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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

In the Matter Of Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding)	Docket No. 40-8027EA Source Materials License No. SUB-1010 March 17, 1994

NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S REPLY BRIEF REGARDING APPROPRIATENESS OF COMMISSION REVIEW OF LBP-94-5 AND WHETHER RULING IN SECTION II.A SHOULD BE SUSTAINED

Introduction

As permitted by the Commission's Order of March 3, 1994, Native Americans for a Clean Environment ("NACE") hereby replies to the initial brief of Sequoyah Fuels Corporation ("SFC"), which supports interlocutory review of LBP-94-5 and urges the Commission to reverse that portion of the decision which allows NACE to intervene in this enforcement proceeding as a matter of right.[1] As discussed below, SFC has misapplied the standard for interlocutory review, which is far from satisfied in this case. Thus, the Commission should dismiss the Licensing Board's referral without reaching the merits. If the Commission decides to address the merits, however, LBP-94-5 should be sustained.

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1 Sequoyah Fuels Corporation's Initial Brief in Opposition to the Ruling in Section II.A of LBP-94-5 (March 11, 1994) (hereinafter "SFC brief"). General Atomics ("GA") filed a statement in support of SFC's position, but no brief. The NRC Staff's brief opposed interlocutory review, and advocated the affirmation of LBP-94-5.

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ARGUMENT

I. INTERVENTION BY NACE WILL NOT HAVE A PERVASIVE OR UNUSUAL EFFECT ON THIS PROCEEDING, AND THUS THERE ARE NO GROUNDS FOR INTERLOCUTORY REVIEW.

SFC argues that the interlocutory review is warranted under 10 C.F.R. § 2.786(g)(2) because admission of NACE as a participant in this case "would affect the basic structure of this and other enforcement proceedings in a pervasive or unusual manner." SFC Brief at 2, 10. In support of its position, SFC raises the "specter" of enforcement proceedings run amok by "private prosecutors," who will intimidate licensees from challenging enforcement orders and engage the Commission and licensees in "unnecessary litigation," "even if the Commission were to reach a compromise or other agreement with the regulated person." Id.

Like most "specters," however, SFC's is based more in conjecture than reality. The reality is that in LBP-94-5 the Board has admitted to this ongoing proceeding an additional party, whose role is narrowly restricted to supporting the NRC's October 15th Order with respect to the limited issues that have been put into contention by the licensee. It is absurd to claim that licensees will be intimidated from challenging enforcement orders by the mere prospect that the Staff's position on these limited issues will be buttressed by another voice.

Similarly, SFC exaggerates in making dire predictions that intervenors who are displeased with proposed settlements between the Staff and licensees will unnecessarily prolong enforcement

hearings at great expense to licensees and the government, and hamper the NRC Staff in achieving settlements. SFC points to no case law which holds that an intervenor can insist on prolonged litigation of an enforcement order after the principal parties, the NRC Staff and the licensee, have settled; nor are we aware of any. Rather, NRC regulations reasonably provide for review and approval of proposed settlement agreements by the Licensing Board, "with input from all parties to the proceeding." LBP-94-5, Slip op. at 15, note 8. The exercise of this opportunity to challenge the reasonableness of a proposed settlement could have only a limited, and entirely legitimate, effect on the conduct of the litigation. For example, on the basis of information provided by an intervenor, the Licensing Board might reject a proposed settlement as unreasonable and proceed with the litigation. In such a case, continuation of the adjudication would not constitute "unnecessary" litigation instigated solely by the intervenor, but essential litigation required by the Licensing Board in the course of its review under 10 C.F.R. § 2.203 or § 2.717(b). Similarly, on the basis of information or arguments provided by an intervenor, the Licensing Board might order additional discovery to establish the reasonableness of a proposed settlement; or request additional briefing on the legal basis for approval of the settlement. Such limited additional litigation, focused on the reasonableness and legal validity of the proposed settlement, could hardly have the drastic effect or limitless

duration that SFC depicts.

SFC's argument that participation by intervenors in enforcement proceedings would "severely limit the Commission's enforcement discretion" is also unfounded. SFC does not explain the basis for its claim that the presence of an intervenor would somehow hamper the NRC Staff from negotiating a settlement with a licensee, nor can we discern any. These parties are free to discuss and resolve their differences without the participation of an intervenor. While ultimately the Staff and licensee must submit their proposed agreement to the Licensing Board and other parties for review of of its reasonableness, this requirement exists regardless of whether intervenors participate.

Similarly, there is no merit to SFC's argument that participation by an intervenor "might even affect the Director's ability to exercise enforcement discretion explicitly reserved under an order."[2] The key factor circumscribing the Director's discretion to modify a proposed Order is the Licensing Board's review and approval authority under 10 C.F.R. §§ 2.203 and 2.717(b), which

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2 SFC's citation to Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983), for the proposition that the admission of intervenors to enforcement proceedings would discourage the NRC from initiating enforcement actions, is completely inapt. In Bellotti, the Court perceived an adverse effect on NRC enforcement policy if intervenors could demand hearings regarding NRC Staff enforcement orders, and expand the scope of the hearings to include the adequacy of those orders. In this case, by contrast, an enforcement hearing has already begun, at the instigation of SFC and GA, and the only issue is whether the October 15th Order should be sustained.

exists regardless of whether intervenors participate.[3] Moreover, intervenors who do participate must function within this regulatory framework.

Finally, it is important to remember amidst the clamor raised by SFC that the mere presence of an intervenor in an NRC adjudication is not an aberration to be wiped out on an emergency basis if it has the slightest effect on the proceeding, but rather is a valued component of the NRC's decisionmaking process. Not only is provision for public participation required by the Atomic Energy Act for licensing decisions, but it is favored as a matter of policy even where it is not statutorily required, in order to "maximize productive public participation in their proceedings." Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976), citing Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1005-1006 (D.C. Cir. 1966). Thus, without more, the fact that an intervenor has been admitted to an NRC adjudication is utterly insufficient grounds for taking interlocutory review.[4]

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[3] In footnote 7 of its brief, SFC appears to argue that § 2.717(b) does not apply in this case. SFC provides no support for this view, nor is it consistent with the plain language of the regulation.

[4] SFC's argument that the Licensing Board's ruling would "open the floodgates to continuous intervention petitions, by permitting petitioners to seek to become parties to proceedings at various stages of an adjudication," is irrational. SFC brief at 14. There is no reason or opportunity for intervenors to exercise their hearing rights before a licensee requests a hearing; and afterwards, the Licensing Board has the discretion under 10 C.F.R. § 2.714 to judge the timeliness of intervention requests in relation to the date when the hearing commenced. Thus, admission of NACE to this proceeding would set no adverse precedent with respect to the timing of interventions in enforcement proceedings.

In this case, SFC has failed to demonstrate that NACE's intervention in this proceeding would have a "pervasive or unusual" effect on this proceeding, and thus the Commission should decline to take interlocutory review.

II. ASSUMING THAT LBP-94-5 SATISFIES THE COMMISSION'S STANDARD FOR INTERLOCUTORY REVIEW, IT SHOULD BE SUSTAINED.

SFC makes three arguments in opposition to LBP-94-5, none of which are persuasive. First, SFC tries to expand on the narrow holding of Bellotti, arguing that it "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." SFC Brief at 15-16. However, as the Licensing Board observed in LBP-94-5, all that the Court held there was that Massachusetts Attorney General Bellotti had no right to a hearing for purposes of challenging the sufficiency of an enforcement order.[5] 725 F.2d at 1382. Here, the circumstances are completely different: the licensee has challenged an Order imposing measures which the NRC deems necessary for protection of public health and safety, and a hearing has been commenced at the licensee's request. Thus, by virtue of SFC's hearing request, it is now uncertain as to whether the decommission-

[5] Moreover, the portions of the Bellotti opinion cited in SFC's brief not only constitute dicta, but they also contradict the position taken by the Commission in that case, as quoted by the Licensing Board in note 6 of LBP-94-5. See NACE initial brief at 11.

ing financing measures deemed necessary by the NRC Staff for protection of public health and safety ultimately will be enforced. Accordingly, because the outcome of this "proceeding" could have an adverse effect on NACE's interests, NACE has satisfied 10 C.F.R. § 2.714.

SFC also challenges the Licensing Board's reliance on Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737 1978) and Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-80-26, 12 NRC 367 (1980). However, although SFC may disagree with Sheffield, it remains a valid precedent.[6] SFC attempts to distinguish LaCrosse on the ground that the language used in that hearing notice (i.e., whether specific measures should be taken) was different than the October 15th Order, which merely poses the question of whether the Order should be sustained. This is a distinction without a difference. In LaCrosse, the measures required in the enforcement order were spelled out in the hearing notice; in this case, they have essentially been incorporated by reference. The practical effect is the same for the intervenor,

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6 SFC's attack on the wisdowm of Sheffield, based on allegedly "complex questions" about the party status of the would-be intervenors in that case, is unpersuasive. It is almost unimaginable that a proponent of a commercial nuclear license would insist on continuing a proceeding, even after the applicant had withdrawn.

whose role is restricted to supporting the enforcement of the specific measures of the Staff's order.[7]

Finally, SFC argues that the right to intervene in an enforcement proceeding must be "coextensive" with the right to a hearing under the Atomic Energy Act, and that LBP-94-5 is not consistent with this requirement. To the extent that SFC's convoluted arguments can be understood, they are dead wrong. There is nothing in the Atomic Energy Act or any NRC regulation that impedes the Commission's authority, as established in 10 C.F.R. § 2.714, to widely permit intervention to persons adversely by adjudicatory proceedings, whether they involve licensing or enforcement actions. Regardless of what other regulations the Commission may institute under Subpart B of 10 C.F.R. Part 2 for the protection of licensee's rights in enforcement matters, § 2.714 has independent vitality as the Commission's chosen vehicle to provide for public participation in such proceedings.[8]

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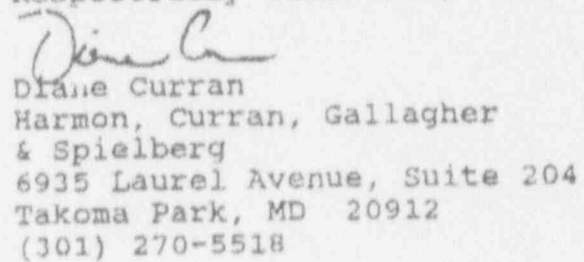
7 SFC argues that LaCrosse is distinguishable because in that case the intervenors timely requested a hearing within the timeframe provided by the hearing notice. However, the Licensing Board has exhaustively discussed the timing of NACE's hearing request and determined that it was timely. See LBP-94-5 at 26-35. In any event, this issue is not before the Commission.

8 In any event, as discussed in NACE's initial brief at 8-10, this adjudication is a Section 189a proceeding under the Atomic Energy Act because it involves the amending of SFC's license.

CONCLUSION

For the foregoing reasons, the Commission should deny interlocutory review. If it decides to take interlocutory review, LBP-94-5 should be sustained.

Respectfully submitted,



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March 17, 1994

CERTIFICATE OF SERVICE

I certify that on March 17, 1994, copies of the foregoing NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S REPLY BRIEF REGARDING APPROPRIATENESS OF COMMISSION REVIEW OF LBP-94-5 AND WHETHER RULING IN SECTION II.A SHOULD BE SUSTAINEDwere served by FAX and/or first-class mail or as indicated below on the following:

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