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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
Sequoyah Fuels Corporation)
Source Material License)
No. SUB-1010)
_____)

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Docket No. 40-08027-MLA
January 19, 1994

SEQUOYAH FUELS CORPORATION ANSWER OPPOSING
NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND
CHEROKEE NATION'S PETITION FOR REVIEW OF LBP-93-25

I. INTRODUCTION

Native Americans for a Clean Environment and the Cherokee Nation (Petitioners) have petitioned^{1/} the Nuclear Regulatory Commission (NRC) pursuant to 10 CFR § 2.786 for review of the Presiding Officer's decision^{2/} granting Sequoyah Fuels Corporation's (SFC) motion for withdrawal of its license renewal application and for termination of the related license renewal proceeding. As discussed below, Petitioners have failed to demonstrate any "substantial question" of law, fact, policy, or discretion, or any prejudicial procedural error. 10 CFR § 2.786(b)(4). Accordingly, Petitioner's request for Commission review of LBP-93-25 should be denied.

In essence, Petitioners seek to have the NRC require SFC to pursue an application for renewal of its materials license and to litigate that renewal in a proceeding before an NRC Presiding

^{1/} Native Americans for a Clean Environment's and Cherokee Nation's Petition for Review of LBP-93-25 (January 4, 1994) (Petition).
^{2/} Memorandum and Order (Withdrawal of Application and Termination of Proceeding), LBP-93-25 (December 10, 1993) (LBP-93-25).

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Officer, even though SFC no longer desires to renew its license and intends to decommission and terminate licensed activities. Petitioners would have the NRC create the legal fiction of a continuing, active license renewal application for no other purpose than to enable them to participate in a hearing on issues for which they are not presently entitled to a hearing.^{2/}

By operation of 10 CFR § 40.42(e), SFC's license "continues in effect" and affords the NRC ample authority to assure the safe possession of licensed material and the safe and effective decommissioning of the Sequoyah facility. Activities presently being undertaken by SFC are only those which are authorized by the terms of its existing license and which may be conducted without further NRC approval or authorization. Thus, such activities do not give rise to any hearing rights.

II. THERE IS NO SUBSTANTIAL QUESTION OF LAW REGARDING THE PRESIDING OFFICER'S JURISDICTION.

In LBP-93-25, the Presiding Officer concluded that SFC's request for withdrawal of its license renewal application and for termination of the license renewal proceeding should be granted. The Presiding Officer's determination was correct.

Under established NRC caselaw, requests for withdrawal of voluntary license applications have been granted unless such action

^{2/} As the Presiding Officer correctly noted, Petitioners are attempting to create "an artificial forum to compel the SFC to continue the pursuit of that which it declines, and has no current obligation, to do -- the litigation of decommissioning activities permitted under its license." LBP-93-25 at 26-27.

would create a "demonstrable legal harm" to either a party or the public interest.^{4/} No such harm was created in this case by the granting of SFC's motion for withdrawal and termination of the proceeding.^{2/}

Petitioners cite the Sheffield^{4/} decision, in which the Atomic Safety and Licensing Board refused to permit the licensee to withdraw its license renewal application and to unilaterally terminate its license -- in essence to "walk away" from its license and its attendant responsibilities thereunder. When that case arose in 1979, there was no provision in the NRC regulations similar to Section 40.42. Today that provision explicitly provides for the mandatory continuation of licenses, in order to provide a licensee with continued authority to possess licensed materials and to assure that NRC regulatory jurisdiction is maintained pending completion of decommissioning and NRC approval of license termination.

^{4/} E.g., Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974, 978-79 (1981); Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1135, 1137-39 (1981).

^{2/} This case is unlike other cases in which the NRC has taken action to redress some legal harm arising out of the granting of a requested withdrawal and termination of a licensing proceeding. E.g., cases cited in NRC Staff's "Answer to Sequoyah Corporation's Motion for Withdrawal of Application and Termination of Hearing" (August 9, 1993), at 4, n.9.

^{4/} Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site) (May 3, 1979), aff'd, ALAB-606, 12 NRC 156 (1980).

In this case, SFC has acknowledged that unilateral withdrawal and license termination are not authorized.^{2/} Thus, there is no "regulatory vacuum" created and no question regarding the NRC's ability to exercise jurisdiction over future activities at the Sequoyah facility.

Furthermore, granting SFC's request does not deny Petitioners any legitimate hearing rights. Any right to a hearing which they may have had on the propriety or terms of SFC's request for license renewal were eliminated once SFC decided not to pursue the underlying license renewal. Petitioners will have the opportunity afforded by Section 189(a) of the Atomic Energy Act to request a hearing on any license amendments that may be necessary for decommissioning. And the fact that SFC's continuing activities will be subject to NRC Staff oversight under Section 40.42 confirms that there has been no "demonstrable legal harm" either to Petitioners or to the public interest.

Petitioners assert that the Presiding Officer's decision was based on an erroneous determination that under 10 CFR § 2.107(a), he could not deny a requested withdrawal of a license application after issuance of a notice of hearing, even though such a denial would be permissible prior to issuance of a hearing notice. Petition at 4. Petitioners have thus misleadingly reduced the extensive discussion

^{2/} For example, SFC has stated that under Section 40.42(e), its "license will continue in effect . . . and that [it] must comply with all provisions of that license applicable to its continuing activities until the NRC notifies SFC that the license is terminated." Letter, James J. Sheppard to Robert Bernero (February 16, 1993), at 2.

of the Presiding Officer's bases for his decision (e.g., LBP-93-25 at 15-27) to a simplistic and technical argument that does not fairly represent the decision as a whole. Clearly, the Presiding Officer's determination was based on a consideration of various factors, including the purposes of the relevant regulations, the pleadings and cases cited by the parties, and the effects of granting the relief sought by Petitioners.

Furthermore, contrary to Petitioners' assertions, Section 2.107(a) is silent with respect to the potential denial of requests for withdrawal of an application -- whether before or after issuance of a notice of hearing. Section 2.107(a) states that the Commission may either permit such a withdrawal with conditions as appropriate, may deny the license application, or may dismiss the license application with prejudice. Read reasonably, Section 2.107(a) also provides this authority to the Presiding Officer after a notice of hearing has been issued. Whether or not Section 2.107(a) also would permit the Commission and the Presiding Officer to deny a request for withdrawal of a license application (as opposed to denying the application itself) is not explicitly addressed in the regulation and need not be decided in this case.^{2/}

^{2/} Even if such a denial were permissible under other circumstances, no such denial was permissible here because of the absence of any "demonstrable legal harm."

III. THE PRESIDING OFFICER PROPERLY INTERPRETED AND APPLIED SECTION 40.42.

Petitioners assert that the Presiding Officer "has wrongly allowed SFC to ... operate with an expired license, when SFC has not satisfied the requirements for continued operation ... as set forth in 10 C.F.R. § 40.42." Petition at 5-6. Even though there was no need for the Presiding Officer to determine SFC's compliance with Section 40.42,^{2/} as set forth below, he properly concluded that its terms were satisfied. LBP-93-25 at 21-24.

First, Petitioners allege that SFC does not fall within the provisions of Section 40.42(e) both because extension of SFC's license is "not 'necessary'" within the meaning of that regulation since "the pending renewal proceeding is an available and appropriate forum [for evaluating] the adequacy of the license..." and because the material possessed by SFC cannot be characterized as "residual source material present as contamination." Petition at 6-7.

Section 40.42 does not explicitly address circumstances in which a licensee has prematurely ceased operations during the pendency of a renewal application. LBP-93-25 at 24. However, as the Presiding

^{2/} Whether or not SFC has complied with Section 40.42 was clearly beyond the Presiding Officer's jurisdiction. Section 40.42 vests in the NRC Staff the authority to maintain regulatory control over the activities of a licensee, even after its license would have otherwise expired or it has notified the NRC of its intent to terminate activities authorized by that license. The NRC Staff's jurisdiction is separate and distinct from the authority of the Presiding Officer in a proceeding on an application for a licensing action, such as a license renewal. A license renewal proceeding is not a "license termination" proceeding, and its pendency does not give the Presiding Officer the authority to impose conditions related to decommissioning or to the ultimate termination of a license.

Officer correctly noted, the purpose of Section 40.42 "leaves no room for concluding that [it] would not be applicable to a premature closing of licensed materials facilities." Id. at 24-25. Thus, the Presiding Officer properly concluded that Section 40.42(e): "would seem to have only one purpose -- that being it maintains the Agency's jurisdiction over licensees (like SFC) involved in decommissioning activities. No reasonable explanation has been forthcoming from Intervenor on why that provision . . ." would not apply to both expired licenses and subsequently withdrawn renewal applications. Id. at 22.

Petitioners' assertion that license extension pursuant to Section 40.42(e) is "not necessary" because the "pending renewal proceeding" will suffice, reflects a transparent attempt to bootstrap a hearing opportunity.^{10/} Similarly, Petitioners' reading of the phrase "residual source material present as contamination" is too narrow and does not represent a reasonable interpretation of Section 40.42(e) in the circumstances of this case. See SFC Response at 20-21.

Petitioners also assert that SFC has not satisfied Section 40.42(c)(1) because it did not complete a "substantial portion of decommissioning" before the time in which its license would have expired. Petition at 7. Again, while Section 40.42 was not written with the precise circumstances applicable to SFC in mind,

^{10/} See SFC "Response to NACE and Cherokee Nation Opposition, to Oklahoma Department Of Wildlife Conservation Request For Conditions, And To NRC Staff Answer" (August 23, 1993) (SFC Response) at 20.

it must be read reasonably, taking into account the practical ramifications of any particular situation. Petitioners' reading is far too narrow.

Finally, Petitioners assert that, contrary to Section 40.42(b), SFC has failed to submit a completed Form NRC-314 radiation survey and a final Plan for Completion of Decommissioning. Id. Again, Petitioners' claim does not represent a reasonable interpretation of Section 40.42 under the circumstances of this case as acknowledged by the Presiding Officer (LBP-93-25 at 22) and as interpreted by the NRC Staff in its proposed rule regarding "Timeliness In Decommissioning of Materials Facilities" -- 58 Fed. Reg. 4099, 4102, 4107 (1993) -- in which the Staff has recognized that only one survey, upon completion of decommissioning, is required under the regulation. See also SFC Response at 17-19.

There is, therefore, no "substantial question" regarding the interpretation of Section 40.42.

IV. PETITIONERS HAVE NOT BEEN UNLAWFULLY DEPRIVED OF ANY HEARING RIGHTS.

Finally, Petitioners are clearly wrong in asserting that the Presiding Officer "has effectively granted SFC an indefinite extension of its 1985 license . . ." and thus "deprived Intervenors of the hearing to which they are entitled . . . on the terms under which the adequacy of SFC's license should be renewed. . . ." Petition at 8. The Presiding Officer has not extended

SFC's license. Instead, that license has been extended by operation of Section 40.42(e) and only for the limited purposes authorized by that regulation.^{11/}

The issues identified by Petitioners on which they are allegedly being deprived of a hearing (e.g. groundwater monitoring, emergency planning, etc.) pinpoint the lack of merit in their arguments. While Petitioners could have been heard on these issues in connection with the NRC proceeding to determine whether such activities should continue for a license renewal period, they were not entitled to a hearing on these issues as they were continued because of the filing of a timely renewal application (Section 40.43(b)), and they are not entitled to a hearing on these issues as they relate to continuing activities pursuant to Section 40.42(e).

Thus, Petitioners have not shown that they have been deprived of any legitimate hearing rights.

V. CONCLUSION

Petitioners believe that LBP-93-25 represents an "egregious violation of [their] hearing rights." Petition at 10. However, such hearing rights were created by SFC's license renewal application and now that SFC no longer intends to pursue that applica-

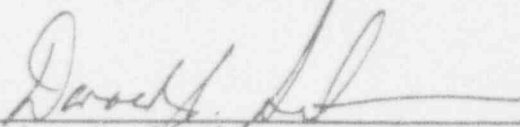
^{11/} As the Commission recently stated in connection with the Long Island Power Authority's "general license" to transfer Shoreham fuel to Philadelphia Electric Company, "[i]t is well established ... that an administrative agency may proceed by generic rule rather than by case-by-case adjudication." CLI-93-25, slip op. at 7-8 (December 3, 1993).

tion, the underlying basis for hearing has been eliminated. Petitioners could have requested the Presiding Officer to impose such conditions, if any, as they believed to be appropriate in conjunction with SFC's request for withdrawal of the license renewal application. Unlike the State of Oklahoma (the other participant in the renewal proceeding), however, they chose not to do so, but instead, to request that the Presiding Officer force SFC to pursue and litigate the renewal application against its will. The Presiding Officer properly declined to take such legally unsupportable, illogical and unprecedented action.

Since Petitioners have failed to identify any substantial question of law, fact, policy, or discretion, or any prejudicial procedural error, Commission review of LBP-93-25 is not warranted.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Sequoyah Fuels Corporation Answer Opposing Native Americans for a Clean Environment's and Cherokee Nation's Petition for Review of LBP-93-25" were served upon the following persons by deposit in the United States mail, postage prepaid and properly addressed on the date shown below or by hand delivery as indicated by an asterisk:

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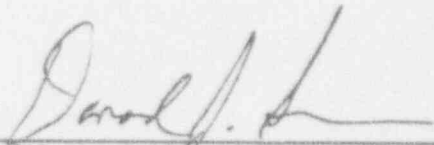
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