

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

'95 NOV 28 P3:40

Before the Commission

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)	Docket No. 40-8027- EA
)	
SEQUOYAH FUELS CORPORATION)	Source Material License
and GENERAL ATOMICS)	No. SUB-1010
)	
(Gore, Oklahoma Site)	
Decontamination and)	
Decommissioning Funding))	November 27, 1995
)	

SEQUOYAH FUELS CORPORATION'S RESPONSE IN
OPPOSITION TO THE STATE OF OKLAHOMA'S PETITION FOR REVIEW

Sequoyah Fuels Corporation ("SFC") submits this Response in Opposition to the State of Oklahoma's "Petition For Review and Request For Additional Time To Amend and Supplement" ("Oklahoma Petition") dated November 13, 1995. The State of Oklahoma has never been a party to this proceeding and has never heretofore requested the opportunity to participate in this proceeding, pursuant to 10 CFR 2.715(c) or otherwise. The Commission's regulation provide only that "a party" to proceedings below may file a petition for review. 10 CFR 2.786(b)(1). Therefore, the State of Oklahoma's petition should be summarily rejected. If it is not rejected, SFC respectfully submits that the petition should be denied for the reasons stated more fully below.

BACKGROUND

On October 26, 1995, the Atomic Safety and Licensing Board ("Licensing Board") entered an Order, LBP-95-18, approving a Settlement Agreement ("Agreement") between SFC and the NRC

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Staff. SFC and the NRC Staff had sought the Licensing Board's approval of their Agreement in an August 24, 1995 "Joint Motion For Approval of Settlement Agreement."

During the pendency of the joint motion, the State of Oklahoma never sought to participate in the proceeding below, pursuant to 10 CFR 2.715(c) or otherwise, and never expressed any views on the motion to the Licensing Board.^{1/} Rather, counsel for the State of Oklahoma sent a letter to counsel for the NRC Staff requesting "additional time to consider the potential effect upon state interests of the proposed 'settlement agreement' between NRC and Sequoyah Fuels." Oklahoma Petition, Exhibit A. This letter was forwarded to the Licensing Board, which held that "the State of Oklahoma is not a party to the proceeding herein and consequently, the Board lacks jurisdiction to review the concerns raised in the State's communication." LBP-95-18, slip op. at 8.

The State of Oklahoma has never sought to participate in the proceeding below -- not by any express request to the Licensing Board, nor even by implication. Having stood idly by

^{1/} The intervenors in the proceeding, Native Americans For a Clean Environment ("NACE") and the Cherokee Nation, opposed the settlement and expressed their views to the Licensing Board in their September 8, 1995 "Intervenors' Response to Joint Motion For Approval of Settlement Agreement" and in other pleadings. On November 13, 1995, the Intervenors submitted their "Petition For Review of LBP-95-18," and SFC is filing its "Response in Opposition to Intervenors' Petition For Review" concurrently with the filing of this response opposing the Oklahoma Petition. SFC incorporates by reference the relevant arguments in its concurrent filing, as if fully set forth herein.

throughout the hearing process and consideration of the Agreement, the State of Oklahoma now seeks review by the Commission. It suggests that "[t]he Board has failed to give adequate consideration of the issues regarding how the settlement agreement will affect the NRC, the public and the state's status." Oklahoma Petition, at 3.

ARGUMENT

The petition of the State of Oklahoma is not properly before the Commission and should be summarily dismissed. It has long been established that "[a]n administrative hearing would be a meaningless charade if those with ample opportunity to participate were allowed to stand idly by and then, nevertheless, demand a replay when they do not like the result." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-583, 11 NRC 447, 448 (1980). Thus, the Commission has plainly held that "a state has no right to participate in administrative appeals when it has not participated in the underlying hearing." Cleveland Electric Illuminating Co., et al. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-20, 24 NRC 518, 519 (1986) (denying the State of Ohio's request to intervene as a nonparty interested state after the adjudicatory record had been closed).

In Diablo Canyon the Appeal Board explained that under the NRC's rules of practice, an interested state does not even "bear the full burden of an ordinary party to preserve its appellate rights." ALAB-583, 11 NRC at 449. Mere participation

by a state under 10 CFR 2.715(c) "carries with it the right to appeal." Id. See also Gulf States Utilities co. (River Bend Station, Units 1 and 2), ALAB-317, 3 NRC 175, 176-80 (1976). However, in Diablo Canyon, where the Governor of California had failed to "undertake even that minimum obligation to assist in developing the record," the Appeal Board concluded that the state had no right to take an appeal. Id. ^{2/}

Under the Commission's current rules, the Appeal Board has been abolished, and there is no right of appeal. Rather, the regulations provide that a "party" has the right to file a petition for review under 10 CFR 2.786. Consistent with established Commission precedent, a state that had participated in a proceeding pursuant to 10 CFR 2.715(c) presumably would be afforded the right to file a petition for review. However, for the same reasons that a state could not sit idly by and then exercise a right to appeal, the State of Oklahoma should not be permitted to file a petition for review in this case.

Even if the Commission did not reject the Oklahoma Petition, the petition nevertheless should be denied because it is both procedurally deficient and without merit. The Oklahoma Petition has failed to comply with the express requirements of 10 CFR 2.786(b)(2). Most notably, the Oklahoma Petition does not contain any statement establishing where the matters raised in the petition were raised before the Licensing Board, or "if they

^{2/} The Appeal Board accepted the Governor's brief as that of an amicus curiae. Id. at 450.

were not why they could not have been raised." 10 CFR 2.786(b)(2)(ii). Not only did the State of Oklahoma fail to present its views for consideration before the Board, the arguments presented in the Oklahoma Petition were not even included in the letter sent by its counsel to the NRC Staff's counsel. Thus, the State of Oklahoma presents arguments for consideration by the Commission that the Licensing Board likely could have resolved in the proceeding below. However, the State of Oklahoma failed to meet its obligation (prior to exercising any right to petition the Commission) to present its arguments in a timely fashion to the Licensing Board.^{3/} This glaring deficiency in the Oklahoma Petition only serves to underscore the impropriety of entertaining the petition of a non-party/non-participant.

The thrust of the State of Oklahoma's argument appears to be that the Agreement serves to deprive the NRC, the public, and the State of Oklahoma of the right to a "secured claim" for the cost of decommissioning of the SFC site. However, this concern is fallacious. The Agreement does not purport in any way to affect the rights of others, and the Licensing Board explicitly held that "[t]he NRC is neither impacted by nor involved in the resolution of other parties' legal disputations." LBP-95-18, slip op. at 5. Moreover, the State of Oklahoma's

^{3/} Significantly, the State of Oklahoma is no stranger to the NRC's rules of practice. It has participated in other NRC proceedings involving SFC's license. See, e.g., Sequoyah Fuels Corporation (Source Material License), CLI-95-2, 41 NRC 179, 181 (1995).

suggestion that NRC is foregoing some purported right to a secured claim is wholly without merit. As explained by the Board, "[t]he premise underlying the terms of the Agreement appears to be that the Agency will receive from SFC all that the NRC would be entitled to receive in the absence of an agreement and a decision issued in NRC's favor." LBP-95-18, slip op. at 9. Simply put, SFC cannot provide any more secure financial assurance than the pledge of all of its net assets and net revenues. Therefore, the State of Oklahoma's desire for further security is a "wish list" that is not possible to accommodate.

Moreover, the State of Oklahoma's concern about the priorities to be applied regarding SFC's obligations is of no moment. The only substantial secured claim against SFC's assets is held by the Kerr-McGee Corporation,^{4/} which has expressly agreed that it would not take any legal action to enforce its rights until decommissioning has been complete.^{5/} Nor would Kerr-McGee have any incentive to attempt to enforce its claim on SFC's assets, because, as noted in Judge Bollwerk's separate

^{4/} SFC's notes with GA are unsecured, and GA does not have any liens on SFC's assets. Other than the Kerr-McGee note, the only liens on SFC's assets are a number of liens on automobiles and office equipment (e.g., xerox machines, computers), in accordance with standard business practices for such assets. Any limitations on these liens would be inappropriate, as such limitations would only serve to disrupt SFC's ability to conduct its activities. This would potentially increase the costs of decommissioning.

^{5/} The Kerr-McGee commitment was made in a letter to SFC dated September 27, 1995, that is appended as Attachment 1 to "SFC's Reply to Intervenors' Renewed Opposition," dated September 29, 1995.

views, the "foreclosure on the note likely would bring the SFC property back into Kerr-McGee's hands, along with the accompanying responsibility for clean-up of contamination on the property." LBP-95-18, slip op. at 16 n.4.

Finally, the Oklahoma Petition's request for additional time to amend and file supplemental pleadings should be denied. Insofar as the State of Oklahoma is not entitled to file a petition for review, the request for additional time is simply moot. Furthermore, the Oklahoma Petition acknowledges that counsel for the state had actual knowledge of the Licensing Board's order in LBP-95-18 on November 9, 1995, but nevertheless has failed to finalize or provide any supplementary information to the Commission and the parties to this proceeding, as of the date of this filing. Having clearly failed to finalize its petition within fifteen days of its actual notice of the Licensing Board's order, ^{6/} the State of Oklahoma offers no just cause for extending the time allowed for its pleadings in connection with its petition.

^{6/} The Commission's regulations provide that a party/participant must file a petition for review within fifteen days of the order for which review is sought. 10 CFR 2.786(b)(1).

CONCLUSION

FOR THE FOREGOING REASONS, and those stated in SFC's accompanying "Response in Opposition to Intervenors' Petition For Review," the State of Oklahoma's petition should be rejected or denied.

Respectfully Submitted,



Maurice Axelrad
John E. Matthews
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000

ATTORNEYS FOR
SEQUOYAH FUELS CORPORATION

November 27, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of Sequoyah Fuels Corporation's "Response in Opposition to Intervenor's Petition For Review of LBP-95-18" and "Response in Opposition to the State of Oklahoma's Petition For Review" were served upon the following persons by deposit in the United States mail, first class postage prepaid and properly addressed, on the date shown below:

Shirley Ann Jackson, Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Kenneth C. Rogers, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Attention: Docketing & Service
Branch
(Original and two copies)

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
James P. Gleason, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
G. Paul Bollwerk, III
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge Jerry R. Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Thomas D. Murphy
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Steven R. Hom, Esq.
Susan L. Uttal, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Diane Curran, Esq.
c/o IEER
6935 Laurel Avenue, Suite 204
Takoma Park, Maryland 20912

Stephen M. Duncan, Esq.
Mays & Valentine
110 South Union Street
P.O. Box 149
Alexandria, VA 22313-0149

John H. Ellis, President
Sequoyah Fuels Corporation
P.O. Box 610
Gore, Oklahoma 74435

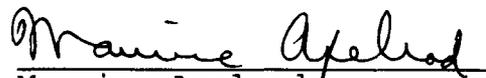
John R. Driscoll
General Atomics
P.O. Box 85608
San Diego, California 92186-9784

Lance Hughes, Director
Native Americans for a Clean
Environment
P.O. Box 1671
Tahlequah, Oklahoma 74465

James Wilcoxon, Esq.
Wilcoxon & Wilcoxon
P.O. Box 357
Muskogee, Oklahoma 74402-0357

Jeannine Hale, Esq.
Assistant Attorney General
Environmental Protection
2300 N. Lincoln Blvd., Suite 112
Oklahoma City, OK 73105-4894

Dated this 27th day of November, 1995.


Maurice Axelrad

MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, DC 20036
(202) 467-7000

ATTORNEYS FOR
SEQUOYAH FUELS CORPORATION