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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

BEFORE THE COMMISSION

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

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NRC STAFF'S BRIEF IN RESPONSE TO
COMMISSION ORDER OF MARCH 3, 1994

Steven R. Hom
Susan L. Uttal
Counsel for NRC Staff

March 11, 1994

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COMMISSION ORDER OF MARCH 3, 1994

Pursuant to the Commission's Order of March 3, 1994, the NRC Staff (Staff) hereby files its response to the questions presented in the Order. For the reasons set forth below, the Commission's review of the Licensing Board's ruling in Section II.A. of LBP-94-5 is not merited, and in any event, the Licensing Board's ruling at issue should be sustained.

BACKGROUND

On October 15, 1993, the Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support issued an Order to Sequoyah Fuels Corporation (SFC) and General Atomics (GA) (Order) addressing decommissioning funding for the SFC Gore, Oklahoma site. In the Order, the Staff concluded that SFC did not appear to be able to satisfy the Commission's financial assurance standards with

regard to decontamination and decommissioning. GA and SFC were declared by the Order to be jointly and severally responsible for providing funding to continue remediation of the site, for providing financial assurance in accordance with 10 C.F.R. § 40.36, and for providing an updated cost estimate and plan for assuring the availability of funds for decommissioning in accordance with 10 C.F.R. § 40.42. The Order directed GA to provide, *inter alia*, financial assurance for decommissioning in the amount of \$86 million in a form prescribed by 10 C.F.R. § 40.36 and Regulatory Guide 3.66. Order at 25.

By its express terms, the Order stated that "SFC and GA must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within 20 days of the date of this Order." Order at 26. The Order further states "[i]f a person other than SFC or GA requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order" Order at 27.

SFC and GA filed requests for hearing on November 3, 1993.¹ On November 18, 1993, Native Americans for a Clean Environment (NACE) filed its "Motion for Leave to Intervene in Proceeding Regarding Sequoyah Fuel Corporation's and General Atomics' Appeal of Nuclear Regulatory Commission's October 15, 1993, Order"

¹ Sequoyah Fuel Corporation's Answer and Request for Hearing (Nov. 3, 1993); General Atomics' Answer and Request for Hearing (Nov. 2, 1993).

(NACE's Motion). Answers to NACE's Motion were filed by the Staff, GA, and SFC, as well as supplemental pleadings concerning NACE's Motion.²

NACE based its Motion in large part on an allegation that one of its members, Ed Henshaw, is a "close neighbor" of the SFC site. According to NACE, it "would be adversely affected if the October 15 order were reversed or weakened." NACE's Motion at 1. NACE explained that if the Order is not sustained, its interest in "ensuring the adequate and safe decommissioning of the SFC site will be adversely affected by the resulting uncertainty that SFC and GA will provide adequate funding for the cleanup." *Id.* at 3.

Following a prehearing conference held on January 19, 1994, during which the merits of NACE's Motion were explored, the Licensing Board issued its Memorandum and Order (Petition for Intervention) (Jan. 25, 1994), in which it granted NACE's Motion. Subsequently, the Licensing Board issued its Memorandum and Order (Granting Intervention Motion; Referring Ruling to the Commission), LBP-94-5, slip op. (Feb. 24,

² See [GA's] Answer In Opposition to the Motion to Intervene of [NACE] (Dec. 6, 1993); [SFC's] Answer in Opposition to NACE's Motion to Intervene (Dec. 6, 1993); NRC Staff's Response to NACE's Motion for Leave to Intervene (Dec. 13, 1993); [NACE's] Reply to [SFC's] Answer in Opposition to NACE's Motion to Intervene (Dec. 30, 1993); [SFC's] Reply to [NACE's] Supplemental Factual Allegations, New Arguments, and Request for Discretionary Intervention (Jan. 11, 1994); [NACE's] Motion for Leave to File Reply Affidavit (Jan. 19, 1994) (attaching affidavit). The parties have filed additional supplemental pleadings regarding NACE's submission of contentions, which did not directly bear on the Licensing Board's ruling at issue in LBP-94-5.

1994). In LBP-94-5, the Board explained its reasons in detail for admitting³ NACE to this proceeding. Also, pursuant to 10 C.F.R. § 2.730(f), the Board referred to the Commission for review the Board's ruling in section II.A. of LBP-94-5, "that in a proceeding on a 10 C.F.R. § 2.202 staff enforcement order, there is no prohibition against an otherwise qualified petitioner intervening as of right in support of the order." LBP-94-5, slip op. at 39-40.

The Commission issued an order dated March 3, 1994 acknowledging the Licensing Board's referral of the preceding issue to the Commission for review. In its order, the Commission provided the parties an opportunity to file briefs in regard to the following two questions:

- (1) Whether review of the referred ruling is appropriate in accordance with 10 C.F.R. § 2.786(g), and
- (2) Assuming that review is appropriate, whether the Licensing Board's ruling in section II.A. of its order should be sustained.

DISCUSSION

In relevant part, 10 C.F.R. § 2.786 provides that:

(g) Certified questions and referred rulings. A question certified to the Commission under § 2.718(i) or a ruling referred under § 2.730(f) *must meet one of the alternative standards in this subsection* to merit Commission review. A certified question or referred ruling will be reviewed if it either--

³ At the present time, the Board has not yet ruled on NACE's proffered contentions. Thus, pursuant to 10 C.F.R. § 2.714(b)(1), NACE has not yet been permitted to participate as a party.

(1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.786(g) (emphasis added). With respect to its discretion to undertake interlocutory review, the Commission has recently stated that as a general rule it will "adhere . . . to the stringent standards for interlocutory review which are codified in 10 C.F.R. § 2.786(g)" *Safety Light Corporation, et al.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85 (1992).

I. Review By The Commission Is Not Merited.

The first question presented by the Commission is whether review is appropriate. To answer the question in the affirmative, under 10 C.F.R. § 2.786(g), at least one of the above standards must be met here.

Under 10 C.F.R. § 2.786(g)(1), the party or parties "adversely affected by" the ruling at issue must be identified, in order to determine whether it or they would be subject to "immediate and serious irreparable impact." In this proceeding, the ruling obviously benefited NACE; thus, only the Staff, GA, or SFC could conceivably be adversely affected by the Board's ruling. Assuming for the moment that at least one of these parties was adversely affected, the next issue is whether the party or parties were adversely affected to such a degree that would constitute "immediate and serious irreparable impact." A recent Commission decision provides some guidance as to what may constitute such "impact."

In *Oncology Services Corporation*, CLI-93-13, 37 NRC 419 (1993), the Commission granted the licensee's petition for interlocutory review of a Licensing Board order granting the Staff's motion for a 120-day stay of proceedings. In that case, the Staff had issued an immediately effective order suspending the license of Oncology Services Corporation, the licensee. The Commission, in granting the petition for review under 10 C.F.R. § 2.786(g)(1), stated: "For the purposes of determining whether interlocutory review is appropriate, when a licensee is subject to an immediately effective suspension order, a licensee's due process interest in a prompt hearing is threatened by a 120-day stay of proceeding." CLI-93-13, 37 NRC at 421. The Commission also found that later review of the final Licensing Board order would "provide no relief from the type of harm that conceivably could be suffered [by the licensee]." *Id.*

Here, in contrast, although all of the parties may incur additional expenses resulting from NACE's participation in discovery, at the hearing, and in the filing of and responding to additional pleadings, this does not rise to the level of "serious irreparable impact" of the nature suggested in the *Oncology* decision.⁴ See also *Safety Light Corp., et al.* (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156 (1992). Thus, under § 2.786(g)(1), review by the Commission is not warranted.

Under § 2.786(g)(2), in order for review to be merited, the "basic structure of the proceeding" must be affected by the Board's ruling "in a pervasive or unusual manner." In *Safety Light*, the Commission granted the Staff's petition for interlocutory review of

⁴ A hearing will be held, with or without NACE's involvement, since GA and SFC have requested one. Thus, GA and SFC have already made a commitment to the expenditure of substantial time and resources.

a Licensing Board order which consolidated an informal proceeding under Subpart L of 10 C.F.R. Part 2 (license denial) with a formal Subpart G proceeding (decommissioning order), the combined proceeding being treated as a formal Subpart G proceeding. Thus, the license denial proceeding, nominally an informal matter where the presiding officer's decision is normally based on the materials in the hearing file and written submissions of parties, became a "formal, trial-type hearing" with discovery and cross-examination of witnesses. CLI-92-13, 36 NRC at 82. In granting the petition for review, the Commission held, *inter alia*, that the consolidation order of the Licensing Board "certainly affected the license denial proceeding in a pervasive and unusual manner by converting it from a Subpart L proceeding into a Subpart G proceeding." *Id.*

The Licensing Board's ruling at issue here is not one that "affects the basic structure of the proceeding," particularly as measured against the situation in *Safety Light*. The Order against GA and SFC continues to be contested under the provisions of Subpart G of Part 2, and no unique or special measures or procedures have been introduced into the proceeding as a result of NACE being permitted to intervene. Accordingly, under 10 C.F.R. § 2.786(g)(2), Commission review is not merited.

II. The Licensing Board's Ruling Should Be Sustained.

The second question presented by the Commission is assuming that review is appropriate, should the Licensing Board's ruling in section II.A.⁵ of its decision in LBP-94-5 be sustained. This ruling addressed the issue of whether in a proceeding

⁵ Other aspects of LBP-94-5 are outside the scope of the Commission's Order of March 3, 1994.

involving a challenge to an enforcement order issued under 10 C.F.R. § 2.202, does one who supports the order have a right to intervene.

In this regard, the Board held that in the context of a proceeding to determine whether an enforcement order should be sustained, "if [an intervenor can] establish a particularized injury that it or its members will suffer in the event the order is not sustained, it is entitled to standing as of right as a 'person whose interest may be affected by the proceeding.'" LBP-94-5, slip op. at 16. In so ruling, the Board relied in large part upon *Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site)*, ALAB-473, 7 NRC 737 (1978). In *Sheffield*, the licensee had applied for renewal and amendment of its license to operate a low-level radioactive waste burial site. The Licensing Board denied a joint petition for intervention based on the petition's insufficiency in establishing intervention as a matter of right. The Appeal Board affirmed the Board's decision, but decided to provide one of the joint petitioners a further opportunity to demonstrate that it should be permitted to participate as a matter of discretion. *Id.* at 739. The Appeal Board noted that "neither petitioner has identified, let alone particularized, any specific injury that it or its members would or might sustain should the Sheffield license renewal and amendment be denied, or, alternatively, granted subject to the imposition of burdensome conditions upon the licensee." *Id.* at 741. Thus, the petitioners failed to demonstrate a cognizable interest that might be adversely affected "if the proceeding has one outcome rather than another." *Id.* at 743. The Appeal Board went on to state that its decision does not "foreclose all attempts at intervention in support of an application." *Id.*

As noted in the Staff's response to NACE's Motion for Leave to Intervene, a petition to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected *by the results of the proceeding*. See 10 C.F.R. § 2.714(a)(2); NRC Staff's Response to NACE's Motion to Intervene (Dec. 13, 1993) (Staff's Response) at 2-3. The Staff acknowledged that if the Order against GA and SFC, containing its financial assurance directives, were not sustained *as a result of the proceeding* that had been initiated by GA's and SFC's request for a hearing, it is conceivable that NACE's interests, stated in NACE's Motion,⁶ might be adversely affected. Staff's Response at 4. There was and is no question that NACE was not adversely affected by the issuance of the Order against GA and SFC, and that absent a proceeding to determine whether the Order should be sustained, under *Bellotti v. NRC*, 725 F.2d 1380 D.C. Cir. 1983), NACE would have had no standing as a matter of right to request a hearing or otherwise intervene.⁷ See Staff's Response at 4.

⁶ See *supra* p. 3.

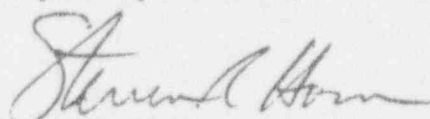
⁷ It should be pointed out that in *Bellotti*, the Court of Appeals stated, in its closing remarks, that "[t]he upshot is that automatic participation *at a hearing* may be denied only when the Commission is seeking to make a facility's operation safer. Public participation is automatic with respect to all Commission actions that are potentially harmful to the public health and welfare." 725 F.2d at 1383 (emphasis added). The Staff recognizes, therefore, that assuming the Order against GA and SFC is in the "safer" category, one could argue that under the quoted language, NACE, notwithstanding the hearing initiated by GA and SFC, does not have standing as a matter of right, *i.e.*, its participation may be denied. However, since in *Bellotti* no hearing had been requested by the licensee (and, therefore, the terms of the order modifying license at issue had become final and binding), and the petitioner, the Commonwealth of Massachusetts, sought to be able to address matters beyond the scope of the proceeding defined by the Commission, the language quoted above is not viewed as controlling here.

Although *Sheffield* did not involve an enforcement action, as the Board points out, the Licensing Board's analysis in *Dairyland Power Cooperative* (LaCrosse Boiling Water Reactor), LBP-80-26, 12 NRC 367 (1980), which was an enforcement matter, is consistent with *Sheffield*. There is no doubt that *Sheffield* and *LaCrosse*, as well as *Bellotti*, which was relied upon by SFC in opposing NACE's intervention, are distinguishable from the matter now before the Board. The Staff is unaware, however, of any Commission or other precedents that squarely address the situation at hand addressed by the Board's ruling in section II.A. of LBP-94-5. The Licensing Board, therefore, was left to and did fashion its ruling on a straightforward application and extrapolation of the limited existing guidance. Accordingly, the ruling should be sustained.

CONCLUSION

In view of the foregoing, the Licensing Board's ruling in section II.A. of LBP-94-5, slip op. at 9-16, does not merit review under 10 C.F.R. § 2.786(g). In addition, assuming that review is appropriate, the ruling should be sustained.

Respectfully submitted,



Steven R. Horn
Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
this 11th day of March, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S BRIEF IN RESPONSE TO COMMISSION ORDER OF MARCH 3, 1994" in the above-captioned matter have been served on the following by deposit in the United States mail, first class, or as indicated by one asterisk by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by two asterisks by facsimile transmission, or as indicated by three asterisks by hand, this 11th day of March, 1994:

James P. Gleason, Chairman*
Administrative Judge
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

G. Paul Bollwerk, III*
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: EW-439
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

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

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

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

Mr. John R. Driscoll
General Atomics Corporation
3550 General Atomics Court
San Diego, California 92121-1194

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Mail Stop: 16-G-15 OWFN
U.S. Nuclear Regulatory Commission
Washington, DC 20555

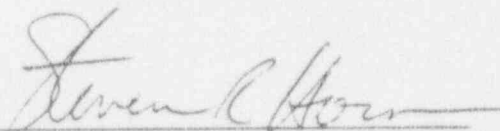
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U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

Maurice Axelrad, Esq.**
John E. Matthews, Esq.
Newman, Bouknight & Edgar, P.C.
1615 L Street, N.W.
Suite 1000
Washington, DC 20036

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



Steven R. Hom
Counsel for NRC Staff