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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'95 MAY -3 P4:25

BEFORE THE COMMISSION

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 Decontamination)	No. SUB-1010
and Decommissioning Funding))	

NRC STAFF'S PETITION FOR REVIEW OF LBP-95-05

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Counsel for NRC Staff

May 3, 1995

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NRC STAFF'S PETITION FOR REVIEW OF LBP-95-05

Pursuant to 10 C.F.R. § 2.786(g), the NRC Staff (Staff) hereby files its Petition for Review of LBP-95-05 (Petition), seeking Commission review of the Atomic Safety and Licensing Board's Memorandum and Order (Ruling on Motion for Protective Order) (Apr. 18, 1995).¹ Specifically warranting Commission review is the constraint now placed upon the Staff concerning its ability to refer within the agency matters of potential wrongdoing ascertained from information received through the discovery process. For the reasons stated below, the Commission should grant review.

BACKGROUND

The decision of the Atomic Safety and Licensing Board (Licensing Board or Board) in LBP-95-05 arises in the context of an enforcement proceeding against General Atomics (GA) and Sequoyah Fuels Corporation (SFC). This proceeding involves an

¹ Sequoyah Fuels Corp. (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-95-05, __ NRC __, slip op. (Apr. 18, 1995).

Order issued to GA and SFC on October 15, 1993, requiring, *inter alia*, GA and SFC to be jointly and severally liable for certain decommissioning funding responsibilities for the SFC facility in Gore, Oklahoma.

The Staff, GA, and SFC each served initial discovery requests. In connection with answering such requests, SFC filed a Motion for Protective Order (Dec. 2, 1994) to govern the treatment and handling of confidential information. The parties reached an agreement as to the vast majority of the terms of the protective order proposed by SFC. However, the terms of paragraph 7 of the proposed order, regarding the possible disclosure of confidential material by the Staff to other offices within the NRC not involved in this litigation, could not be resolved by the parties.²

SFC and GA sought a provision that would require the Staff to obtain prior approval, either from the Licensing Board or the provider of the relevant discovery material, before the Staff could disclose, for the purpose of referring matters of potential wrongdoing, any confidential information derived from protected discovery material to the Office of Investigations, the Office of the Executive Director for Operations, or the Office of the Inspector General. The Staff, on the other hand, opposed any such prior

² See, e.g., SFC Motion for Protective Order (Dec. 2, 1994); GA's Brief in Support of the Motion for a Protective Order (Dec. 22, 1994); SFC's Brief in Support of Motion for a Protective Order (Dec. 23, 1994); NRC Staff's Response to SFC's Motion for Protective Order (Dec. 23, 1994); SFC's Reply to NRC Staff's Response to Motion for Protective Order (Jan. 6, 1995); GA's Reply to the NRC Staff's Response to SFC's Motion for Protective Order (Jan. 6, 1995); NRC Staff's Reply to GA's Brief in Support of Motion for a Protective Order (Jan. 6, 1995).

approval provision on the grounds that it would interfere with the legitimate exercise of its duties.³

Following oral argument on January 27, 1995,⁴ the Staff supplemented its arguments at the invitation of the Board through an additional written submission.⁵ Subsequently, on February 24, 1995, the Board directed the Staff (and provided the other parties the option) to answer certain questions regarding NRC Management Directives.⁶ The Staff filed its answers on March 3, 1995. On April 18, 1995, the Board issued a divided decision in LBP-95-05. The majority ruled in favor of SFC and GA and adopted a provision requiring the Staff to obtain the approval of the Board prior to releasing protected material obtained in discovery to individuals not explicitly covered by the terms of the protective order. The dissent, believing that the dispute presents an important issue regarding the extent of the Board's authority in an area that traditionally has been within the purview of the Staff, would have certified the question to the Commission for resolution. The dissent also disagreed with the merits of the majority's determination.

³ The Staff's position is supported by intervenors Native Americans for a Clean Environment and the Cherokee Nation.

⁴ See Memorandum and Order (Scheduling Oral Argument) (Jan. 11, 1995); see also Memorandum (Notice Regarding Authorities) (Jan. 25, 1995).

⁵ See NRC Staff's Supplement to Oral Argument Regarding Motion for Protective Order (Feb. 3, 1995).

⁶ Memorandum and Order (Requiring Staff to Answer Board Questions) (Feb. 24, 1995).

DISCUSSION

I. Standards for Commission Review

The Commission's regulations generally prohibit appeals of interlocutory Board decisions. 10 C.F.R. § 2.730(f). However, the Commission has recognized exceptions to this general rule if circumstances are present as set forth in 10 C.F.R. § 2.786(g):

"Under our present appellate system, we have entertained petitions for review of an otherwise interlocutory order -- akin to a motion for directed certification -- if the petitioner can satisfy one of the criteria under section 2.786(g)." [citation omitted] 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.

Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994), quoting *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994).

II. Argument

A. The Licensing Board Erred

As has been fully briefed and argued orally before the Licensing Board, the Staff has an obligation under the NRC Management Directives to refer all potential matters of wrongdoing to the appropriate offices, *i.e.*, the Office of Investigations (OI) or the Office of the Inspector General (OIG). See NRC Staff's Answers to the Atomic Safety and Licensing Board's Questions (Mar. 3, 1995); NRC Staff's Response to SFC's Motion for

Protective Order (Dec. 23, 1994); LBP-95-05, slip op. at 39-40 (Apr. 18, 1995) (Bollwerk, J. dissenting). Illustrative of this point, Manual Chapter NRC-0517-03.033(f) requires all Office Directors and Regional Administrators to "refer all matters where there is a reasonable basis for belief of wrongdoing and for which the staff determines an investigation is necessary to determine whether regulatory action is required, except those involving NRC employees or NRC contractors, to the Office of Investigations" Likewise, Manual Chapter NRC-0517-03.033(g) requires all Office Directors and Regional Administrators to "refer all allegations of wrongdoing by NRC employees or NRC contractors to [the Office of the Inspector General]."

Notwithstanding the broad obligation imposed upon the Staff by the Management Directives, the Board determined that its authority to issue protective orders under 10 C.F.R. § 2.740(c) conflicted with this obligation. *Id.* at 7-8. The Board, which relied in large part upon decisions under Rule 26 of the Federal Rules of Civil Procedure to support its decision, *id.* at 8-12, erred by doing so. Specifically, the existence of explicit Management Directives that articulate the agency's policy with respect to the referral of matters of wrongdoing distinguish the situation here from the usual situations in civil litigation between two private parties.

The Board also erred in that it concluded that the Management Directives were not sufficiently clear as to whether the Commission intended that they apply to information received in the discovery process. *Id.* at 15-16. To the contrary, the Management Directives are sufficiently broad as to warrant compliance therewith unless the Commission clearly indicates that they are *not* intended to apply to certain situations.

As Judge Bollwerk noted in his dissent supporting the Staff's position, the Staff has been delegated the authority to initiate and pursue investigations and enforcement actions; oversight of ongoing Staff activities concerning the initiation of investigations and enforcement actions generally is not a matter within the jurisdiction or expertise of the Board. *Id.* at 41. This only further supports the notion that the majority was in error in issuing a protective order that placed the Board squarely in the middle of the Staff's investigatory and enforcement processes.

B. The Board's Ruling Merits Interlocutory Review By The Commission

The Board's ruling interposing the Board between the Staff and OI and OIG threatens the Staff with immediate and serious irreparable impact. The ruling has created a situation where the Staff may be unable to perform its responsibilities as explicitly set forth in the Management Directives. Investigations, and consequently enforcement actions, that might be warranted may be subject to delay or may not even be initiated due to a potential determination by the Board not to permit the Staff to release information to OI or OIG. As the need to initiate an investigation or an enforcement action is normally time-sensitive, requesting review by the Commission in each instance of a Board determination not to permit the disclosure of discovery information to OI or OIG may not fully remedy the situation. Furthermore, a petition for review of the final decision addressing the merits of the October 15, 1993 Order to GA and SFC would not alleviate the current and immediate consequences of the Board's protective order on the NRC's normal internal workings.

In *Georgia Power Co., et al.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190 (1994), the Commission, pursuant to 10 C.F.R. § 2.786(g)(1), accepted review of a Board discovery order to release an OI report, since premature release would adversely affect the agency's ongoing deliberation concerning possible enforcement action. *Id.* at 193. Here, the Board's order in LBP-95-05 also threatens to adversely impact agency investigatory processes and consequent enforcement deliberations by impeding the normal flow of information that could become an integral part of such deliberations. Accordingly, the criterion for Commission review in section 2.786(g)(1) has been met.

In addition to the immediate and serious irreparable impact the Board's decision in LBP-95-05 has or threatens to have, the decision:

implicates a significant question about the authority of th[e] Board to involve itself in determinations regarding the initiation and prosecution of agency investigations and enforcement matters. Because [paragraph seven of the protective order] presents such an important issue regarding the extent of the Board's authority in an area that traditionally has been considered within the delegated purview of the staff and because the Commission is the ultimate repository of both the investigative/enforcement power and the judicial authority that are implicated here, in this instance certification of the parties' dispute to the Commission is warranted.

LBP-95-05, slip op. at 37 (Apr. 18, 1995) (Bollwerk, J., dissenting). The majority itself views the issues raised by paragraph seven of the protective order as falling within an area of "largely undefined Commission policy." *Id.* at 21. Given that the Commission is the ultimate authority in setting and clarifying its own policies, even the majority's view clearly supports immediate Commission review.

In summary, the Staff's Petition should be granted because LBP-95-05 threatens to have an immediate and serious irreparable impact on the investigative and enforcement functions of the Staff and the agency, and the question raised by the ruling involves an important area of Commission policy and the extent of the Board's authority.

CONCLUSION

In view of the foregoing, the Commission should undertake review of LBP-95-05.⁷

Respectfully submitted,



Steven R. Hom
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of May 1995

⁷ OIG believes that the constraint imposed by the Board on the Staff is inconsistent with the statutory responsibilities and authority under the Inspector General Act of 1978, 5 U.S.C. App. 3 § 6(a)(1), and agrees with the Staff's position and concurs that Commission review at this time is warranted.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S PETITION FOR REVIEW OF LBP-95-05" 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 3rd day of May 1995:

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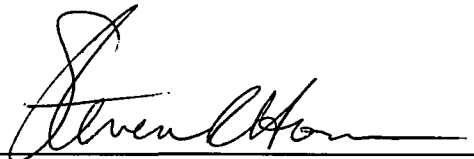
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