

14608

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RECEIVED
GENERAL

BEFORE THE COMMISSION

'94 JAN 21 12:08

In the Matter of)
)
SEQUOYAH FUELS CORPORATION)
)
(Source Material License No. SUB-1010))

Docket No. 40-08027-MLA

OFFICE OF THE CLERK
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20545

NRC STAFF RESPONSE IN OPPOSITION TO NATIVE AMERICANS
FOR A CLEAN ENVIRONMENT AND CHEROKEE NATION'S
PETITION FOR REVIEW OF LBP-93-25

Susan L. Uttal
Counsel for NRC Staff

January 19, 1994

9401260095 940119
PDR ADOCK 04008027
C PDR

D507

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
SEQUOYAH FUELS CORPORATION) Docket No. 40-08027-MLA
)
(Source Material License No. SUB-1010)

NRC STAFF RESPONSE IN OPPOSITION
TO NATIVE AMERICANS FOR A CLEAN ENVIRONMENT
AND CHEROKEE NATION'S PETITION FOR REVIEW OF LBP-93-25

INTRODUCTION

On January 4, 1994, Native Americans for a Clean Environment and the Cherokee Nation (Petitioners) filed a petition for Commission review of the Presiding Officer's Memorandum and Order (Withdrawal of Application and Termination of Proceeding), LBP-93-25, dated December 10, 1993.¹ The NRC Staff (Staff) hereby files its response in opposition to the Petition.

BACKGROUND

Since 1970, Sequoyah Fuels Corporation (SFC) has operated a licensed nuclear fuel processing facility in Gore, Oklahoma. The last renewal of the license was due to expire in September 1990. In August 1990, however, SFC requested that its license be renewed for a period of ten years. Because the application for license renewal was timely filed, the license did not expire and SFC was allowed to continue operation until

¹ Native Americans for A Clean Environment's and Cherokee Nation's Petition for Review of LBP-93-25, dated January 4, 1994 (Petition).

its renewal application was finally determined by the Commission. See 10 C.F.R. § 40.43(b). Native Americans for a Clean Environment (NACE) filed a timely request for a hearing on the license renewal,² which was granted. Subsequently, SFC moved to withdraw the pending license renewal application, without prejudice, and terminate this proceeding. The Petitioners did not object to withdrawal of the application or termination of the proceeding to the extent that "production-related" activities were involved, but opposed dismissal of the proceeding on "non-production" activities.³

After considering the positions of all the parties, the Presiding Officer issued a Memorandum and Order in which he concluded, among other things, that Petitioners' argument in opposition to the withdrawal of the license renewal application is without merit. The Presiding Officer granted SFC's motion to withdraw its application for license renewal and terminated the proceeding. LBP-93-25, slip op. at 38. Petitioners now seek Commission review of the Presiding Officer's decision.

DISCUSSION

A. Legal Standards for Commission Review.

In determining whether to grant a petition for review of a Presiding Officer's decision, the Commission considers the factors set forth in 10 C.F.R. § 2.786(b)(4). See *Advanced Medical Systems, Inc.*, CLI-93-8, 37 NRC 181, 184 (1993). Pursuant to that

² Native Americans for a Clean Environment, Request for a Hearing, September 28, 1990.

³ As indicated by the Licensing Board, NACE's use of the term "non-production activities" included all activities authorized under the SFC license relating to decommissioning. LBP-93-25, slip op. at 1 n.2.

rule, the Commission gives due weight to the existence of a substantial question with respect to the following factors:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

As discussed below, Petitioners have not raised a substantial question with respect to any of the criteria set forth above so as to warrant Commission review of the Presiding Officer's Memorandum and Order. Accordingly, the Petition for Commission review of LBP-93-25 should be denied.

B. The Petition Does Not Raise an Issue That Warrants Commission Review.

The Petitioners assert that the Presiding Officer committed three principal errors that should be reviewed by the Commission. Petition at 3, 5, and 8. First, they assert that the Presiding Officer misinterpreted the scope of his authority in ruling on a motion to withdraw an application and terminate a proceeding. Petition at 3. The Petitioners claim that this error raises a "substantial and important" question of both law and policy

as set forth in 10 C.F.R. § 2.786(b)(4)(iii). Petition at 5.⁴ Second, the Petitioners assert that the Presiding Officer ignored the requirements of 10 C.F.R. § 40.42. *Id.* at 5. Finally, the Petitioners assert that the Presiding Officer deprived them of their right to a hearing on the "license terms under which SFC will continue to operate." Petition at 8. For the reasons set forth below, these assertions are without merit.

1. The Presiding Officer Correctly Delineated the Scope of His Authority Pursuant to 10 C.F.R. § 2.107.

The Petitioners argue that SFC's request to withdraw its application for license renewal was improper, because "SFC has explicitly stated that it intends, for some years, to continue certain decommissioning-related activities under the terms of the 1985 license which was extended only by virtue of SFC's renewal application." Petition at 5. The Petitioners seem to suggest that once a renewal request is filed and a hearing has been convened in connection with that request, that proceeding cannot be terminated until all issues relating to decommissioning activities which might have been conducted under a renewed license are resolved. The Presiding Officer correctly rejected this theory, concluding that the filing of a request to withdraw a renewal application after a hearing notice has been issued does not pose an obstacle to an applicant's ability to withdraw its application. LBP-93-25, slip op. at 20. Indeed, the Commission's regulations anticipate the withdrawal of an application after the initiation of a hearing, and specifically authorize the presiding officer to allow withdrawal of the application, subject only to the imposition of such terms as the presiding officer may prescribe. 10 C.F.R. § 2.107(a).

⁴ Of the three errors asserted, this is the only one which is specifically asserted by the Petitioners to meet any of the standards in 10 C.F.R. § 2.786(b).

The Commission recently considered a request quite similar to the pending Petition, filed by these same Petitioners concerning SFC's withdrawal of its application to amend its license in connection with ground water monitoring. *Sequoyah Fuels Corp.*, CLI-93-7, 37 NRC 175, 179 (1993). In that proceeding, the Petitioners argued that withdrawal of the license amendment application and resubmission of the same proposed change in the pending license renewal proceeding would constitute an illegal and indefinite postponement of a hearing on the license amendment. *Id.* at 177. While the Commission was considering the Petitioners' arguments, SFC notified the Commission and the parties that it was terminating licensed activities, requested termination of its license, and indicated that it anticipated filing a motion to terminate the license renewal proceeding. *Id.* at 178. The Commission treated the announced withdrawal as a request for permission to withdraw the license amendment application pursuant to 10 C.F.R. § 2.107(a). *Id.* at 179. The Commission concluded that:

SFC's notice of termination of licensed activities, along with its request for termination of its license and its anticipated motion for termination of the license renewal proceeding, *making it virtually certain that any disputes regarding the Groundwater Monitoring Plan will not be adjudicated in the license renewal proceeding. Under these circumstances, however, the Commission believes that any necessary NRC action regarding the plan should be addressed in decommissioning or enforcement actions or proceedings.*

CLI-93-7, 37 NRC at 179 (emphasis added).

As was the case in the license amendment proceeding discussed above, here the Petitioners are asking the Commission to continue litigation of the license renewal proceeding so that they may challenge, in this proceeding, ground water monitoring issues as well as other decommissioning matters. *Petition at 8-9.* However, under the

Commission's Rules of Practice, and consistent with the Commission's prior *Sequoyah Fuels* decision, it would not be appropriate to do so. The Presiding Officer's decision to allow the withdrawal of the license renewal application without imposing conditions, and to terminate this proceeding, was proper. Just as the Commission found in connection with the withdrawal of the license amendment application, the concerns expressed by the Petitioners here may appropriately be addressed in subsequent actions or proceedings on decommissioning matters. The Petitioners' arguments do not provide a valid basis for Commission review of LBP-93-25.

2. The Presiding Officer Correctly Applied the Requirements of 10 C.F.R. § 40.42.

The Petitioners assert that the Licensing Board "disregard[ed] the plain language" of 10 C.F.R. § 40.42, "and wrongly allowed SFC to withdraw its license renewal application and operate with an expired license, when SFC has not satisfied the requirements for continued operation absent application for renewal" Petition at 5-6. The Petitioners argue that since SFC has withdrawn its renewal application, it should now be treated as if it had never submitted a renewal application. *Id.* at 6. These assertions are without merit.

The Commission's regulations provide a mechanism for dealing with expiration and termination of licenses issued under Part 40, in 10 C.F.R. § 40.42. That regulation provides a framework for decommissioning and maintaining control over a licensee during decommissioning. As stated by the Presiding Officer in this proceeding: "the various sections of these prescriptions (10 C.F.R. § 40.42) are *in pari materia* and should be construed together, not separately and distinctly as Intervenors' interpretation

would have it." LBP-93-25, slip op. at 21. When the regulation is read as a whole, it is clear that the Petitioners' interpretation is without basis or logic.

It is undisputed that SFC submitted a license renewal application, and then requested leave to withdraw that application. Because SFC filed a license renewal application, the license continued in effect beyond the expiration date, pursuant to 10 C.F.R. § 2.109(a). SFC's application for termination of the license thus falls under the provisions of 10 C.F.R. § 40.42(b) -- which requires a licensee to provide written notice when it decides to terminate all activities involving materials authorized under the license, and to include in its request for termination the reports and information required by 10 C.F.R. §§ 40.42(c)(1)(iv) and (v), and submission of a decommissioning plan, if required by § 40.42(c)(2) or by license condition.⁵ In addition, regardless of whether SFC had ever filed a request for renewal of its license, like any other licensee it is also required to take the actions specified in 10 C.F.R. §§ 40.42(c)(1)(i), (ii) and (iii) prior to license termination. See 10 C.F.R. § 40.42(f). Indeed, section 40.42(f) clearly enumerates the conditions under which the NRC will terminate a license, including, *inter alia*, a requirement that a radiation survey be completed demonstrating that the premises are suitable for release for unrestricted use prior to license termination. 10 C.F.R. § 40.42(f)(3)(i).

Upon termination of this proceeding, SFC will remain a licensee for limited purposes, pursuant to 10 C.F.R. § 40.42(e), and the NRC will continue to exercise

⁵ To be sure, the requirement in 10 C.F.R. § 40.42(c)(1) that certain actions must take place "before the expiration date specified in the license," is inapplicable here, in light of SFC's filing of an application for license renewal.

regulatory authority over SFC so as to assure that it complies with the requirements of 10 C.F.R. § 40.42 concerning decommissioning. Section 40.42 establishes a system for satisfying a licensee's obligation to decommission in accordance with Commission regulations, requires the licensee to remain responsible for decommissioning, and enables the Commission to maintain positive regulatory control over the licensee by continuing the license in effect for limited purposes during decommissioning.⁶

The Petitioners assert that it is not "necessary" pursuant to 10 C.F.R. § 40.42(e), for a licensee to be permitted to operate beyond the license expiration date when a license renewal application is pending. Petition at 6. The Petitioners' narrow reading of the regulation is unsupported. When the word "necessary" is read in context with the regulation, it is apparent that the regulation contemplates it may be "necessary" to extend licenses beyond their expiration dates to ensure that decommissioning is carried out to the NRC's satisfaction.⁷ Thus, "necessary" as used in this section means that the license will continue in effect, as appropriate, to allow completion of the decommissioning effort and related activities; the license continues in effect as a positive regulatory control, *not* to permit operation or production. Contrary to Petitioners' suggestion, under 10 C.F.R. § 40.42, licensees are not permitted to conduct licensed operations at their facilities,

⁶ The regulations are designed so that "the license and the responsibility to protect health and safety and promote the common defense and security continues until the Commission terminates the license." 53 Fed. Reg. at 24024.

⁷ In pertinent part, 10 C.F.R. § 40.42(e) provides that "[e]ach specific license continues in effect, beyond the expiration date if necessary, with respect to *possession* of residual source material present as contamination until the Commission notifies the licensee in writing that the license is terminated" (emphasis added).

except insofar as they may conduct decommissioning activities. As correctly stated by the Presiding Officer:

[10 C.F.R. § 40.42(e)] would seem to have only one purpose -- that being that it maintains the Agency's jurisdiction over licensees (like SFC) involved in decommissioning activities. . . . Absent such a license continuation provision, in this instance the existing license, past its due date for renewal, would have expired and, with no decommissioning plan in operation, the NRC's responsibility for ensuring the removal of contaminated material with appropriate controls would have been jeopardized.

LBP-93-25, slip op. at 22.

The Petitioners also assert, as an impediment to the application of 10 C.F.R. § 40.42(e), that SFC has more than "residual source material present as contamination" on site. However, 10 C.F.R. § 40.42(e) must be read together with § 40.42(c)(1)(iii), which requires the proper disposal of source material, *and* § 40.42(e)(1), which limits "actions involving source material to those related to decommissioning." When these regulations are read in context, it is apparent that the process being followed by SFC is consistent with the regulation. Under this regulatory scheme, the license would continue in effect as necessary to complete decommissioning; and the licensee is to proceed with decommissioning in accordance with the regulation, including the proper disposal of source material. Any other reading would subvert the clear intent of the regulation. Accordingly, the Petitioners have failed to raise an issue warranting Commission review.

3. The Petitioners Are Not Entitled to a Hearing on Any Aspect of the Abandoned License Renewal Application.

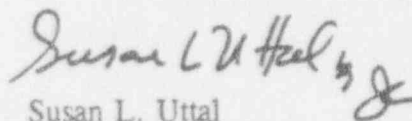
Finally, the Petitioners assert that the granting of SFC's motion to withdraw its license renewal application has deprived them of their right to a hearing on the adequacy of the terms of renewal. This argument assumes that SFC is still in a renewal posture.

However, SFC is not seeking to renew its license and, accordingly, a hearing on renewal issues is not warranted. Because SFC is not seeking renewal, the only matters which might require adjudication will be those related to decommissioning, and any enforcement or license amendment matters which may arise⁸ -- none of which are appropriate for consideration in this proceeding. This is consistent with the Commission's decision in CLI-93-7, where it explained that issues concerning actions to be taken after withdrawal of the application should be dealt with in subsequent decommissioning or enforcement actions or proceedings. See CLI-93-7, 37 NRC at 179.

CONCLUSION

For the reasons set forth above, the Petitioners have failed to demonstrate the existence of a substantial question with respect to any of factors set forth in 10 C.F.R. § 2.786(b)(4), which would warrant review by the Commission of the Presiding Officer's decision in this matter. Therefore, the Petition for Commission review should be denied.

Respectfully submitted,



Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of January, 1994

⁸ One such proceeding was convened recently, following the Staff's issuance of an Order dated October 15, 1993, against SFC and its parent corporation, General Atomics (GA), with respect to decommissioning financing. Both SFC and GA requested a hearing on the Order, and NACE filed a petition requesting leave to intervene, which is under consideration by an Atomic Safety and Licensing Board at this time.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SECRETED
USNRC

'94 JAN 21 112:08

BEFORE THE COMMISSION

In the Matter of)
)
SEQUOYAH FUELS CORPORATION) Docket No. 40-08027-MLA
)
(Source Material License No. SUB-1010)

RECEIVED
DIRECTOR'S OFFICE
JAN 21 1994

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO NATIVE AMERICANS FOR A CLEAN ENVIRONMENT AND CHEROKEE NATION'S PETITION FOR REVIEW OF LBP-93-25" 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 19th day of January, 1994:

James P. Gleason, Esq.*
Administrative Judge
Presiding Officer
Atomic Safety and Licensing Board
Mail Stop: EW-439
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jerry R. Kline*
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: EW-439
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

Maurice Axelrad, Esq.
Donald J. Silverman, Esq.
Newman & Holtzinger, P.C.
1615 L Street, N.W.
Suite 1000
Washington, DC 20036

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

Brita Haughland-Cantrell
Assistant Attorney General
Oklahoma Dept. of Wild Life
Conservation
2300 North Lincoln Boulevard
112 State Capitol Building
Oklahoma City, OK 73105-4894

Sequoyah Fuels Corporation
ATTN: Mr. John Ellis
President
P.O. Box 610
Gore, OK 74435

James Wilcoxon, Esq.
Wilcoxon & Wilcoxon
Attorney for Cherokee Nation
P.O. Box 357
Muskogee, OK 74402-0357

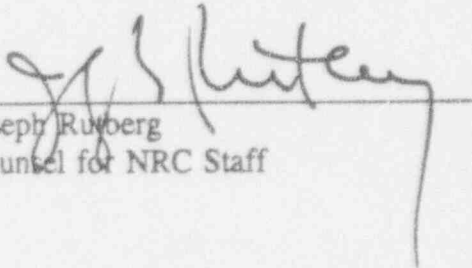
Office of the Commission Appellate
Adjudication*
Mail Stop: 16-G-15 OWFN
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Adjudicatory File (2)*
Atomic Safety and Licensing Board
Mail Stop: EW-439
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Kathy Carter-White, Esq.
ECOLaw Institute, Inc.
Attorney for Citizens' Action For
A Safe Environment
P.O. Box 124
Welling, Oklahoma 74471

Atomic Safety and Licensing Board
Panel*
Mail Stop: EW-439
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary* (2)
ATTN: Docketing and Service
Mail Stop: 16-G-15 OWFN
U.S. Nuclear Regulatory Commission
Washington, DC 20555



Joseph Ruberg
Council for NRC Staff