for the Commission to promptly resolve the following question:

Does its enabling legislation vest in the Commission jurisdiction to retroactively impose an \$86 million non-civil penalty financial liability upon the corporate parent of a licensee, where there is no claim of illegal or intentional misconduct against either the licensee or the parent, and where, with respect to the licensee's regulated site and activities, the parent is not a licensee, is not engaged in activities within the subject matter jurisdiction of the Commission, and does not possess or use regulated source materials?

For the reasons set forth below, the Commission should accept interlocutory review, grant certification and rule that it lacks jurisdiction to hold General Atomics jointly and severally liable for the decommissioning and remediation costs of the licensee, Sequoyah Fuels Corporation.

² LBP-94-17, p. 9.

BACKGROUND

On October 15, 1993, the NRC Staff initiated this matter by filing a proposed Order that would purportedly hold both Sequoyah Fuels Corporation (the sole licensee named in NRC License No. SUB-1010, Docket No. 40-8027, hereinafter referred to as the "Licensee") and General Atomics, the Licensee's third-tier parent company, "jointly and severally" liable for (1) providing "funding to continue remediation" of alleged contamination at the Licensee's facility in Gore, Oklahoma, whether or not the facility continued to operate, (2) providing "financial assurance for decommissioning" in accordance with the requirements of 10 C.F.R. § 40.36, and (3) providing "an updated, detailed cost estimate for decommissioning and a plan for assuring the availability of adequate funds for completion of decommissioning" in accordance with the requirements of 10 C.F.R. § 40.42(c)(2)(iii)(D). The Order specifically directed General Atomics to provide financial assurance in the amount of \$86 million through (1) prepayment, (2) a surety method, insurance, or other guarantee method, or (3) an external sinking fund in which deposits are made at least annually.³

On November 2, 1993, General Atomics Answered the October 15 Order and requested that it be rescinded or, in the alternative, that a hearing on the Order be conducted. In its Answer, General Atomics specifically denied that the NRC has any jurisdiction over it with regard to the matters set forth in the Order.

³ NRC Staff Order, October 15, 1993, pp. 23-25.

On February 17, 1994, General Atomics moved for an order granting summary disposition in its favor on all matters involved in this proceeding or for an order of dismissal. The motion was supported by affidavits and a brief. General Atomics specifically asserted, inter alia, that the statutes upon which the NRC Staff relied in its Order of October 15, 1993, do not authorize it to either assert jurisdiction over General Atomics in this matter or to impose upon General Atomics the non-civil penalty financial liability which is claimed in the October 15 Order.

The importance of the issues presented by the October 15, 1993 Order and by General Atomics' Motion for Summary Disposition or for an Order of Dismissal has been expressly acknowledged by the NRC Staff. On March 4, 1994, the Staff characterized this case as "complex and far-reaching."⁴ The Staff further recognized that "the outcome of this proceeding may very well have an impact on decommissioning issues involving other licensees and their parent organizations."⁵

Briefs in opposition to General Atomics' motion were filed on April 13, 1994 by the NRC Staff and Native Americans for a Clean Environment ("NACE") respectively.⁶ On April 20, 1994, General

⁴ NRC Staff's Motion for Extension of Time to Respond to General Atomics' Motion for Summary Disposition or for an Order of Dismissal (March 4, 1994), p. 3.

⁵ Id.

⁶ On February 24, 1994, the Licensing Board tentatively granted NACE's motion for leave to intervene in this proceeding (subject to the Board's later acceptance of a litigable contention by NACE). The Board simultaneously referred to the Commission for its review, the Board's ruling that in a proceeding on a 10 C.F.R.

Atomics moved the Licensing Board for leave to file a reply to those responses.

In a brief Order of April 28, 1994, a majority of the Licensing Board denied General Atomics' Motion for Summary Disposition or for an Order of Dismissal, including both its request for oral argument and its Motion for Leave to Reply to the responses filed by the NRC Staff and NACE. In its Order, the Licensing Board noted that the reasons supporting its decision would be detailed in a subsequent memorandum. The Licensing Board further noted that Judge Bollwerk "would have granted General Atomics' Motion for Leave to Reply" and "does not join in the denial of [General Atomics'] Motion for Summary Disposition or an Order of Dismissal."⁷

The Licensing Board's Memorandum was issued on June 8, 1994. Despite the majority's conclusion that this proceeding "is a significant one, being one of first impression,"⁸ and the separate conclusion of Judge Bollwerk who, in dissenting from the majority's denial of the Motion for Summary Disposition stated that "[t]he issues [General Atomics] raises in its summary disposition motion involve fundamental questions about the jurisdictional basis for

§ 2.202 staff enforcement order, there is no prohibition against an otherwise qualified petitioner intervening as of right in support of the order. See LBP-94-5, 39 NRC _____, 1994 NRC LEXIS 10 (Feb. 24, 1994). On March 22, 1994, the Board admitted contentions 1 and 2 in NACE's February 8, 1994 supplemental intervention petition.

⁷ ASLB Order of April 28, 1994, p. 2.

⁸ LBP-94-17, p. 9.

this proceeding,"⁹ the Board has not referred its ruling to the Commission pursuant to 10 C.F.R. § 2.730(f).

ARGUMENT

1. Immediate Commission review of the Licensing Board's ruling is appropriate and necessary.

The duty which the NRC Staff seeks to impose upon General Atomics by the October 14, 1993 Order is based upon a theory of liability which is novel, far-reaching, and without precedent. The NRC Staff seeks nothing less than to impose an \$86 million non-civil penalty financial liability upon the corporate parent of a licensee, when there is no claim of illegal or intentional misconduct against either the licensee or the parent, and where, with respect to the licensee's regulated site and activities, the parent is not a licensee, is not engaged in activities within the subject matter jurisdiction of the NRC, and does not possess or use regulated source materials.

The NRC Staff does not base the asserted jurisdiction upon the text of the NRC's enabling statute, or even upon the NRC's own established interpretation of that statute. Rather, it apparently seeks to suddenly and broadly expand the jurisdiction of the NRC by imposing a new form of liability upon those non-licensees whom the NRC Staff perceives to have "deep pockets." In order to fall

⁹ LBP-94-17, p. 19.

within the scope of the NRC's purported jurisdiction, the NRC Staff asserts that it is not necessary that a non-licensee parent company engage in some form of wrongful conduct. It is not even necessary that it engage in activities which are clearly within the NRC's subject-matter jurisdiction. According to the NRC Staff, it is only necessary that the non-licensee parent engage in some activity that "affects" -- in some undefined way -- other activities which are within the NRC's subject-matter jurisdiction.¹⁰

It is undisputed that the Licensee is a Delaware corporation and that General Atomics is a California corporation. Nevertheless, in its October 15, 1993 Order the NRC Staff alleged that General Atomics has constructive or "de facto control" over the day-to-day business of the Licensee and that that control makes General Atomics equally responsible with the Licensee to satisfy the Commission's financial assurance requirements.¹¹ At the January 19, 1994 Prehearing Conference, the Staff counsel elaborated: "The Staff's theory is more akin to . . . the common law, corporation/contract, sometimes tort action involving parent-subsidary relationships where a claimant attempts to pierce the corporate veil between the subsidiary and the parent to reach the parent" ¹²

¹⁰ See the NRC Staff's Answer in Opposition to General Atomics' Motion for Summary Disposition or for an Order of Dismissal (April 13, 1994), pp. 14-16.

¹¹ NRC Staff Order, October 15, 1993, pp. 14, 19.

¹² Prehearing Conference, January 19, 1994, Official Transcript of Proceedings, p. 107.

Nowhere in the October 15, 1993 Order, however, did the NRC Staff plead or otherwise allege the basis in law for its "de facto licensee" theory. There is no statutory basis in its enabling legislation for such a theory and only a few days ago the United States Supreme Court re-affirmed that "[T]here is no federal general common law." O'Melveny & Myers v. Federal Deposit Insurance Corporation, 1994 WL 249558 (U.S.). Even if a basis in federal law for a "de facto licensee" theory had been cited in the October 15, 1993 Order, and even if NRC Staff reliance on some state's common law doctrine of "piercing the corporate veil" was otherwise proper, the Staff has failed to plead the essential elements of that doctrine. A fundamental prerequisite to the piercing of a corporate veil is abuse of the corporate form for some illegal purpose or other intentional misconduct. No such abuse or intentional misconduct has been alleged in this proceeding. Indeed, in its Answer in Opposition to General Atomics Motion for Summary Disposition or for an Order of Dismissal, the Staff expressly conceded that "the Order is not based on a theory of deliberate misconduct."¹³

Not content with its assertion of such unprecedented NRC jurisdiction, the NRC Staff also seeks to apply it retroactively. It is undisputed that during the 1988 discussions between the NRC and General Atomics which eventually led to the sale of the Licensee to General Atomics by Kerr-McKee Corporation, the NRC

¹³ NRC Staff's Answer in Opposition to General Atomics' Motion for Summary Disposition or For an Order of Dismissal, p. 13.

considered asking General Atomics for a guarantee of the Licensee's decommissioning and reclamation expenses. It is also undisputed that ultimately, no new conditions were placed by the NRC on the change in ownership of the Licensee. It is further undisputed that if the NRC had at that time required General Atomics to accept responsibility for providing funding, or financial assurance, or any form of guarantee of the decommissioning and remediation costs of the Licensee's facility, the sale and change of ownership would not have taken place.

Now, however, the NRC Staff appears to be taking the position that merely by accepting ownership of the Licensee in 1988, General Atomics assumed total responsibility for the Licensee's decommissioning and remediation expenses. The Staff's assertion of jurisdiction over General Atomics and its retroactive application is not based on new legislation. Nor is it being sought through a regular rule-making proceeding. Rather, the NRC Staff is seeking to establish it through an enforcement action.

The threshold issue of the NRC's jurisdiction to hold General Atomics "jointly and severally liable" for the decommissioning and remediation costs of the facility operated by its subsidiary-licensee, Sequoyah Fuels Corporation, is so fundamental and important to this matter that it affects the basic structure of the proceeding in a pervasive and unusual manner. As a question of first impression, this issue of law requires a deliberate exposition and a full consideration by the NRC, since the risk of error is particularly acute when a Licensing Board is acting

outside an established body of law.

If, before the threshold issue of the NRC's jurisdiction over it is determined with finality, General Atomics is required to engage in protracted and expensive litigation with the NRC, and possibly with one or more third parties (Native Americans for a Clean Environment -- "NACE" -- and/or the Cherokee Nation), both of which concede that their only reason for intervening in the matter is to support the NRC Staff's proposed order, General Atomics will suffer immediate and serious irreparable impact. That adverse impact will not be limited to the substantial costs of litigation. It will also include substantial risks to General Atomics' credit rating, its ability to obtain financing, and its overall ability to carry on its work. As a practical matter, these risks cannot be alleviated through a petition for review of the Presiding Officer's final decision.

It has long been established that the NRC has the power to direct the certification of legal issues raised in proceedings which are still pending before licensing boards. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 482 (1975). It is of no moment that a licensing board has already ruled since "there is nothing in Section 2.718(i) [of the Rules of Practice] or its history to suggest an intent to place limitations upon the right of the Commission . . . to have brought up to it for consideration any question raised before a licensing board which is thought deserving of early dispositive resolution." Id. Nor is there any legal obstacle in the path of a request being

made by one of the parties that the NRC utilize Section 2.718(i), since the request for a Section 2.718(i) certification does not invoke the NRC's jurisdiction as a matter of right, but instead, seeks simply the exercise by the NRC of a discretionary power. Id. Exceptions to the general proscription against interlocutory appeals in 10 C.F.R. § 2.730(f) have been routinely granted if a party can demonstrate that review is appropriate under one of the criteria in 10 C.F.R. § 2.786(g)(1)-(2). See, e.g., Oncology Services Corp., CLI-93-13, 37 NRC 419, 420-21 (1993); Georgia Power Company, CLI-94-05 (1994). See, also, Statement of Policy on Conduct Licensing Proceedings, CLI-81-8, 13 NRC 452, 456-57 (1981) (in licensing hearings, licensing boards should seek Commission guidance on significant legal or policy questions and should do so in a manner that will avoid delay in the proceeding).

A licensing board's view of its own jurisdictional boundaries goes to the basic structure of a proceeding and has a significant and pervasive effect upon the proceeding. Safety Light Corporation, et al. (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350, 361 (1990). The instant matter presents critically important, novel questions of law of first impression on the jurisdictional boundaries not of the Licensing Board alone, but of the Commission itself.

2. The Board failed to consider very recent decisions of the U.S. Supreme Court.

It is not apparent in the Licensing Board's June 8, 1994

Memorandum that the Board considered three decisions of the U.S. Supreme Court that were issued after the parties to this matter had filed papers relating to General Atomics' Motion for Summary Disposition or for an Order of Dismissal. Since General Atomics was not permitted by the Board to file a Reply Brief, it was unable to discuss the applicability of those decisions to this proceeding. Each of the opinions is relevant to the jurisdictional issues raised by General Atomics' motion.

In its Motion and supporting papers, General Atomics asserted inter alia, that (1) the statutes upon which the NRC relied in its Order of October 15, 1993, do not authorize it to either assert jurisdiction over General Atomics in this matter or to impose upon General Atomics the non-civil penalty financial liability which is claimed; (2) Congress never intended to delegate to the NRC the authority which it now seeks to assert over General Atomics; (3) by their own terms, the NRC's regulations do not apply to General Atomics, and to any extent that they appear to apply, the regulations are void, since they cannot confer any greater authority than that granted by Congress; (4) the attempt by the NRC to stretch its jurisdiction far enough to encompass a non-licensee like General Atomics in these circumstances, is arbitrary and so unreasonable as to be unlawful, even if it were not obviously beyond the NRC's authority; (5) in its October 15, 1993 Order the NRC otherwise failed to plead or assert a legally cognizable claim against General Atomics; (6) the NRC has admitted that General Atomics is not legally obligated to provide assurance of the

decommissioning and remediation costs of the Licensee's facility, and the NRC is thus estopped from seeking to compel such assurance; (7) the actions of the NRC suggest that it has prejudged the contested matters raised by the October 15, 1993 Order and to require General Atomics to contest the Order further before the NRC itself or before any other administrative forum which is inferior to the NRC, would be to deprive General Atomics of the fairness traditionally associated with any form of judicial process and violate due process rights that are guaranteed to General Atomics under the Constitution.

On April 19, 1994, nine days before the Licensing Board denied General Atomics' Motion, the United States Supreme Court issued its opinion in Central Bank of Denver v. First Interstate Bank of Denver, ___ U.S. ___, 114 S.Ct. 1439 (1994). Rejecting arguments to look to broad congressional purposes behind a statute to determine the scope of individual liability, the Court concluded that "[t]he ascertainment of congressional intent with respect to the scope of liability created by a particular section" of a statute "must rest primarily on the language of that section;" that the statutory text controls the definition of prohibited conduct; that the issue is not whether the imposition of a new form of liability is good policy, but whether it is covered by the statute in question; and that generally, liability may not be imposed on parties who are not within the "plain language" of the statute in question. Id., 114 S.Ct. at pp. 1446-1448.

On April 26, 1994, two days before the Licensing Board's

ruling, the Supreme Court decided two additional cases that are relevant to the jurisdictional issues raised by General Atomics' Motion for Summary Disposition. In Landgraf v. USI Film Products, et al., ___ U.S. ___, 114 S.Ct. 1483 (1994), the Court addressed the question of retroactive legislation. In words that go directly to the effort by the NRC Staff here to retroactively impose a novel new form of liability upon a non-licensee parent company, the Court declared that:

". . . . the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

* * *

In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions."

Id., 114 S.Ct. at 1497. The Court further observed that:

"The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. As Justice Marshall observed in his opinion for the Court in Weaver v. Graham, 450 U.S. 24 (1981), the Ex Post Facto Clause [of the Constitution] not only ensures that individuals have 'fair warning' about the effect of criminal statutes, but also 'restricts governmental power by restraining arbitrary and potentially vindictive legislation.'" Id., 114 S.Ct. at 1497-98.

In Rivers v. Roadway Express, Inc., ___ U.S. ___, 114 S.Ct. 1510 (1994), an 8-1 majority of the Court expressly recognized a judicial presumption of great antiquity, that a legislative

enactment affecting substantive rights does not apply retroactively, absent clear evidence to the contrary. These cases compel recognition that an administrative agency like the NRC cannot do what Congress may not, namely, impose a new duty and a new liability (upon General Atomics) with respect to a transaction (General Atomics' 1988 purchase of the Licensee) already past.

CONCLUSION

For the foregoing reasons, the Commission should grant interlocutory review of the Licensing Board's Order of April 28, 1994 and its June 8, 1994 Memorandum (LBP-94-17). In the alternative, the Commission should direct certification of all issues raised in General Atomics' Motion for Summary Disposition or for an Order of Dismissal.

Respectfully submitted,

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Docket No. 40-8027-EA

June 24, 1994

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing General Atomics' Petition for Review of LBP-94-17 and/or Motion for Directed Certification was served upon the following persons on June 24, 1994, by deposit in the United States mail, first class postage prepaid and properly addressed:

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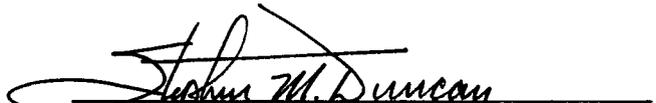
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