

May 10, 1994
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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'94 MAY 10 P2:45

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)	
)	
SEQUOYAH FUELS CORPORATION)	Docket No. 40-8027-EA
GENERAL ATOMICS)	
)	Source Material License
(Gore, Oklahoma Site)	No. SUB-1010
Decontamination and)	
Decommissioning Funding))	

NRC STAFF'S RESPONSE
TO THE CHEROKEE NATION'S APPLICATION
FOR ORDER ALLOWING INTERVENTION

INTRODUCTION

On April 20, 1994, in response to a Notice of Hearing published in the *Federal Register* on April 5, 1994,¹ the Cherokee Nation filed its "Application For Order Allowing Intervention" (Petition).² The NRC Staff (Staff) hereby responds to the Cherokee Nation's Petition. As set forth below, the Staff submits that the Cherokee Nation's Petition, as filed, should be denied. However, the Staff would not object to allowing the Cherokee Nation to amend its Petition to correct the deficiencies in the Petition described below and to submit a valid contention.

¹ Notice of Hearing; Staff Order Regarding Decommissioning Funding, 59 Fed. Reg. 15,953 (1994).

² It should be noted that the Petition, although served on April 20, 1994, is dated April 15, 1994.

SECY-036

DESIGNATED ORIGINAL

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BACKGROUND

On October 15, 1993, the Deputy Director for Nuclear Materials Safety, Safeguards, and Operations Support issued an Order to Sequoyah Fuels Corporation (SFC) and General Atomics (GA) addressing decommissioning funding for the Sequoyah Fuels site (Order).³ In the Order, the Staff concluded that SFC did not appear to be able to satisfy the Commission's financial assurance standards, and that SFC's parent corporation, GA, is required to provide financial assurance for decommissioning the SFC site in the amount of \$86 million. On November 3, 1993, SFC and GA filed requests for hearing on the Order with the Secretary of the Commission.⁴ The hearing requests were referred to the Atomic Safety and Licensing Board Panel for appropriate action.⁵ On November 22, 1993, this Licensing Board was established.⁶ On November 18, 1993, Native Americans for a Clean Environment (NACE) filed a motion to intervene in the proceeding,⁷ which was granted by the Board.⁸ That matter is currently pending before

³ 58 Fed. Reg. 55,087 (1993).

⁴ Sequoyah Fuels Corporation's Answer and Request for Hearing (Nov. 2, 1993); General Atomics' Answer and Request for Hearing (Nov. 2, 1993).

⁵ Memorandum from Samuel J. Chilk, Secretary, to B. Paul Cotter, Chief Administrative Judge (Nov. 18, 1993).

⁶ 58 Fed. Reg. 63,406 (1993).

⁷ NACE's Motion for Leave to Intervene in Proceeding Regarding Sequoyah Fuel Corporation's and General Atomics' Appeal of Nuclear Regulatory Commission's October 15, 1993, Order (Nov. 18, 1993).

⁸ *Sequoyah Fuels Corporation and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, ___ NRC ___, slip op. (Feb. 24, 1994).

the Commission.⁹ On March 29, 1994, the Licensing Board issued a Notice of Hearing informing "any person whose interest may be affected by this proceeding" that he or she may petition for leave to intervene within twenty days. *See supra* note 1.

As noted above, the Cherokee Nation filed its Petition to intervene in the proceeding on April 20, 1994, within the time prescribed in the Notice of Hearing. For the reasons set forth below, the Staff submits that the Cherokee Nation's Petition, as filed, does not fully address the factors regarding intervention set forth in 10 C.F.R. § 2.714 of the Commission's regulations. However, for the reasons set forth below, the Staff does not oppose providing the Cherokee Nation with the opportunity to submit an amended petition to intervene setting forth with appropriate specificity the basis for its standing to participate in this proceeding and, thereafter, a valid contention.

DISCUSSION

The NRC regulations provide that a petition to intervene "shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reason why petitioner should be permitted to intervene." 10 C.F.R. § 2.714(a)(2). In order to determine whether a petitioner has met these standards, the Commission has applied contemporaneous judicial concepts of standing. *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-92-2, 35 NRC 47, 56 (1992), *aff'd*, *Environmental & Resources Conservation Organization v. NRC*, 996 F.2d, 1224 (9th Cir. 1993); *Metropolitan*

⁹ *See* Sequoyah Fuels Corporation's Notice of Appeal of LBP-94-5 and LBP-94-8 (Apr. 7, 1994).

Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). In order to establish standing, a petitioner must show that the proposed action will cause "injury in fact" to the petitioner's interest and that the injury is arguably within the "zone of interests" protected by the statutes governing the proceeding. *E.g., Public Service Company of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266 (1991) (citing *Three Mile Island*, CLI-83-25, 18 NRC at 332).

The Cherokee Nation's Petition is deficient in two respects: (1) the Petition has not adequately demonstrated an injury in fact; and (2) the Petition fails to allege adequate facts demonstrating that the result of these proceedings will adversely impact the Cherokee Nation's interests. As such, the Staff cannot determine from the Petition whether the Cherokee Nation has standing to intervene in this proceeding.

As an initial matter, the Petitioner has failed to sufficiently demonstrate that it has suffered an injury in fact. An organization, such as the Cherokee Nation, may meet the injury in fact test for standing in one of two ways. It may demonstrate an effect upon its organizational interest, or it may allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justifiable case had the members themselves brought suit. *See Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 646-47 (1979).

An organization seeking to intervene in its own right must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the Atomic Energy Act or the National Environmental Policy Act. *Florida Power and*

Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991). The Cherokee Nation alleges, presumably as its organizational interest, that, as a tribal government, it has the obligation to protect the health, safety and welfare of its members where possible, and also that the tribe is the owner of a portion of the bed of the Arkansas River and has the responsibility to protect the asset for future generations. Petition at 2. However, the Cherokee Nation has failed to allege with any specificity any injury in fact to these organizational interests.

Furthermore, the Cherokee Nation has not met the criteria for demonstrating that, as a result of the challenged action, its members are suffering immediate or threatened injury of the sort that would make out a justifiable case had the members themselves brought suit. An organization, depending upon injury to the interests of its members, to establish standing must provide with its petition identification of at least one member who will be injured, a description of the nature of that injury, and an authorization for the organization to represent that individual in the proceeding. *E.g., Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 192-93 (1991) (citing *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982)).¹⁰ While the Petition submitted by the

¹⁰ Reference is made in the Petition to the fact that the Cherokee Nation has been permitted to intervene in licensing proceedings concerning this same facility. Petition at 3. This alone does not provide the basis to permit intervention here. The Commission's regulations at 10 C.F.R. § 2.714(a)(2) address the showing a petitioner must make of its interests that may be affected by the results of "the proceeding," *i.e.*, the immediate proceeding, not past or other proceedings. Consistent with this reading of the regulations, Licensing Boards have determined that merely because a petitioner may have had standing in an earlier proceeding, such does not automatically confer

(continued...)

Cherokee Nation vaguely asserts that "many tribal members live within a ten (10) mile radius of the plant," Petition at 2, the Cherokee Nation has not included with its Petition either identification of any member who would be injured and a description of the nature of that injury, or an authorization for the organization to represent that individual in the proceeding.¹¹

A key failure of the Petition is that it fails to allege adequate facts to demonstrate a connection between the result of these proceedings and any harm to the Petitioner. In order to demonstrate standing to intervene, the test is whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another.¹² *Nuclear Engineering, Inc.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). There must be a concrete demonstration that harm to the petitioner will or could flow from a result unfavorable to

¹⁰ (...continued)

standing in subsequent proceedings involving the same facility, even if the scope of the earlier and later proceedings is similar. *See, e.g., Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-92-27, 36 NRC 196, 198 (1992) (citing *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 125-26 (1992)); *but see Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-33, 34 NRC 138, 140-41 (1991).

¹¹ It is not clear, and the Petition does not allege, that there exists an "obvious potential for offsite consequences" stemming from decontaminating the SFC site. Thus, the Cherokee Nation "must allege some specific 'injury in fact' that will result from the action taken," and may not rely solely on the proximity of its members to the facility to establish standing. *See Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

¹² The application of this test in the context of one who is not adversely affected by the issuance of an enforcement order is an issue presently before the Commission. *See* [Commission] Order (Mar. 3, 1994) (addressing the Board's referral of its ruling in Section II.A. of LBP-94-5, slip op. (Feb. 24, 1994)).

it. *Id.* The Cherokee Nation asserts that "[t]he property interests and membership obligations of the Cherokee Nation will undoubtedly be affected by the results of these proceedings." Petition at 3. By its terms, the Order limits the scope of this proceeding to whether the Order should be sustained. Order at 27. Although not clearly stated, the gist of the Petitioner's argument appears to be that it will suffer harm if the Order is not sustained, and the aspect within the scope of the proceeding as to which it seeks to participate is that it wants to assure that the Order is sustained. In this connection, the Petitioner expresses concern regarding the extent to which the environment surrounding the Sequoyah Fuels facility has been contaminated by its operation. The Cherokee Nation vaguely asserts that it is "known" that significant quantities of contaminants remain at the plant site and will have to be adequately dealt with during decommissioning, and that it is "believed" that contaminants from the site have been allowed to escape and settle on nearby tribal lands. Petition at 2. However, the Petitioner does not provide any further documentation or submit any affidavits in support of these vague assertions. In particular, the Petitioner has provided no factual basis for its assertion that contaminants have settled on tribal lands, nor has it provided information as to how the outcome of these proceedings will impact its interest in avoiding contamination. Absent further specificity, the Petitioner has failed to demonstrate a nexus between a possible outcome of these proceedings and its interests.

The Staff, therefore, submits that the Cherokee Nation has not submitted enough information in its Petition to demonstrate that it has standing to intervene in this proceeding. Furthermore, in order to be admitted as a party, a petitioner must submit

at least one admissible contention. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. 10 C.F.R. § 2.714(b)(2). Thus, even if the Cherokee Nation is determined to have sufficient standing to participate in this proceeding, it still must submit a valid contention.

While the Staff, therefore, submits that the Cherokee Nation's Petition is deficient, under governing NRC regulations, the Staff would not object to allowing the Cherokee Nation to amend its Petition so as to correct the deficiencies in its present Petition as described above and to submit a valid contention. While the fact that the Cherokee Nation has participated in other proceedings involving this facility does not alone provide the requisite standing, *see supra* note 10, the available information of record from such other proceedings¹³ and the limited information presented in the current Petition reflect that the potential exists for the Cherokee Nation to establish standing. The Staff believes, therefore, that it would be appropriate to allow the Cherokee Nation to correct the deficiencies in its Petition.

CONCLUSION

For the foregoing reasons, the Staff submits that the Cherokee Nation's Application for Order Allowing Intervention, as filed, should be denied. However, for the reasons

¹³ See, e.g., *Sequoyah Fuels Corporation*, No. 40-08027-MLA, slip op. (May 6, 1991) (discussing basis for granting Cherokee Nation's request for intervention in license renewal proceeding); Cherokee Nation's Application for Order Allowing Intervention (Mar. 13, 1991), *Sequoyah Fuels Corporation* (No. 40-08027-MLA).

set forth above, the Staff would not object to allowing the Cherokee Nation to amend its Petition to correct the deficiencies described above and to submit a valid contention.

Respectfully Submitted,

Susan S. Chidakel
Susan S. Chidakel
Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of May 1993

May 10, 1994
DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of)
) Docket No. 40-8027-EA
)
SEQUOYAH FUELS CORPORATION) Source Material License No. SUB-1010
GENERAL ATOMICS)
)
(Gore, Oklahoma Site)
Decontamination and)
Decommissioning Funding))

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Address: U.S. Nuclear Regulatory Commission
Office of the General Counsel
Washington, D. C. 20555
Telephone Number: 301-504-1688
Admission: Court of Appeals of Maryland
Name of Party: NRC Staff

Respectfully submitted,

Susan S. Chidakel
Susan S. Chidakel
Counsel for NRC Staff

Dated in Rockville, Maryland
this 10th day of May 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of)
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SEQUOYAH FUELS CORPORATION) Docket No. 40-08027-EA
GENERAL ATOMICS)
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) Source Material License
(Gore, Oklahoma Site Decontamination) No. SUB-1010
and Decommissioning Funding))

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO THE CHEROKEE NATION'S APPLICATION FOR ORDER ALLOWING INTERVENTION" and "NOTICE OF APPEARANCE" for Susan S. Chidakel in the above-captioned matter have been served on the following by deposit in the United States mail, first class, or as indicated by asterisk through deposit in the Nuclear Regulatory Commission's internal mail system this 10th day of May 1994:

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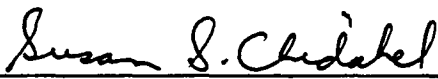
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