

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

OFFICE OF SECRETARY
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BRANCH

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

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

SERVED AUG 23 1994

ORDER DENYING PETITION FOR INTERLOCUTORY REVIEW
AND/OR MOTION FOR DIRECTED CERTIFICATION

CLI-94- 11

On June 24, 1994, General Atomics ("GA") filed with the Commission a "Petition for Review of LBP-94-17 and/or Motion for Directed Certification" ("Petition").¹ In that filing, GA challenged the Licensing Board's denial of GA's February 17, 1994 motion seeking either an order granting summary disposition in its favor regarding all issues in this proceeding or an order of dismissal. We deny GA's Petition.

Background

NRC Staff initiated this proceeding on October 15, 1993, by issuing an order ("Staff Order") holding Sequoyah Fuels Corporation ("SFC") and its parent company, GA, jointly and

¹ The Commission treats GA's filing as a Petition for Review under 10 C.F.R. § 2.786. See Unpublished Order in this docket, dated June 29, 1994 (expanding the filing period and the page limit set forth in section 2.786).

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severally liable for providing (1) the necessary "funding to continue remediation" of the contamination at SFC'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, 58 Fed. Reg. 55,087, 55,092 (Oct. 25, 1993). Staff concluded that GA was liable because it had constructive or "de facto control" over SFC's daily activities. Id. at 55,091.

On February 17, 1994, GA filed with the Licensing Board a motion for summary disposition or, in the alternative, for dismissal. In that motion, GA asserted that the statutes relied upon in the Staff Order do not authorize the staff to assert jurisdiction over GA in this proceeding or to impose upon it the non-civil-penalty financial liability set forth in the Staff Order.

On April 28, 1994, the Licensing Board denied GA's February 17th Motion, and set forth its reasons in a Memorandum issued June 8, 1994. LBP-94-17, 39 NRC _____. The Licensing Board explained that the jurisdictional issue was fact-based, that factual issues underlying the jurisdictional question remained in controversy and that, consequently, the resolution of the jurisdictional question "must await the development of litigative factual issues before [the Board]." Id. at 9. See also id. at 12.

On June 24, 1994, GA filed the instant Petition pursuant to 10 C.F.R. §§ 2.718(i) and 2.786(g)(1), (2). The NRC staff and the two intervenors in this proceeding oppose GA's Petition.

Applicable Legal Standards

The Commission has a longstanding policy disfavoring interlocutory review (other than appeals pursuant to 10 C.F.R. § 2.714a), and will undertake such review only in the most compelling circumstances. See, e.g., Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994). See also Arizona Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 (1983); Pacific Gas and Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978).² A Licensing Board decision refusing to dismiss a party from a proceeding does not, without more, constitute such a compelling circumstance. See Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-736, 18 NRC 165, 166 (1983).

"Under our present appellate system, we have entertained petitions for review of an otherwise interlocutory order -- akin

² We refer throughout this opinion to Appeal Board decisions. The Commission abolished the Atomic Safety and Licensing Appeal Board Panel in 1991, but its decisions still carry precedential weight. See Final Rule, Procedures for Direct Commission Review of Presiding Officers, 56 Fed. Reg. 29,403 (June 27, 1991); Final Rule, Interim Procedures for Agency Appellate Review, 55 Fed. Reg. 42,944 (Oct. 24, 1990); Proposed Rule, Options and Procedures for Direct Commission Review of Licensing Board Decisions, 55 Fed. Reg. 42,947 (Oct. 24, 1990).

to a motion for directed certification -- if the petitioner can satisfy one of the criteria under section 2.786(g)." Sacramento Municipal Utility District, 39 NRC at 93. That section allows interlocutory review only where the question presented either:

- (1) Threatens the party adversely affected by it with 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.

10 C.F.R. § 2.786(g)(1), (2).

The Petition

GA in its Petition asserts that the Licensing Board erred in ruling that the "resolution of the jurisdictional matter must await the development of the litigative factual issues before [the Board]." Petition at 2, quoting LBP-94-17 at 9. GA offers the following three arguments why this error requires immediate Commission attention.

GA's first argument is that the challenged ruling, if allowed to stand, would impose upon GA the following four immediate and serious irreparable impacts (the test set forth in section 2.786(g)(1)): substantial litigation costs, and substantial risks to GA's credit rating, ability to obtain financing, and ability to carry on its work. Petition at 10.

Second, GA asserts that the ruling affects the basic structure of this proceeding in a pervasive or unusual manner (the test set forth in section 2.786(g)(2)); is based upon a

legal conclusion without governing precedent; and raises a substantial and important question of law and policy. Petition at 2, 11. In support, GA cites Safety Light Corp. (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350, 361 (1990) ("Safety Light"), for the proposition that a Licensing Board's view of its own jurisdictional boundaries affects the basic structure of a proceeding and has a significant and pervasive effect upon the proceeding. GA also argues that the question is one of first impression, and that it affects the jurisdiction of not only the Licensing Board but also the Commission itself. Id. at 11.

Finally, GA points out that the Commission routinely grants interlocutory review where a party satisfies either of the criteria set forth in section 2.786(g). Id. at 11, citing Oncology Services Corp., CLI-93-13, 37 NRC 419, 420-21 (1993) ("Oncology"); Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-05, 39 NRC 190 (1994) ("Vogtle"); and Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456-57 (1981) ("Policy Statement").³

Discussion

The issue now pending before the Commission is whether, pursuant to 10 C.F.R. § 2.786(g), the Commission should exercise its discretion to review the Licensing Board's interlocutory

³ GA also contends that three recent decisions by the United States Supreme Court support its position that the Commission lacks authority to impose retroactively on GA any liability for decommissioning costs. Petition at 11-15. However, because we are denying the Petition, we do not need to reach the issue whether the three cases support GA's substantive arguments.

order denying GA's February 17th motion for summary disposition or dismissal. For the reasons set forth below, we conclude that GA's Petition satisfies neither of the two conditions for interlocutory review set forth in section 2.786(g).

1. Immediate and serious irreparable impact

GA, in asserting that its expected litigation costs constitute an immediate and serious irreparable impact, fails to distinguish its situation from those of numerous other parties whose similar arguments have been rejected in other proceedings.⁴ It is well established in Commission jurisprudence that the mere commitment of resources to a hearing which may later prove to have been unnecessary does not constitute sufficient grounds for an interlocutory review of a Licensing Board order. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 138-39 (1987) ("Shoreham"); Public Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21-22 (1987); Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973). Nor may a party obtain interlocutory review merely by asserting potential delay and increased expense

⁴ GA itself recently raised a similar argument in requesting a stay of discovery until we ruled on the instant Petition. GA asserted, inter alia, that its incurrence of potentially unnecessary litigation costs during the pendency of the Petition would constitute an "irreparable injury" justifying the requested stay. We denied GA's request, largely because we did not consider the incurrence of such costs to constitute an "irreparable injury." Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC ____, slip op. at 5-8 (July 21, 1994).

attributable to an allegedly erroneous ruling by the Licensing Board. See, e.g., Virginia Elec. Power Co. (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 n.11 (1983), and authority cited therein.

Regarding GA's remaining three assertions of "irreparable impact," GA provides no substantiation that it will suffer "immediate and serious" risks to its credit rating, ability to obtain financing, and ability to carry on its work. Nor does it cite any legal authority to support its claim that such risks constitute the kind of "immediate and serious irreparable impact" contemplated in section 2.786(g)(1). Mere generalized representations by counsel are not enough. See Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 23-24 (1983), and authority cited therein; Shoreham, supra, 25 NRC at 138-39. GA's unsubstantiated assertions, in short, do not persuade us that interlocutory review is necessary to prevent an "irreparable impact." Cf. Consolidated Edison Co. of N.Y. (Indian Point Station, Units 1, 2 and 3), CLI-77-2, 5 NRC 13, 14 (1977) (burden of persuasion with the movant); 10 C.F.R. § 2.732.

GA also relies on two Commission decisions, Vogtle and Oncology, supra, and a policy statement to support the proposition that the Commission grants interlocutory review where a party satisfies either criterion set forth in section 2.786(g). Petition at 11. But that proposition was already obvious from the plain terms of section 2.786(g). Nothing in Vogtle or

Oncology helps GA here because, unlike this case, they involved clear instances of immediate and tangible risks of irreparable impact. See Vogtle, 39 NRC at 193; Oncology, 37 NRC at 421. The Policy Statement is similarly unhelpful, as it refers to interlocutory appeals only generally and nowhere suggests that such appeals are permissible in situations like GA's. See 13 NRC at 456-57.

We instead find persuasive a decision in which the Appeal Board declined to grant interlocutory review regarding an issue somewhat similar to the one in this proceeding. In Public Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977), the Appeal Board was faced with a Licensing Board's referred ruling that all proposed co-owners of a nuclear generating facility should be treated as "de facto co-applicants" with the "lead" applicant (LBP-77-4, 5 NRC 433, 434 (1977)). In declining review, the Appeal Board concluded that "the ruling below ... does not appear to threaten the co-owners with any substantial harm to their interests which could not be alleviated by an appeal to us at the conclusion of the proceeding." Id. at 1192 (footnote omitted). A fortiori, we see no "substantial harm" arising from GA's continued involvement in this proceeding until the Licensing Board can compile a record and conduct a factual inquiry on whether GA has "de facto

control" over SFC's daily activities (58 Fed. Reg. at 55,091) and is thereby subject to the Commission's jurisdiction.⁵

2. Pervasive or unusual effect on the basic structure of the proceeding

GA cites Safety Light for the proposition that a Licensing Board's view of its own jurisdictional boundaries affects the basic structure of a proceeding and has a significant and pervasive effect upon the proceeding. Safety Light is distinguishable. The Licensing Board decision which the Appeal Board reviewed in that case confirmed the Commission's jurisdiction over parties which were denying the existence of such jurisdiction. By contrast, the Licensing Board decision at issue in the instant proceeding never reached the question whether the Commission has jurisdiction over such a party. Instead, the Licensing Board here ruled merely that the jurisdictional issue cannot be resolved without further factual inquiry. See supra note 3.

Although a definitive ruling by the Licensing Board that the Commission actually has jurisdiction over GA in this proceeding might rise to the level of a pervasive or unusual effect upon the

⁵ Cf. Data Disc, Inc. v. Systems Technology Assoc., 557 F.2d 1280, 1285 (9th Cir. 1977) (if questions of fact are raised on a Rule 12(b)(2) motion challenging personal jurisdiction, the court has discretion to take evidence at a preliminary hearing); Ohio Nat. Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990) ("[w]hen facts presented to the district court give rise to factual controversy, the district court must therefore weigh the conflicting evidence to arrive at a factual predicate that subject matter jurisdiction exists or does not exist"); 2A James W. Moore et al., Moore's Federal Practice ¶ 12.07[2.-1] at p. 12-54 and ¶ 12.07[2.-2] at pp. 12-69 to 12-70 (2d ed. 1994); 5A id. ¶ 52.08 at pp. 52-156 to 52-157 (2d. ed. 1993).

nature of the proceeding, the preliminary ruling on appeal here does not. The fact that an appealed ruling touches on a jurisdictional issue does not, in and of itself, mandate interlocutory review. See Safety Light Corp., CLI-92-9, 35 NRC 156 (1992). Similarly, the mere issuance of a ruling which is important or novel does not, without more, change the basic structure of a proceeding. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 474 and nn.16-17 (1985), and authority cited therein.

Conclusion

For the reasons set forth above, we consider it premature to undertake a review of the jurisdictional issue at this early a stage of the proceeding. See Safety Light Corp., CLI-92-9, 35 NRC 156, 160 (1992). Consequently, General Atomics' Petition for Review and/or Motion for Directed Certification is denied.

It is so ORDERED.



For the Commission



John G. Hoyle
Acting Secretary
of the Commission

Dated at Rockville, Maryland,
this 23rd day of August 1994.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM ORD (CLI-94-11) DTD 8/23 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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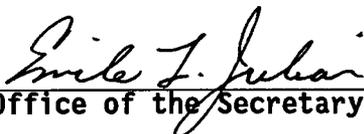
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