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NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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In the Matter of)	
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SEQUOYAH FUELS CORPORATION)	Docket No. 40-8027-EA
and GENERAL ATOMICS)	
)	
(Sequoyah Facility))	March 11, 1994
)	
_____)	

SEQUOYAH FUELS CORPORATION'S INITIAL BRIEF
IN OPPOSITION TO THE RULING IN SECTION II.A OF LBP-94-5

Sequoyah Fuels Corporation ("SFC") hereby submits this Initial Brief in opposition to the Atomic Safety and Licensing Board's ("Licensing Board") ruling in section II.A of its Memorandum and Order issued February 24, 1994 ("LBP-94-5"). In LBP-94-5, the Licensing Board held that, as a general matter, an otherwise qualified petitioner may intervene in a proceeding as of right for the purpose of arguing that a proposed enforcement order should be fully sustained.

SFC believes that immediate Commission review of this ruling is appropriate because it will affect the basic structure of this and other enforcement proceedings in a pervasive and unusual manner. It extends rights to intervenors in circumstances not required by the Atomic Energy Act of 1954 and

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would significantly impair the Commission's exercise of discretion with respect to enforcement proceedings.

SUMMARY OF THE ARGUMENT

The Licensing Board maintains that once a hearing is requested by a person opposed to a proposed order, a petitioner/intervenor that supports issuance of the order can be "entitled to standing as of right as a 'person whose interest may be affected by the proceeding.'" LBP-94-5, slip op. at 16. The premise of this conclusion is that once a hearing on an enforcement order is requested, a petitioner may be "adversely affected" by the proceeding, because a possible outcome of the proceeding is that the order will not be fully sustained.

SFC respectfully submits that the Licensing Board's ruling is in error, and if sustained, the ruling would affect the basic structure of this and other enforcement proceedings in a pervasive and unusual manner. The rule articulated by the Licensing Board poses significant legal and policy questions, because it would permit a petitioner to act as a "private prosecutor" any time that a licensee or other person opposed to an enforcement order challenges the Commission. Once a private prosecutor is admitted to an enforcement proceeding, the Commission's enforcement discretion will be severely limited. For example, even if the Commission were to reach a compromise or other agreement with the regulated person, the private prosecutor could compel the Commission and the regulated person to expend additional resources in unnecessary litigation. This would

substantially interfere with the Commission's ability to efficiently allocate its enforcement resources based upon its assessment, at any given time, of the best means to achieve its enforcement objectives. It is therefore important that the Commission accept immediate review of this question.

Enforcement action is within the sole discretion of the Commission, and a petitioner that favors the taking of enforcement action by the Commission against a third party cannot compel the Commission to take such action.^{1/} Moreover, when the Commission proposes to take an enforcement action that a petitioner finds desirable, the petitioner cannot be adversely affected by the action and has no right to request a hearing.^{2/} Nevertheless, the Licensing Board concluded in LBP-94-5 that the fact that the subject of a proposed order challenges the Commission's action creates a right for a petitioner to intervene in support of the order.

Contrary to the Licensing Board's ruling, a petitioner that favors an enforcement action cannot be adversely affected by the outcome of a proceeding regarding the enforcement action. If the proceeding were to result in no order being issued, the result would be a return to the status quo ante. If the

^{1/} Such a person can petition the NRC to take enforcement action under 10 CFR § 2.206. However, any such action is within the sole enforcement discretion of the NRC. See, e.g., Arnow v. NRC, 868 F.2d 223, 235 (7th Cir. 1989); Safe Energy Coalition v. NRC, 866 F.2d 1473, 1477 (D.C. Cir. 1989); Massachusetts Public Interest Research Group, Inc. v. NRC, 852 F.2d 9, 19 (1st Cir. 1988).

^{2/} See Bellotti v. NRC, 725 F.2d 1380, 1381 (D.C. Cir. 1983).

proceeding results in an order that imposes fewer requirements than those originally proposed, but more restrictive than the status quo ante, the petitioner's interests will likewise remain unaffected. There is therefore no possible outcome that adversely affects the petitioner's interests. The petitioner will always be in the same or better position as the petitioner would have been in the absence of any proposed action.

The Licensing Board's ruling inappropriately draws a distinction based upon the notion that a petitioner may not be "adversely affected" by an order, but can be "adversely affected" by the outcome of a proceeding regarding whether the order should be sustained. This distinction is fundamentally flawed. The core issue in such a proceeding is the Commission's proposal to issue an order. The potential adverse effects of the proceeding must therefore be measured in terms of whether a person will be adversely affected by the issuance of the proposed order. Thus, only those who oppose the order have an interest that can be adversely affected by the proposed action in the proceeding.

Moreover, a critical aspect of the Licensing Board's approach is the notion that the "adverse effect" upon a petitioner can be measured by the procedural posture of the proceeding at various points throughout the proceeding, rather than by looking to the petitioner's interest in the proceeding at the time it is initiated (i.e., when the action is proposed). Under the Licensing Board's analysis, a petitioner may not have an interest in a proceeding or any hearing rights when the

proceeding is initiated, but the fact that other persons exercise rights during the course of a proceeding would "create" new interests in the proceeding. If sustained, the Licensing Board's order would logically result in petitioners seeking to become parties to proceedings at all stages of adjudication. This approach is inconsistent with the orderly adjudication of matters before the Commission.

Finally, the right to intervene in an enforcement proceeding must be co-extensive with the right to request a hearing. If there is a class of persons that can be adversely affected by a proceeding that is different from the class of persons who can be adversely affected by an order, 10 CFR § 2.202(a)(3) would be in violation of section 189(a) of the Atomic Energy Act of 1954. Section 2.202(a)(3) of the Commission's regulations only provides hearing rights to the class of persons adversely affected by an order, but section 189(a) requires that any person adversely affected by a proceeding has a right to request a hearing. Since section 2.202(a)(3) was specifically intended to continue the hearing rights afforded under section 189(a) of the Act, the term "adversely affected by the order," as used in section 2.202(a)(3), must be intended to include all persons who could be adversely affected by an enforcement proceeding.

For these reasons, and other reasons described more fully below, the Commission should accept immediate review and should reverse the Licensing Board's ruling in section II.A.

BACKGROUND

SFC is the owner of the NRC-licensed facilities at Gore, Oklahoma (hereafter, "SFC Facility"). SFC is the sole licensee named in NRC Source Materials License No. SUB-1010 (Docket No. 40-8027) (hereafter, "SFC License"), and SFC is currently decommissioning the SFC Facility in accordance with the terms of its license, NRC regulations, and the Atomic Energy Act of 1954, as amended ("the Act").

On December 29, 1992, the NRC issued a "Demand for Information" (hereafter, the "DFI") to both SFC and General Atomics ("GA"), a third tier parent company of SFC. SFC and GA responded separately to the DFI.^{2/} Simultaneously, SFC filed a notification pursuant to 10 CFR § 40.42(b) that it intended to terminate activities involving materials authorized under the SFC License effective July 31, 1993 or earlier.^{4/} Along with this notice, SFC submitted a Preliminary Plan for Completion of Decommissioning ("PPCD"). In accordance with 10 CFR § 40.42(c)(2)(iii)(D), the PPCD included a plan for assuring the availability of adequate funds for completion of decommissioning. On July 7, 1993 SFC informed the NRC that licensed activities at

^{2/} Letter from Mr. Sheppard to Mr. Bernero (Re: Demand for Information Dated 12/29/92) (Feb. 16, 1993); Letter from Mr. Blue to Mr. Bernero (Feb. 16, 1993).

^{4/} Letter from Mr. Sheppard to Mr. Bernero (Re: License No. SUB-1010; Docket No. 40-8027; Notification Pursuant to 10 C.F.R. 40.42(b)) (Feb. 16, 1993).

the Sequoyah Facility (other than activities related to decommissioning) had been completed on July 6, 1993.^{2/}

On October 15, 1993, NRC issued an enforcement order ("Order") to SFC and GA. The Order was published in the Federal Register on October 25, 1993 (58 Fed. Reg. 55,087). It provided that SFC, GA, and "any other person adversely affected by this Order" could request a hearing within 20 days, i.e., by November 4, 1993. If a hearing were requested, the issue to be decided in such a hearing would be "whether this Order should be sustained." 58 Fed. Reg. at 55092.

SFC filed an answer dated November 2, 1993 and requested that the Order be withdrawn, or in the alternative, requested a hearing on the Order. GA separately filed an answer dated November 2, 1993 and also requested withdrawal of the Order or a hearing. No other hearing requests were filed with the NRC, and on November 18, 1993 the Secretary of the Commission referred the SFC and GA requests to the Chairman of the Atomic Safety and Licensing Board Panel for further proceedings in accordance with 10 CFR § 2.772(j). The Atomic Safety and Licensing Board in this

^{2/} Letter from Mr. Ellis to Mr. Bernero (July 7, 1993). In its letter transmitting the PPCD, SFC offered to provide to the NRC, on a confidential basis, proprietary commercial and financial information relating to its plan for assuring decommissioning funding. SFC had subsequent discussions with the NRC Staff regarding this information, and SFC provided such information voluntarily to the NRC. Letter from Mr. Sheppard to Mr. Bernero (Apr. 7, 1993). On July 2, 1993, NRC issued a supplemental Demand for Information requesting additional documents and information. SFC also provided this information to the NRC. Letter from Mr. Ellis to Mr. Bernero (July 21, 1993).

proceeding was established on November 22, 1993 (58 Fed. Reg. 63,406 (Dec. 1, 1993)).

On November 18, 1993, Native Americans for a Clean Environment ("NACE") requested leave to intervene in this enforcement proceeding.^{5/} NACE proposed to intervene in the proceeding for the purpose of arguing that the NRC should sustain the Order. It contended that its interests and/or that of one of its members will be adversely affected if the Order is not sustained.

NACE acknowledged that it had no right to request a hearing on the Order "because NACE was not 'adversely affected' by the order." NACE Motion at 3 (citing Bellotti). Indeed, it is clear that NACE could not have compelled the NRC to issue the Order in the first instance. However, NACE sought to intervene in the hearings requested by GA and SFC "solely for the purpose of protecting its interest in seeing that the October 15 order is fully defended." NACE Motion at 4. NACE asserted that its interest in the proceeding and right to intervene was triggered when SFC and GA requested hearings because NACE would be adversely affected if the Order were not sustained or if it were sustained only in part.

The NACE Motion therefore presented the question of whether a petitioner can claim to be injured based upon the fact

^{5/} "Motion for Leave to Intervene in Proceeding Regarding Sequoyah Fuels Corporation's and General Atomics' Appeal of Nuclear Regulatory Commission's October 15, 1993, Order" (Nov. 18, 1993) (hereafter, "NACE Motion").

that the outcome of a proceeding may be that the NRC will not take an enforcement action (or will take some other lesser action) that the petitioner could not compel in the first instance. The Licensing Board answered this question in the affirmative, concluding that a petitioner can intervene as of right in a 10 CFR § 2.202 enforcement proceeding in order to support the NRC Staff's proposed order. LBP-94-5, slip op. at 38. However, the Licensing Board recognized that this question "is of some moment for the structure of this proceeding, as well as the Commission's adjudicatory process generally." Id. Therefore, the Licensing Board referred this question, in accordance with 10 CFR § 2.730(f), for immediate review by the Commission.

By order served on March 3, 1994, the Commission invited the parties to this proceeding, and presumably NACE, to file initial briefs with the Commission by March 11, 1994, addressing the questions of whether Commission review is appropriate and whether the ruling in section II.A of LBP-94-5 should be sustained.

ARGUMENT

I. COMMISSION REVIEW IS APPROPRIATE

The Licensing Board's ruling in section II.A of LBP-94-5 poses significant legal and policy questions that will affect the basic structure of this and other enforcement proceedings in a pervasive and unusual manner. It is therefore

important that the Commission accept immediate review of this question.

A. The Ruling Would Limit the Commission's Ability to Exercise Its Enforcement Discretion

The rule articulated by the Licensing Board, if sustained, would permit a petitioner to act as a "private prosecutor" any time that a licensee or other person opposed to an enforcement order challenges an action proposed by the Commission. Such an approach not only raises the potential that licensees or other persons may be hesitant to exercise their hearing rights, but also has broad implications for the Commission's exercise of its enforcement authority. It raises the specter of private prosecutors intervening to compel unwarranted continuation of Commission enforcement actions affecting materials licensees, commercial reactor licensees, and even individuals.

For example, under the rule articulated in LBP-94-5, if the Commission proposed to take enforcement action against an individual pursuant to 10 CFR § 50.5, and the individual sought a hearing to vindicate his or her rights, a petitioner claiming to be adversely affected if the Commission action is not fully sustained could intervene in support of the action. This private prosecutor could insist upon full adjudication and implementation of the proposed enforcement action against the individual, even if the Commission itself later decided that the proposed action was unwarranted and should be withdrawn. Under such circumstances, the individual would be forced to defend himself

or herself in an adjudication being prosecuted by the petitioner, not by the Commission. Surely, the Atomic Energy Act does not contemplate such a result.

Moreover, the admission of a private prosecutor in a proceeding on a proposed enforcement order would severely limit the Commission's enforcement discretion. The Commission has delegated its enforcement discretion with regard to materials licensees, such as SFC, to the Director, Office of Nuclear Material Safety and Safeguards ("NMSS"). However, the presence of a petitioner acting as "co-prosecutor" would limit the Director's ability to reach compromise or settlement in enforcement proceedings, and might even affect the Director's ability to exercise enforcement discretion explicitly reserved under an order.^{2/} Even if the Director arrived at a settlement that he thought was appropriate, he would be forced to respond to the continued prosecution of the proposed enforcement action, if the petitioner did not agree with the settlement. The Licensing Board's authority to approve settlement agreements (10 CFR § 2.203) would be of no moment, if a petitioner were to retain

^{2/} In the Order at issue in this proceeding, the Director, NMSS, specifically reserved his authority to "relax or rescind" any of the Order's conditions upon demonstration of "good cause." Section VII of the Order (58 Fed. Reg. at 55,092). However, the Licensing Board has indicated that any exercise of this authority "would be subject to review by the Board with input from all parties to the proceeding." LBP-94-5, slip op. at 15 n.8 (citing 10 CFR § 2.717(b)). In SFC's view, the Licensing Board's review in an enforcement proceeding such as this one, does not extend to the Director's exercise of such authority unless it amounts to a settlement of the proceeding subject to 10 CFR § 2.203.

the right as a party to adjudicate its claim that the order should be fully sustained without regard to the settlement. ^{8/}

This result would have adverse impacts upon the Commission's regulatory regime. The Commission and its delegates, such as the Director of NMSS, might be discouraged from initiating formal enforcement actions if to do so could result in relinquishing their enforcement discretion to a lengthy adjudicatory process. As suggested in Bellotti, this could cause "the Commission to be more circumspect in its drafting of orders and seek to accomplish some reforms informally," and if the Commission were discouraged from taking formal actions, "the net effect would be regulation less visible to the public." 725 F.2d at 1382. Moreover, once a licensee requested a hearing and intervention was granted, the Commission and its delegates would have no flexibility to revise their enforcement actions as needs arose. This could result in unnecessary litigation and wasted resources even in cases where a Director, who utilized his discretion in issuing the order initially, later becomes convinced that the Commission's enforcement objectives are better served through lesser action. This would substantially interfere with the Director's ability, in fulfilling the responsibilities delegated by the Commission, to allocate his enforcement resources efficiently based upon his assessment, at any given time, of the best means to achieve the Commission's enforcement objectives.

^{8/} See LBP-94-5, slip op. at 15 n.8.

The Director, as the proponent of the Order, appropriately has the burden to establish that the Order should be sustained and is adequately equipped to protect the public's interest in sustaining the Order. In such a case, it is inappropriate to permit a petitioner, such as NACE, to intervene and assume a duplicative prosecutorial role as a proponent of the Order. The public interest in sustaining the Order or taking appropriate enforcement action is presumptively represented fully and adequately by the NRC Staff. ^{2'}

Curiously, the Licensing Board's ruling, if sustained, would permit a person who could not initiate a hearing in the first instance to unnecessarily prolong the hearing. As stated by the Commission in Marble Hill:

We believe that public health and safety is best served by concentrating inspection and enforcement resources on actual field inspections and related scientific and engineering work, as opposed to the conduct of legal proceedings. This consideration calls for a policy that encourages licensees to consent to, rather than contest, enforcement actions.

Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980).

Although that statement was made in the context of the Commission's denial of a petitioner's request for a hearing seeking more drastic remedies than specified in an order, the

^{2'} See, e.g., Federal Communications Commission v. Schreiber, 381 U.S. 279, 296 (1965) (there is a "presumption to which administrative agencies are entitled -- that they will act properly and according to law").

basic policy expressed is equally applicable when the agency official who utilized his discretion to issue an order later decides that the order should be relaxed or modified pursuant to the authority retained in the order. The issuer of the order has been made responsible by the Commission for determining, in the course of performing his overall duties, whether his resources should be devoted to actual field inspections and related scientific and engineering work or to the conduct of legal proceedings. A third party should not be able to insist on the continuation of legal proceedings when the Commission's delegate has determined that a modified order satisfies his enforcement objectives, enabling him to apply his resources more effectively.

B. The Ruling Could Adversely Impact the Orderly Adjudication of Matters Before the Commission

A critical aspect of the Licensing Board's approach is the notion that the "adverse effect" upon a petitioner can be measured by the procedural posture of the proceeding at various points throughout the proceeding, rather than by looking to the petitioner's interest in the proceeding at the time it is initiated (i.e., when the action is proposed). This conclusion is in conflict with the Commission's statements that it has set "the point at which a[n enforcement] 'proceeding' begins for purposes of triggering the adjudicatory rights under section 189 of the Atomic Energy Act to the point of issuance of an order." 56 Fed. Reg. 40664, 40678 (Aug. 15, 1991).

Under the Licensing Board's analysis, a petitioner might not have an interest in a proceeding or any hearing rights

when the proceeding is initiated, but the fact that other persons exercise rights during the course of a proceeding would "create" new interests in the proceeding that could be vindicated by potential petitioners. If sustained, this approach would open the floodgates to continuous intervention petitions, by permitting petitioners to seek to become parties to proceedings at various stages of an adjudication.

Under the Licensing Board's approach, such petitioners would not be required to meet the standards for late-filed petitions. Rather, they could presumably seek to intervene "as of right" whenever the procedural posture of the proceeding changes to create a potential outcome that might affect them. The measure of such a petitioner's interest under this regime would have no nexus to the action originally proposed and at issue in the proceeding, but would be based upon the potential adverse effect of the new procedural posture. This approach would interfere with the orderly adjudication of matters before the Commission.

For the foregoing reasons, it is important that the Commission accept immediate review of this question.

II. THE LICENSING BOARD'S RULING IN SECTION II.A OF LBP-94-5 SHOULD NOT BE SUSTAINED

A. The D.C. Circuit's Decision in Bellotti Is Persuasive, If Not Controlling, Authority In This Case

The Licensing Board's failure to acknowledge the full impact and logical conclusion of Bellotti goes to the very crux of its ruling. Bellotti establishes that only those who oppose

an enforcement order which purports to make a facility safer have the requisite interest to request a hearing and/or to intervene in a proceeding. In the proposed order at issue in Bellotti, as with the Order at issue in this case, the Commission limited the scope of the proceeding to the question of "[w]hether . . . this Order should be sustained." ¹⁰ The D.C. Circuit held that the Commission had the authority to so limit the proceeding, even though it precluded petitioners from intervening in the proceeding. Bellotti, 725 F.2d at 1382 & n.2. Therefore, the proceeding was limited so that only those who would be adversely affected if the order was sustained had the requisite interest to request a hearing in the proceeding. Significantly, the court alluded to the impact of this Commission authority to limit its proceedings, pointing out:

As [the Commission] interpret[s] it, this language limits possible intervenors to those who think the Order should not be sustained, thereby precluding from intervention persons such as petitioner who do not object to the Order but might seek further corrective measures.

Id. at 1382 n.2 (emphasis added).

The Bellotti court further explained:

The upshot is that automatic participation at a hearing may be denied only when the Commission is seeking to make a facility's operation safer. Public participation is automatic with respect to all Commission actions that are potentially harmful to the public health and welfare.

¹⁰ Compare Bellotti, 725 F.2d at 1382 n.2, and 58 Fed. Reg. at 55092.

725 F.2d at 1383.

This position was consistent with the Licensing Board's position in Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Unit 1), LBP-80-29, 12 NRC 581 (1980). In Point Beach the Director of the Office of Nuclear Reactor Regulation had issued a "Confirmatory Order" amending an operating license, and the order permitted any person whose interest might be affected by the order to request a hearing limited to the issue of "whether the order should be sustained." Id. at 582. In rejecting a request for a hearing, the Licensing Board implicitly acknowledged that the only litigable issue within the scope of such an order would be one "which challenges the remedies proposed by the Director." Id. at 588.

Thus, the logical conclusion of Bellotti is sound. Once the NRC proposes to take an enforcement action in an effort to make a facility safer, the only persons who have an interest in any resulting proceeding are those who oppose the proposed agency action. Persons who support the action could not have compelled the NRC to take such action, ^{11/} and therefore, cannot be adversely affected by any result in the proceeding, which, at

^{11/} The Commission's regulations commit "total discretion to the NRC on matters of enforcement." Arnow v. NRC, 868 F.2d 223, 235 (7th Cir. 1989); see also Safe Energy Coalition v. NRC, 866 F.2d 1473, 1477 (D.C. Cir. 1989) (section 2.206 request fell "squarely within the category of 'enforcement' actions held presumptively unreviewable"); Massachusetts Public Interest Research Group, Inc. v. NRC, 852 F.2d 9, 19 (1st Cir. 1988).

worst, would leave such persons in the same status as existed before the NRC proposed to take discretionary action.

NACE simply cannot be adversely affected if the NRC ultimately decides not to take a discretionary enforcement action. If the proceeding results in no order being issued to SFC and GA, the result would be a return to the status quo ante, and NACE's interests will remain unaffected.^{12/} As the Commission has previously stated in another context, "it is not clear how [the petitioners] are adversely affected by an order that does not make the Sequoyah Fuels facility safer, so long as it does not make it less safe." Sequoyah Fuels Corporation (UF₆ Production Facility), CLI-86-19, 24 NRC 508, 514 (1986).

B. The Licensing Board's reliance Upon Sheffield and La Crosse is Misplaced

The Licensing Board relies upon dicta in an Appeal Board decision in Nuclear Eng'g Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737

^{12/} The lack of merit in NACE's argument that it could be adversely affected if the Order were not sustained, in whole or in part, is emphasized by the provision of the Order which authorizes the Director, NMSS, to relax or rescind any of the conditions in the Order. Order at 26. Even if the Order were fully sustained by the Licensing Board, a provision of the Order provides the Director with ongoing authority to relax or rescind the Order. Therefore, even if the Licensing Board concluded its proceeding by fully sustaining the Order, NACE would still be subject to its purported injury (the potential grant of relief to SFC or GA). The only way that NACE could achieve a remedy would be if the Director were to be deprived of his ongoing authority under the Order. Such requested relief would be beyond that proposed in the Order and would therefore fall precisely within the type of relief determined in Bellotti to be unavailable to a petitioner.

(1978) and upon a Licensing Board decision in Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367 (1980). These decisions, however, are inapposite to this case, and to the extent that they might be construed as supporting the proposition that a petitioner may be permitted to intervene in support of and compel a proposed agency enforcement action, these decisions should be overturned as inconsistent with Bellotti and the current regulatory regime for conducting enforcement proceedings.

In Sheffield the Appeal Board indicated that a petitioner could obtain standing to support an applicant's license renewal application. Although the Appeal Board denied that the petitioners had standing as of right, it remanded the case for further consideration of whether the petitioners might be entitled to discretionary intervention. Sheffield, ALAB-473, 7 NRC at 741-42. The suggestion in Sheffield that a petitioner may intervene in support of a license application is dicta,^{13/} and the proposition remains an open question at best. In Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.4 (1983), the Appeal Board rejected a petition as untimely and specifically declined to decide whether a petitioner's interest in supporting a license application was

^{13/} Although the Licensing Board asserted that this proposition was not dicta, LBP-94-5, slip op. at 14 n.7, it remains clear that no intervenor has ever been granted standing "as of right" for the purpose of supporting an applicant's licensing request. See Shoreham, ALAB-473, 18 NRC at 390 n.4.

cognizable under the Act. This decision implicitly acknowledged that this remains an open question.

SFC believes that a petitioner's interest in supporting a license application is unlikely to be cognizable under the Act and raises complex questions as to the party status of such an individual. For example, if such a petitioner were admitted to support a license application, what would be the petitioner's status if the applicant wished to withdraw or modify its application? Could such a petitioner continue the adjudication and compel an unwilling applicant to prosecute its application? In any event, the Commission need not reach this question. As discussed more fully in section II.C below, the procedures governing hearing requests and intervention petitions in an enforcement proceeding have been prescribed by the Commission in 10 CFR § 2.202 and clearly differ from license application proceedings because of the limited scope of the hearing that the Commission provides in its enforcement proceedings. Sheffield is therefore inapposite to this enforcement proceeding.

Likewise, the Licensing Board's reliance upon La Crosse is misplaced. As the Licensing Board acknowledges, La Crosse "was decided under a regulatory enforcement scheme that is different from the current section 2.202, which was adopted in 1991." LBP-94-5, slip op. at 16 n.9 (citing 56 Fed. Reg. 40,664). The intervenors in La Crosse filed a timely request for hearing pursuant to the broad terms of the hearing opportunity provided in the order at issue in that case. See LBP-80-26, 12

NRC at 369. In contrast to the limited scope of the hearing in this proceeding, ^{14/} the order at issue in La Crosse provided for a potentially much broader proceeding, as follows:

In the event a hearing is requested, the issues to be considered at such hearing shall be:

- (1) Whether the licensee should submit a detailed design proposal for a site dewatering system; and
- (2) Whether the licensee should make operational such a dewatering system as soon as possible after NRC approval of the system, but no later than February 25, 1981, or place the LACBWR in a safe co[]ld shutdown condition.

Dairyland Power Cooperative (La Crosse Boiling Water Reactor), "Order to Show Cause," 45 Fed. Reg. 13,850, 13,852 (March 3, 1980).

Thus, La Crosse is inapposite to this case, because the scope of the hearing at issue and interests which could have been affected by the La Crosse hearing were substantially broader than the scope of the hearing at issue in this proceeding. Notably, in Bellotti the D.C. Circuit rejected efforts to litigate issues, other than the issue of whether the Order should be sustained as "within the scope of the Order," because this "would result in a hearing virtually as lengthy and wide-ranging as if intervenors were allowed to specify the relevant issues themselves." 725 F.2d at 1382.

^{14/} The scope of the hearing proffered in this proceeding is limited, as was the case in Bellotti, to "whether the Order should be sustained." 58 Fed. Reg. at 55092.

C. The Right To Intervene in an Enforcement Proceeding Must be Co-extensive With the Right to Request a Hearing

The Licensing Board implicitly acknowledges that a petitioner that favors a proposed enforcement order cannot request a hearing on the order. Such a person is not adversely affected by the order. Bellotti, 725 F.2d 1380. However, the Licensing Board attempts to draw a distinction between the right to request a hearing under 10 CFR § 2.202 and the right to intervene under 10 CFR § 2.714. It inappropriately distinguishes between a person "adversely affected" by an order, and a person "adversely affected" by the outcome of a proceeding regarding whether the order should be sustained. Although even NACE concedes that it is not adversely affected by the proposed Order, the Licensing Board concludes that once SFC and GA requested a hearing on the Order, NACE can be adversely affected by the proceeding if the Order is not fully sustained.

This distinction is fundamentally flawed. The core issue in an enforcement proceeding is the Commission's proposal that the order be issued. The potential adverse effects of the proceeding must therefore be measured in terms of whether a person will be adversely affected by the issuance of the proposed order. The Commission is not proposing to "not" issue a required order, or to "not" take an action that it would otherwise be required to take. Thus, only those who oppose the order have an interest that can be adversely affected by the proposed action at issue in the proceeding. Those who support the order cannot

compel its issuance and therefore cannot be adversely affected by the Commission's inaction, e.g., if the result of the proceeding is that the order is not fully sustained. At worst, the outcome of a proceeding might be a return to the status quo ante.

Significantly, the right to intervene in an enforcement proceeding must be co-extensive with the right to request a hearing. The Commission's regulations for enforcement proceedings (in 10 CFR § 2.202) and for intervention (in 10 CFR § 2.714) must be read together along with section 189 of the Atomic Energy Act. Although the Order at issue in this proceeding does not fall within the types of licensing actions implicated by section 189, ^{15/} 10 CFR § 2.202 clearly contemplates the possibility that the Commission would propose enforcement orders that do implicate the hearing rights of section 189. ^{16/} With regard to such orders, section 189

^{15/} The NRC Staff agrees with SFC that the Order does not involve the types of licensing actions specified in section 189 of the Act. LBP-94-5 at 10 n.4. However, the Licensing Board declined to decide this issue. Id. Notably, the NRC has successfully argued in the federal courts that certain enforcement orders do not fall within the terms of section 189. See, e.g., In re: Three Mile Island Alert, Inc. ("TMI Alert"), 771 F.2d 720, 729-30 (3d Cir. 1985), cert. denied sub nom. Aamodt v. NRC, 475 U.S. 1082, reh'g denied, 476 U.S. 1179 (1986). In TMI Alert the United States Court of Appeals for the Third Circuit held that section 189(a) was "not implicated" when NRC entered an order which lifted an immediately effective suspension of the TMI license, thereby permitting restart of TMI without an opportunity for hearing pursuant to section 189. Id. at 730.

^{16/} 10 CFR § 2.202(a) applies to "a proceeding to modify, suspend, or revoke a license or to take such other action as may be proper." Section 189 applies to "any proceeding under this Act, for the granting, suspending, revoking, or amending of any license." 42 U.S.C. § 2239 (1988).

provides that "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239(a)(1). (emphasis added).

With respect to proceedings involving enforcement actions, the Commission has interpreted the statutory hearing requirements of section 189 of the Act in 10 CFR § 2.202(a)(3).^{17/} It has explicitly defined the category of persons entitled to request a hearing as "the licensee or any other person adversely affected by the order." (Emphasis added.) Thus, unless the Commission has improperly interpreted section 189 of the Act, in an enforcement proceeding any person "adversely affected by the proceeding" within the terms of the statutory language is limited to a person that is "affected by the order." If there were a class of persons who could be adversely affected by an enforcement proceeding that would be different from the class of persons adversely affected by the order (pursuant to 10 CFR § 2.202(a)(3)), the Commission's rules would not provide a means for such a person to request a hearing. If so, the Commission's rules would violate section 189 of the Act.

^{17/} In its Statement of Considerations accompanying the 1991 revisions to 10 CFR § 2.202, the Commission explained that "[t]he final rule, as revised, does not eliminate any hearing rights afforded under the statutory provisions of the 1954 Act; rather, it continues those rights." 56 Fed. Reg. at 40670 (citing 10 CFR § 2.202(a)(3)).

No additional class of persons is granted the right to participate in enforcement proceedings under 10 CFR § 2.714(a)(1) which permits intervention of "[a]ny person whose interest may be affected by a proceeding." (Emphasis added.) This is the same language as appears in section 189(a) of the Act, and therefore, for purposes of enforcement proceedings, must be limited by the Commission's interpretation of section 189(a) as reflected in 10 CFR § 2.202(a)(3), i.e., only persons "adversely affected by the order" could be "adversely affected by the proceeding" within the terms of 10 CFR § 2.714(a)(1). If the phrase were given any broader meaning in 10 CFR 2.714(a)(1), it would mean that 10 CFR § 2.202(a)(3) violates the Act.

Thus, the only way to construe 10 CFR §§ 2.202 and 2.714(a)(1) in enforcement proceedings that is consistent with the Atomic Energy Act, is that when the Commission proposes an order intended to make a licensee's activities safer, the class of persons adversely affected by the enforcement proceeding and those adversely affected by the proposed order are the same. The natural consequence of this construction is that the only persons that can obtain party status as of right in an enforcement proceeding, either by requesting a hearing or by petitioning to intervene, ^{18/} are those that could be adversely affected by the

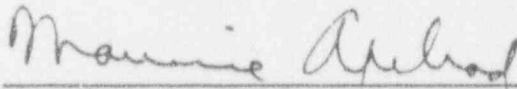
^{18/} There may be persons adversely affected by an order that may not choose to request a hearing, but may nevertheless petition to intervene if a request is made by another person adversely affected by the order. For example, a licensee might choose to accept an order and not request a hearing, but might wish to intervene if one of its employees was adversely affected by the order and requested a hearing.

issuance of the proposed order, i.e., those that oppose the proposed enforcement action. ^{19/}

CONCLUSION

FOR THE FOREGOING REASONS, the Commission should accept immediate review of the Licensing Board's ruling in section II.A of LBP-94-5, reverse that ruling, and remand this case to the Licensing Board for issuance of a decision consistent with the ruling of the Commission.

Respectfully submitted,



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^{19/} To the extent that the NRC would have any interest in hearing the views of those who support an enforcement order, the appropriate mechanism is provided in 10 CFR § 2.715. Section 2.715 provides that a person who is not a party to a proceeding may, at the discretion of the presiding officer, make a "limited appearance" in order to provide a statement of position on the issues. Accordingly, the Commission's rules have expressly provided the manner for public participation for those who support an enforcement order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

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In the Matter of)

SEQUOYAH FUELS CORPORATION)
and GENERAL ATOMICS)

(Sequoyah Facility))

) Docket No. 40-8027-EA
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OFFICE OF SECRETARY
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Sequoyah Fuels Corporation's Initial Brief In Opposition To The Ruling In Section II.A of LBP-94-5" were served upon the following persons by hand delivery or by deposit in the United States mail, first class postage prepaid and properly addressed as indicated by an asterisk (*) on the date shown below:

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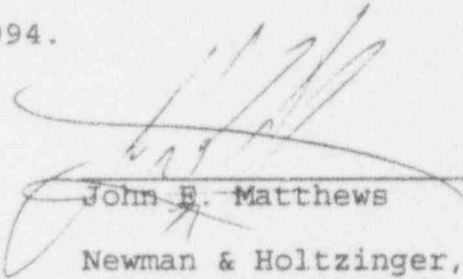
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