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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III

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In the Matter of

SEQUOYAH FUELS CORPORATION
and GENERAL ATOMICS

(Gore, Oklahoma Site
Decontamination and
Decommissioning Funding)

Docket No. 40-8027-EA

Source Material License
No. SUB-1010

ASLBP No. 94-684-01-EA

January 13, 1994

MEMORANDUM

(Posing Matters for Consideration
at Prehearing Conference)


In accordance with the Board's January 6, 1994 memorandum and order, attached to this memorandum is an outline of the general areas the Board wants to explore with the participants during the January 19, 1994 prehearing conference regarding 1) the intervention petition of the Native Americans for a Clean Environment (NACE), and 2) their "theory of the case" relative to the statutory and

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regulatory authority underlying the October 15, 1993 order at issue in this proceeding.*

FOR THE ATOMIC SAFETY
AND LICENSING BOARD



James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland

January 13, 1994

* Copies of the memorandum and the accompanying attachment are being sent this date to counsel for Sequoyah Fuels Corporation, General Atomics, and NACE by facsimile transmission and to staff counsel by E-Mail through the agency's wide area network system.

I. Intervention

A fundamental problem facing the Board is determining what is the statutory and regulatory authority governing its consideration of the pending intervention petition of the Native Americans for a Clean Environment (NACE). To aid the Board in making a decision in this regard, we ask that the participants be prepared to discuss the following matters:

A. Section 189a(1) of the Atomic Energy Act (AEA), 42 U.S.C. § 2239(a)(1) states that the Commission must grant a hearing at the request of any person whose interest may be affected in any proceeding for the "granting, suspending, revoking, or amending of any license." Given that the order at issue in this proceeding does not carry a title (e.g., order modifying license) that clearly places it into one of the categories specified in section 189a, the Board would like to discuss with the participants whether this is, or is not, a section 189a proceeding. The Board also is interested in the participants' views on any ramifications for the conduct of this proceeding that might flow from a finding that this is not a section 189a proceeding.

B. It is generally recognized that "injury in fact" portion of the judicial standing standard applied by the Commission has three components -- injury, cause, and remedial benefit. See Babcock and Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81, appeal dismissed, CLI-93-9, 37 NRC 190 (1993). The Board is interested in the participants' views on how NACE's intervention claim meets each of these standards. In this regard, the Board also is interested in the participants' views on the relevance and applicability of the "outcome of the proceeding" principle enunciated by the Appeal Board in Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

C. Section 2.714 of 10 C.F.R. concerning "Intervention" indicates that "[a]ny person whose interest may be affected by a proceeding" may file an intervention petition. This language essentially parrots the language of AEA section 189a.

In contrast, 10 C.F.R. § 2.202 concerning orders such the one in this case contains a number of different references to the types of persons who may be involved in an enforcement proceeding under that section.

1. Section 2.202(a) states that the Commission may issue an order to "the licensee or other person subject to the jurisdiction of the Commission."
2. Section 2.202(a)(1) declares that the order must allege the charges against "the licensee or other person subject to the jurisdiction of the Commission."
3. Section 2.202(a)(2) indicates that the order must provide that the "licensee or other person" must file an answer within twenty days.
4. Section 2.202(a)(3) states that the order must inform "the licensee or any other person adversely affected by the order" of the right to request a hearing, except in a case where the "licensee or other person" has consented to the order.
5. Section 2.202(b) states that a "licensee or other person to whom the Commission has issued an order" must respond with an answer that is to deny or admit each charge and set forth the matters of law or fact on which "the licensee or other person" relies.

The Board would like the participants' views on how it can, or cannot, reconcile these different references. For instance, is the term "person adversely affected by the order" meant to be coextensive with the term "person whose interest may be affected"? Also, is the term "person adversely affected by the order" meant to cover persons other than "the licensee or other person subject to the jurisdiction of the Commission" or "the licensee or other person to whom the Commission has issued an order"? (Discussion of these questions should, of course, be in the context of applying the various terms to a petitioner like NACE.)

D. Section 2.714(b)(2) requires that an interested person seeking to intervene must file at least one litigable "contention" that must consist of "a specific statement of the issue of law or fact to be raised or controverted" and must include the supporting bases for the contention. On the other hand, section 2.202(a)(2) declares that a "licensee or other person" must file an "answer" that section 2.202(b) states must "specifically admit or deny each allegation or charge made in the order, and shall set forth the matters of law and fact on which the licensee or other person relies." The Board would like the participants' views on how the specifications for a

section 2.714 contention are, or are not, different from what must be provided in a section 2.202 answer.

E. Section 2.714(a)(1) sets out standards governing the admission of untimely intervention petitions. The Board would like the participants' views on what standards govern the admission of a late-filed answer under section 2.202.

F. It has been suggested that because the terms of the October 15 order permit the Director, Office of Nuclear Material Safety and Safeguards, to relax or rescind any of the order's conditions, and because NACE cannot object to such discretionary staff actions, NACE's interest in this proceeding is too illusory to provide it with standing. The Board would like the participants' views on this matter, including whether the Board has jurisdiction to consider the propriety of the Director's decision to relax or rescind the conditions of an enforcement order before the Board and the relevance of 10 C.F.R. § 2.203 regarding settlements.

G. NACE has requested discretionary intervention in this proceeding. Although the availability of such intervention in licensing cases is well established, the Board would like the participants' views on whether such intervention is appropriate in an enforcement proceeding.

II. Theory of the Case

The terms of the October 15, 1993 order, appear to make General Atomics (GA) a "guarantor" for remediation and decommissioning funding for the Gore, Oklahoma facility. The order does not delineate the specific legal theory under which the agency has the authority to place this non-civil penalty financial liability upon GA. In considering the matter expansively without the benefit of the participants' views and without foreclosing the ability to present additional theories, several possibilities present themselves that, singly or in combination, might be a basis for the order.

1. GA is liable because it is a de facto licensee.
2. GA is liable as a "person otherwise subject to the jurisdiction of the Commission" in accordance with 10 C.F.R. § 2.202 and 10 C.F.R. Part 2, app. C, § X. See also 56 Fed. Reg. 40,664 (1991).
3. GA is liable based upon a contractual obligation or legal duty it has to Sequoyah Fuels Corporation

or to the agency, which may flow from, among other things, the Commission's purported reliance upon representations made by GA.

Beginning with the staff, we would like to discuss with the participants what views they might be willing to share on their theory of the case relative to the matter of the agency's authority to impose upon GA the responsibilities set forth in the October 15 order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
SEQUOYAH FUELS CORPORATION
(Sequoyah Facility)

Docket No.(s) 40-8027-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMO (POSING MATTERS FOR..) 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.

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

Richard G. Bachmann, Esq.
Steven R. Hom, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Maurice Axelrad, Esq.
John E. Matthews, 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

Stephen M. Duncan, Esq.
Bradfute W. Davenport, Jr., Esq.
Mays & Valentine
110 South Union Street
Alexandria, VA 22314

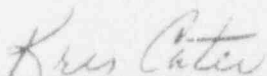
Docket No.(s)40-8027-EA
LB MEMO (POSING MATTERS FOR..)

John R. Driscoll
General Atomics Corporation
3550 General Atomics Court
San Diego, CA 92121

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

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

Dated at Rockville, Md. this
14 day of January 1994


Office of the Secretary of the Commission