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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKET

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

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June 17, 1994

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INTRODUCTION

On April 1, 1994, the Commission granted review of the Presiding Officer's decision to allow Sequoyah Fuels Corporation (SFC) to withdraw its license renewal application and terminate the proceeding.¹ The Commission ordered the parties (Petitioners, Sequoyah Fuel's Corporation and the NRC Staff) to submit briefs addressing five delineated matters. On May 6, 1994, the Petitioners filed "Native Americans For a Clean Environment's and Cherokee Nation's Initial Brief on Review of LBP-93-25" (Petitioners' Brief) in response to the Commission's Order. The NRC Staff (Staff) hereby files its response to Petitioners' Brief and the Commission's Order.

¹Memorandum and Order (Withdrawal of Application and Termination of Proceeding), LBP-93-25, 38 NRC 304 (1993).

DISCUSSION

1. What is the Basis for the Presiding Officer's Jurisdiction Over Decommissioning Activities in a License Renewal Proceeding in Which the Licensee Requests to Withdraw its Renewal Application?

The Presiding Officer was correct in his conclusion that he did not have jurisdiction over the matters raised by the Petitioners, which all relate to decommissioning activities, and in his conclusion that the imposition of conditions on the withdrawal of an application requires a showing of "some legal injury to a private or public interest that the conditions are designed to eliminate." LBP-93-25, 38 NRC at 321 and 315. (Citation omitted).²

It is well settled law that the Presiding Officer's jurisdiction is limited to the authority delegated to it by the Commission. *See Public Service Company of Indiana*

²The Petitioners raise several decommissioning issues in support of the petition for review, which, they aver, the Presiding Officer should have decided in the context of the license withdrawal motion. Petitioners' Brief at 15, 24-29. The issues involve activities that are related to decommissioning, some of which have previously been approved for SFC, and which are more appropriately explored in the context of a decommissioning proceeding. *See, e.g., Sequoyah Fuels Corporation*, CLI-93-7, 37 NRC 175, 179 (1993) (request to hold a hearing in connection with the groundwater monitoring plan). Petitioners have offered no compelling reason why the Commission should reverse itself on this issue. Petitioners' Brief at 24-25. The raffinate spreading program was approved in a prior license renewal, and the Petitioners have pointed to no new or altered procedures or circumstances which call that approval into question. *Id.* at 27-28. Decommissioning funding (*Id.* at 25-26) is presently the subject of a proceeding before a licensing board. *Sequoyah Fuels Corporation and General Atomics* (Gore, Oklahoma, Site Decontamination and Decommissioning Funding) (Establishment of Atomic Safety and Licensing Board) (unpublished), Docket No. 40-8027-EA (November 22, 1993). NACE has been admitted as an intervenor and the Cherokee Nation has filed a petition to intervene. Regarding the changes in management at SFC since 1991, (Petitioners' Brief at 27) at least two opportunities to request a hearing in connection with management changes at SFC have been provided to the public since 1991, but Petitioners *did not* request an opportunity for a hearing. *See* 58 Fed. Reg. 8,638 (1993); 57 Fed. Reg. 38,072 (1992).

(Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976). In the instant case, the Presiding Officer's authority was limited to consideration of renewal of the SFC materials license.³ Once there was a determination not to pursue renewal, the only issue left for the Presiding Officer was whether to grant the withdrawal with or without conditions. Decommissioning issues were well beyond the Commission's delegation of authority in this matter.

The Presiding Officer's jurisdiction over decommissioning activities where the licensee has requested withdrawal of its renewal application after the initiation of a proceeding is limited to preventing (1) legal harm to a private or public interest, *see Sequoyah Fuels Corporation*, LBP-93-25, 38 NRC at 315-316 and the cases cited therein, or (2) loss of Commission jurisdiction over an applicant or licensee in possession of nuclear materials or which has made changes to a site which may require stabilization. *See, e.g., Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 416 (1989);⁴ *Public Service Company of Oklahoma* (Black Fox Station, Units 1 and 2), LBP-83-10, 17 NRC 410 (1983); *Northern Indiana Public*

³ See Order (Designation of Presiding Officer), 55 Fed. Reg. 46,744 (1990). See also Memorandum and Order (Requests for Hearing and Petitions for Leave to Intervene), 56 Fed. Reg. 7,422 (1991), wherein the Presiding Officer, in granting NACE's request for hearing and ruling on the areas of concern, pursuant to 10 C.F.R. § 2.1205(g), held that the request for the Staff to look at decommissioning rather than operation was "not relevant or germane to the proceeding." *Id.*

⁴ The Commission, in responding to the Intervenors' argument that the Applicant might withdraw its application, stated that withdrawal is "neither automatic nor a matter of right, especially where as here Applicants would be in possession of an irradiated reactor." *Id.* (footnote omitted). The Commission also said: "[t]he Commission may deny a pending full-power application if it is not pursued. Subsequent to the denial of the application, NRC would nonetheless retain regulatory authority over applicants that are in possession of nuclear materials." *Id.*

Service Co. (Bailly Generating Station, Nuclear-1), LBP-82-29, 15 NRC 762 (1982); *The Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 2 and 3), LBP-81-33, 14 NRC 586 (1981).

In the instant case, NRC jurisdiction over SFC during the entire decommissioning process will be maintained by operation of 10 C.F.R. § 40.42(e) which 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. During this time, the licensee shall--

- (1) Limit actions involving source material to those related to decommissioning; and
- (2) Continue to control entry to restricted areas until they are suitable for release for unrestricted use and the Commission notifies the licensee in writing that the license is terminated.

Thus, the Commission will maintain authority over the actions of SFC until such time as the Commission is satisfied that the site has been suitably decommissioned.

The Petitioners, on the other hand, contend that the Presiding Officer has jurisdiction over all activities that SFC will perform, as authorized by its present license, during the period of decommissioning.⁵ The Staff disagrees. The activities which SFC

⁵The Petitioners' suggestion that SFC may be able to complete decommissioning without any license amendment if it decides on offsite disposal is without merit. See Petitioners' Brief at 16 n.5. SFC is required to submit a decommissioning plan under the terms of its license. License No. SUB-1010, Chapter 7, Section 2.2(a) (1985). In addition, 10 C.F.R. § 40.42(c)(2) requires a decommissioning plan. The decommissioning plan must be approved by the Commission. 10 C.F.R. § 40.42(c)(2)(iv). The Site Decommissioning Management Plan (SDMP), to which SFC is subject, provides that the approved decommissioning plan will be incorporated into the license by "amendment through normal licensing procedures." Action Plan To Ensure Timely Cleanup Of Site Decommissioning Management Plan Sites, 57 Fed. Reg. 13,389, (continued...)

will be permitted to perform during this period are governed by 10 C.F.R § 40.42, which permits only those activities relating to decommissioning. Because 10 C.F.R. § 40.42(e) is the only authority under which the license will continue, and that regulation continues the license in effect solely for the purpose of decommissioning, there was no reason for the Presiding Officer to take jurisdiction over decommissioning activities. There is no threat to public health and safety because the NRC will maintain continuous licensing control over the actions of the licensee, and the issues raised should be addressed during the decommissioning process.

Were there some legal injury to public or private interests, or the possible loss of Commission jurisdiction over SFC, then the appropriate remedy would be the imposition of conditions on withdrawal.⁶ However, the Presiding Officer found no legal injury, and the Commission retains jurisdiction over SFC by operation of 10 C.F.R. § 40.42. The remedy of compelling completion of the renewal process, as proposed by the Petitioners, is neither necessary nor appropriate.⁷

⁵ (...continued)

13,391 (1992) (SDMP Action Plan). Such procedure includes an opportunity for a hearing but does not necessarily delay the issuance of the amendment. 10 C.F.R. § 2.1205(l).

⁶ See cases cited *infra* note 10.

⁷ To continue the license renewal proceeding, where the Commission's regulations specifically provide for the method of dealing with decommissioning, would force the parties to proceed with an unnecessary and wasteful action to decide issues specifically dealt with elsewhere in the regulations.

2. Faced With a Request to Withdraw an Application Under 10 C.F.R. § 2.107(a), What Actions May the Presiding Officer in a License Renewal Proceeding Take? May a Presiding Officer Deny the Withdrawal of an Application?

The regulation in question, 10 C.F.R. § 2.107(a), provides:

The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

The Petitioners assert that the "discretionary" language contained in the first sentence of 10 C.F.R. § 2.107(a) permits the Commission to deny an "improper" request to withdraw an application made prior to the issuance of a notice of hearing. Petitioners' Brief at 11. Other than reference to the language in the regulation, Petitioners provide no authority for the proposition that the Commission may require an applicant to pursue an application to fruition, when the applicant no longer wishes to conduct the activities under a license. Nor do Petitioners provide authority which defines or explains how a withdrawal motion may be deemed "improper." No case law is cited for either position.

In support of their position that termination of this proceeding is not appropriate, Petitioners rely on two cases. They cite the unpublished licensing board decision in *Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), slip op. at 3 (May 4, 1980), *affirmed on other grounds*, ALAB-606, 12 NRC 156 (1980), for the proposition that, in this case, "dismissal of [the] license renewal proceeding must be denied [because] the licensee continues to have responsibilities under the existing license." Petitioner's Brief at 12. Finally, the Petitioners argue that,

pursuant to *Pacific Gas and Electric Co.* (Humboldt Bay Power Plant, Unit 3), LBP-86-1, 23 NRC 25, 26 (1986), dismissal is only appropriate where there are "no further issues to litigate in the proceeding," and it is not appropriate here where SFC "will continue to have responsibilities under the existing license and that only production-related issues have been mooted by superseding events." Petitioners' Brief at 13-14. The Petitioners' analyses regarding these points are incorrect.

Pursuant to 10 C.F.R. § 2.107(a), the Commission has the authority to rule on an applicant's request to withdraw an application prior to the issuance of a notice of hearing. The regulation allows the Commission to select one of three actions in response to an applicant's request. Succinctly, the Commission may (1) permit withdrawal of the application, with or without conditions, (2) deny the application or (3) dismiss the application with prejudice. The regulation does not contemplate that the Commission will require the applicant to continue the application procedure, with its attendant hearing procedures and potential grant of the activity sought under the application.

After a notice of hearing has issued, the decision regarding an applicant's request for withdrawal devolves to the presiding officer, who may permit withdrawal "on such terms as the presiding officer may prescribe."⁸ 10 C.F.R. § 2.107(a). The presiding officer is not given the option of continuing the application procedure over the objections of the applicant. *C.f. Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201 (1990), *reconsideration denied*, CLI 91-2, 33 NRC 61

⁸The presiding officer may, as a condition of granting the request, permit the withdrawal with prejudice. See *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981).

(1991).⁹ "[N]owhere in our regulations is it contemplated that the NRC would need to approve of a licensee's decision that a plant should not be operated." *Id.* at 207. The *Shoreham* case is particularly pertinent to the instant case, where SFC has made the decision not to operate its facility and to withdraw its request for license renewal. The Commission should not pass judgment on this private decision not to renew the license.

As originally promulgated, 10 C.F.R. § 2.107(a) provided that "[a]n applicant may withdraw an application at any time prior to the issuance of a notice of hearing." 27 Fed. Reg. 377, *et seq.* (1962). There was no specific provision dealing with withdrawal after the issuance of the notice of hearing, nor were there any provisions for authorizing conditions for dismissal, denial of the application or dismissal of the application with prejudice. The regulation was revised to its present form in 1963. The Statement of Considerations accompanying the revision indicated that the amendments that were being made to the rules of practice at that time were "corrective amendments." 28 Fed. Reg. 10,151-52 (1963). The amendments were "essentially clarifying and corrective and [were] deemed beneficial to proper interpretation of the Commission's procedures and practice." Notice of Proposed Rule Making, 28 Fed. Reg. 411-12 (1963). The Commission made it clear how it intended to deal with withdrawals of applications prior to the issuance of a notice of hearing. Similarly, the Presiding

⁹In *Shoreham*, the licensee had decided not to operate the facility for which it had been licensed. The Commission discussed that decision, holding that the decision not to operate was for the licensee alone to make and required no federal action. *Shoreham*, CLI-90-8, 32 NRC at 207. On reconsideration, the Commission said "Operation of Shoreham is surely an alternative to [the licensee's] decision not to operate, but this . . . decision is a *private* decision not subject to [federal review]." *Shoreham*, CLI-91-2, 33 NRC at 71.

Officer's authority was delineated in the second sentence of the regulation, affording less latitude in determining the outcome of a request to withdraw an application after a notice of hearing has been issued. *Id.* Thus, the Presiding Officer has two options: permit withdrawal with conditions or without conditions. Yet, a licensing board's authority to permit withdrawal with conditions is not unfettered. As stated in *Fulton*:

[T]he boards may not abuse this discretion by exercising their power in an arbitrary manner. The terms prescribed at the time of withdrawal must bear a rational relationship to the conduct and legal harm at which they are aimed. And, of course, the record must support any findings concerning the conduct and harm in question.

Fulton, ALAB-657, 14 NRC at 974. See also *Pacific Gas and Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 49 (1983); *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134 (1982). In the instant case, the Presiding Officer determined that the application could be withdrawn without conditions. That decision was proper under the facts and circumstances of this case, since the NRC will continue to maintain control over the actions of SFC through operation of 10 C.F.R. § 40.42, and no appropriate basis for imposing conditions was presented to the Presiding Officer.¹⁰

¹⁰In *Sheffield*, *supra*, had the withdrawal been permitted and the proceeding terminated, the Commission might have been deprived of jurisdiction because the license would have expired and the licensee had apparently terminated *all* activities at the site. In other cases of which the Staff is aware where this issue was addressed, the withdrawals were granted with and without conditions. See, e.g., *Public Service Company of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), LBP-86-37, 24 NRC 719 (1986); *Humboldt Bay*, LBP-86-1, 23 NRC 25; *Black Fox*, LBP-83-10, 17 NRC 410; *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), LBP-83-7, 17 NRC 157 (1983); *Stanislaus*, LBP-83-2, 17 NRC 45; *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981).

As explained above, the Petitioners rely upon an unpublished licensing board decision in *Sheffield* for the proposition that the pending license renewal proceeding cannot be dismissed because the licensee continues to have responsibilities under the existing license. Petitioners' Brief at 12. Their reliance on that case is clearly misplaced. First, this unreported decision of a licensing board has no precedential value. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant Units 1 and 2), ALAB-592, 11 NRC 744 (1980). Second, it does not stand for the proposition claimed by Petitioners. *Sheffield* involved a renewal application for a waste disposal site, which was licensed for disposal, by burial, of nuclear waste. After the renewal proceeding had commenced, the licensee notified the NRC that it was withdrawing its application and unilaterally terminating its license.¹¹ *Sheffield*, slip op. at 3. The Staff issued an order to show cause why the licensee should not continue with its license duties and obligations, and a hearing was requested by the licensees. *Id.* The Staff opposed the licensee's motion to withdraw the application, and also asked that certain conditions be imposed on the licensee should the Board grant the motion to withdraw. *Id.* at 4. The Licensing Board denied the motion to withdraw the application and to dismiss the proceeding, finding that the Staff's request for conditions on the withdrawal was related to the order to show cause and that they both required evidentiary hearings. *Id.* at 5-6. Furthermore, the Appeal Board did not affirm the licensing board's decision on this issue, and

¹¹ At that time there were no regulations which governed the closure of waste sites or the conditions under which a license could be withdrawn. *U.S. Ecology, Inc.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), LBP-87-5, 25 NRC 98, 101-103 (1987), *vacated on other grounds*, ALAB-866, 25 NRC 897 (1987) (hereinafter "*Sheffield II*").

specifically noted that nothing in its opinion implied "any belief as to [the licensee's] continuing obligations with regard to the previously-licensed site. That matter is not now before us." *Sheffield*, ALAB-606, 12 NRC at 163 n. 17.¹² Finally, the *Sheffield* case predates the enactment of 10 C.F.R. §§ 61.10 to 61.31, which govern licenses for land disposal of radioactive waste, and which contain the requirements for the termination of licenses. These regulations contain provisions which maintain NRC control and oversight of the process, much like those contained in 10 C.F.R. § 40.42. Thus, at the time of the *Sheffield* decisions, there were no regulations governing withdrawal, and the extent of the NRC's licensing control over the Sheffield site and the actions required of the licensee was far from clear. Had the Licensing Board granted the motion to withdraw the application, it is conceivable that the NRC would have been deprived of jurisdiction over the licensee and its ability to protect the public health and safety, due to the expiration of the license and the absence of regulatory procedures to deal with termination. *See Sheffield II*, LBP-87-5, 25 NRC at 103.

As correctly stated by the Presiding Officer in the instant case, "the Licensing Board [in *Sheffield*] refused to permit a withdrawal of a renewal application because an order to show cause why the licensee should not continue at the site, and for which a hearing had been requested on that Order, was pending before the Commission." LBP-93-25, 38 NRC at 318 (footnote omitted).

¹² Issues not decided by the Appeal Board cannot be considered in other proceedings as precedent. *See, e.g., Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 85 (1983).

Finally, the Petitioners argue that the Licensing Board decision in *Humboldt Bay* is applicable to this case and stands for the proposition that dismissal of a pending amendment application is appropriate only where there are no further issues to litigate. Petitioners' Brief at 13. *Humboldt Bay*, LBP-86-1, 23 NRC at 26. They assert, based on *Humboldt Bay*, that dismissal of the application is not appropriate here because SFC "will continue to have responsibilities under the existing license." Petitioners' Brief at 13-14. Petitioners' interpretation of *Humboldt Bay* is flawed.

In *Humboldt Bay*, the Staff moved for an order dismissing a proceeding involving an amendment to a facility operating license (which sought permission to resume power operation) due to mootness, because the licensee (1) was seeking to withdraw its amendment application, (2) had submitted an application for decommissioning, and (3) the Staff had amended the license to a "possession only" license. *Humboldt Bay*, LBP-86-1, 23 NRC at 25-26. The Staff further argued that the Licensing Board "did not have jurisdiction to consider the decommissioning application," and a separate proceeding would be available after notice of consideration of the decommissioning application. *Id.* at 26. The Licensing Board granted the motion, noting, *inter alia*, "[t]he submission of the licensee's decommissioning plan renders moot the amendment application which is the subject of this proceeding and any issue pertaining to the contested application. As a result, there are now no issues in dispute which are within the licensing board's jurisdiction to decide." *Id.* As the Presiding Officer correctly noted in the instant case, the *Humboldt Bay* decision does not address whether the withdrawal would have been permitted if there had been no decommissioning plan submitted. LBP-93-25, 38 NRC

at 314 n. 29. Although the Licensing Board in *Humboldt Bay* did state that the submission of the decommissioning plan rendered the amendment application and any issue pertaining to the application moot, it is not at all clear that the submittal of the decommissioning plan was the reason for the granting of the motion to withdraw. *Humboldt Bay*, LBP-86-1, 23 NRC at 26. The *Humboldt Bay* Licensing Board also placed reliance on the opportunity for hearing which would be available on the decommissioning application. *Id.* Moreover, the *Humboldt Bay* Licensing Board made no findings regarding the adequacy of the decommissioning plan, or whether it, in fact, subsumed the issues raised in the amendment proceeding. *Id.*

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 considered during the renewal proceeding 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, 38 NRC at 317. 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).

The Staff submits that there is no reason why the instant matter should not be decided in the same manner as the Commission did in the recent case concerning SFC's

withdrawal of the application to amend its license in connection with groundwater monitoring. *Sequoyah Fuels Corporation*, CLI-93-7, 37 NRC 175 (1993). In that proceeding, the Petitioner, NACE, 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 and that expeditious treatment of the groundwater monitoring plan was essential due to the seriously contaminated groundwater. *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 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 (sic) 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 CLI-93-7, here the Petitioners are asking the Commission to continue litigation of the license renewal proceeding so that they may challenge groundwater monitoring issues and other decommissioning matters. Petitioners' Brief at 14, 15, 24-28. The Presiding Officer's decision to allow the withdrawal of the license

renewal application without imposing conditions, and to terminate this proceeding, was proper and one of only two options available under 10 C.F.R. § 2.107(a). Just as the Commission held in CLI-93-7, the concerns expressed by the Petitioners here "should be addressed in decommissioning or enforcement actions or proceedings." CLI-93-7, 37 NRC at 179.

3. Was a Determination of the Licensee's Compliance With 10 C.F.R. §§ 40.42(b) and (c) Necessary to the Presiding Officer's Decision on Whether to Permit the Withdrawal of the Renewal Application? If So, Has the Licensee Satisfied the Requirements of Those Regulations?

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, as set forth in 10 C.F.R. § 40.42." Petitioners' Brief at 19. The Petitioners argue that since SFC has withdrawn its renewal application, it has restored itself to the status of never having filed a license renewal application, and must therefore also meet the requirements of 10 C.F.R. § 40.42(c), regarding completion of a substantial portion of decommissioning activities prior to the expiration of its license. *Id.* at 19-20, 22. Petitioners also claim that SFC must satisfy the notice requirements of 10 C.F.R. § 40.42(b), concerning submittal to the NRC of (1) a completed form NRC-314, (2) a completed radiation survey report, and (3) a plan for decommissioning. *Id.* at 20-21. Finally, Petitioners contend that SFC does not fit within 10 C.F.R. § 40.42(e), with respect to extension of its license beyond the expiration date. *Id.* These assertions are without merit.

The Commission's regulations provide the mechanism for dealing with expiration and termination of Part 40 licenses 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 (Section 40.42) are *in pari materia* and should be construed together, not separately and distinctly as [Petitioner's] interpretation would have it." LBP-93-25, 38 NRC at 318. When the regulation is read as a whole, it is clear that the Petitioners' interpretation is without basis or logic.

The regulation requires that licensees notify the Commission promptly and request termination of the license when deciding to terminate all activities involving materials authorized under the license. 10 C.F.R. § 40.42(b). This notification must include the reports and information specified in 10 C.F.R. §§ 40.42(c)(1)(iv) and (v) and a decommissioning plan, if required by 10 C.F.R. § 40.42(c)(2) or by license condition.

The issue as to whether the Presiding Officer in a license renewal proceeding must determine whether a licensee has complied with 10 C.F.R. § 40.42(b) and (c) prior to allowing withdrawal of the renewal application appears to be one of first impression. As the Licensing Board noted, the NRC's regulatory requirements controlling the expiration and termination of licenses do not appear to contemplate a situation where, as here, a licensee who has filed for license renewal, suddenly and unexpectedly notifies the Commission of a cessation of its operational activities and requests termination of its license. LBP 93-25, 38 NRC at 316. The Staff submits that the determination regarding SFC's compliance with 10 C.F.R. § 40.42(b) and (c) was not a prerequisite to the

Presiding Officer's grant of the motion to withdraw. It is clear that 10 C.F.R. § 40.42 is exclusively concerned with expiration and termination of licenses, decommissioning issues, and the maintenance of Commission authority over licensees during decommissioning. It has no bearing on license renewal proceedings. Decommissioning issues were outside the delegation of jurisdiction to the Presiding Officer. Compliance with 10 C.F.R. § 40.42 was, and is, a matter to be determined by the Staff, in the first instance, until, and if, a tribunal is convened to determine the issue. The extent of the inquiry that the Presiding Officer might have made is whether the licensee had notified the Commission of its intent to terminate all activities, thus bringing 10 C.F.R. § 40.42(e) into play. That inquiry would only be made in order to assure that the Commission maintained continuous control over the licensee. Therefore, it was not necessary to determine whether the licensee had complied with 10 C.F.R. § 40.42(b) or (c) prior to allowing withdrawal of the renewal application.

Even if such a determination were a prerequisite to allowing withdrawal of the renewal application, the Licensing Board correctly held that the "dictates of Section 40.42(b) to notify the Commission of a decision to terminate licensed activities has been implemented here." LBP-93-25, 38 NRC at 319. As the Licensing Board noted, the regulation "merely requires a notification and request for license termination (which SFC complied with) when a licensee has made a termination decision." *Id.* at 318. By letter dated February 16, 1993, SFC notified the Commission of its decision to terminate production activities effective July 31, 1993, or earlier.¹³ The Preliminary

¹³ Letter from James J. Sheppard, President, SFC, to Robert M. Bernero, Director, Office of Nuclear Materials Safety and Safeguards (NMSS) (February 16, 1993).

Plan for Completion of Decommissioning (PPCD) was attached to this letter. In addition, as the Licensing Board also noted, the Petitioners' assertion that SFC failed to comply with 10 C.F.R. § 40.42(c) because it has not supplied a completed NRC-314 form (disposition of materials) or radiation survey does not comport with a reasonable interpretation of what that provision requires. Rather, "the agency only expects such a final report at the completion of decommissioning and will accept preliminary documentation characterizing the site's condition that is sufficient to permit NRC to evaluate a decommissioning plan [footnote omitted]. And there is no allegation that SFC has not furnished that information." LBP-93-25, 38 NRC at 318.¹⁴

In accordance with 10 C.F.R. § 40.42(c)(1), "[i]f a licensee does not submit an application for license renewal under 10 C.F.R. § 40.43, the licensee shall on or before the expiration date specified in the license" complete certain requirements. The Petitioners argue that if the Licensing Board allowed SFC to withdraw its application for renewal, it would revert to the status of never having filed a license renewal application, in which case it would have to be in compliance with 10 C.F.R. § 40.42(c)(1), the section applicable to all licensees who have not applied for renewal under 10 C.F.R. § 40.43. Petitioners' Brief at 22. The Petitioners assert further that SFC has not satisfied -- and cannot have satisfied -- the conditions of this regulation, as it requires that

¹⁴ This approach is consistent with the NRC's SDMP, which was instituted to identify and resolve issues associated with the timely cleanup of materials licensees' sites, including that of Sequoyah Fuels. As explained in the SDMP Action Plan, developed to describe the approach the NRC would use to accelerate cleanup of radiologically contaminated sites listed in the SDMP, the timing of SDMP site cleanups was to be addressed on a case-by-case basis, with schedules to provide flexibility and the establishment of specific and enforceable milestones for each phase of decommissioning. SDMP Action Plan, 57 Fed. Reg. at 13,391.

a substantial portion of decommissioning activities must have been finished prior to the expiration of SFC's license in 1990 (or at best July 1993 when the motion for withdrawal was filed), and, at present, SFC is still in the midst of those activities, *i.e.*, disposal of cylinders, yellowcake, raffinate sludge, and raffinate fertilizer. *Id.*

This argument is without merit. As stated above, 10 C.F.R. § 40.42(c)(1) applies to licensees who have not applied for renewal of their licenses. SFC did, in fact, submit a renewal application, with the undisputed intention of renewing its license for a ten year period. Therefore, SFC was not required to have completed the activities specified in 10 C.F.R. § 40.42(c)(1) before its license expired. As already noted, in February of 1993, SFC "promptly" informed the Commission, pursuant to 10 C.F.R. § 40.42(b), that it was terminating production as of July 31, 1993, or sooner. However, pursuant to operation of 10 C.F.R. §§ 2.109(a) and 40.43(b), SFC's existing license did not expire until, at the earliest, the Presiding Officer granted the motion to withdraw the license renewal application and terminate the proceeding. At that time, SFC was, for the first time, no longer in "timely renewal" under 10 C.F.R. §§ 2.109(a) and 40.43(b) and was henceforth required to comply with all aspects of 10 C.F.R. § 40.42(c)(1).¹⁵ SFC's license was continued in effect by operation of 10 C.F.R. § 40.42(e). *See infra* pp. 20-24. Thus, SFC was not required to have completed the activities specified in 10 C.F.R. § 40.42(c)(1) at the time its motion for withdrawal was filed.

¹⁵ Should SFC fail to comply with these requirements, the Commission may take enforcement action against SFC pursuant to 10 C.F.R. Part 2, Subpart B.

4. Upon Withdrawal of the License Renewal Application, Does 10 C.F.R. § 40.42(e) Maintain SFC's License in Effect?

Section 40.42(e) provides in pertinent part that each specific license continues 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 and that, during this time, the licensee shall limit actions involving source material to those related to decommissioning. As stated by the Presiding Officer in this proceeding:

[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 be jeopardized. This result could not have been intended by the Commission in adopting this regulation.

LBP-93-25, 38 NRC at 318-19. Clearly, 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 regulatory authority over SFC in order to assure that it complies with the requirements of 10 C.F.R. § 40.42 concerning decommissioning.

The Petitioners maintain that SFC does not fall within the license extension provision of 10 C.F.R. § 40.42(e) because that section is only available to licensees who have not filed renewal applications and who have complied with 10 C.F.R. § 40.42(c)(1). Petitioners' Brief at 20. In support of this assertion, Petitioners essentially make two arguments: (1) The license extension provided for in 10 C.F.R. § 40.42(e) is available only if it is "necessary." Where there is a renewal application pending, it will never be

"necessary" to extend a license indefinitely, as the Licensing Board must make a determination regarding the application and establish a new expiration date that is consistent with SFC's now limited operation; (2) SFC still has a significant amount of commercially useable or saleable source material on site, such as UF₆ cylinders and yellowcake, and such significant commercial quantities of source material cannot be characterized as "residual source material present as contamination." Therefore, SFC does not meet the other major condition of 10 C.F.R. § 40.42(e), *i.e.*, that extension of the license term is only for possession of "residual source material present as contamination." *Id.* at 20-21.

The Statement of Considerations that accompanied the final rule amending 10 C.F.R. Parts 30, 40, 50, 51, 70 and 72 to establish the general requirements for decommissioning nuclear facilities made it clear that the intent of the amendments was to assure that decommissioning would be accomplished in a safe and timely manner. General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018 (1988). In addition, the Statement of Considerations accompanying the proposed rule on decommissioning stated, *inter alia*, that 10 C.F.R. § 40.42 would be modified to clarify that "whether or not the licensee has detected residual radioactivity, the licensee is responsible for controlling the site until the Commission terminates the license." Decommissioning Criteria for Nuclear Facilities, 50 Fed. Reg. 5,600, 5,602 (1985). Clearly, the paramount consideration in promulgating these regulations was that public health and safety would be maintained during decommissioning. Accordingly, during the

time that decommissioning is underway, the Commission would maintain jurisdiction over licensees involved in decommissioning.¹⁶

The Petitioners have cited no authority for their assertion that 10 C.F.R. § 40.42(e) is inapplicable where a renewal application has been applied for and has been subsequently withdrawn. As correctly stated by the Presiding Officer in this proceeding with regard to 10 C.F.R. § 40.42(e), "[n]o reasonable explanation has been forthcoming from Intervenors on why that provision would cover cases where licenses have expired without a renewal application being filed, but not those where a renewal application has been applied for and subsequently withdrawn with a termination notice submitted under 10 C.F.R. § 40.42(b)." LBP-93-25, 38 NRC at 318-19.

The Petitioners specifically argue that the license extension provided in 10 C.F.R. § 40.42(e) is available only if it is "necessary." According to Petitioners, where there is a renewal application pending, it will never be "necessary" to extend a license indefinitely, because the pending renewal proceeding is an appropriate forum in which the Licensing Board can evaluate the adequacy of the license and establish a new expiration date. Petitioners' Brief at 20. The Petitioners' narrow reading of 10 C.F.R. § 40.42(e) is unsupported. When the word "necessary" is read in context with the regulation, it is obvious that the regulation contemplates that it may be "necessary" to extend licenses beyond their expiration dates to ensure that decommissioning is carried

¹⁶ The promulgation of these rules clearly eliminated the problem faced by the licensing board in the *Sheffield* case, *supra*.

out to the NRC's satisfaction.¹⁷ Thus, "necessary" as used in this section means that the license will continue in effect 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, 10 C.F.R. § 40.42 does not permit licensees to conduct licensed operations at their facilities, except insofar as they may conduct decommissioning activities.

The Petitioners also assert that SFC does not meet the "other major condition" of 10 C.F.R. § 40.42(e), *i.e.*, extension of the license term is only for possession of "residual source material present as contamination," because SFC has more than residual source material present as contamination on site. *Id.* at 21. The Petitioners' assertion is based upon a misreading of the provisions of 10 C.F.R. § 40.42. While Petitioners are correct that 10 C.F.R. § 40.42(e) continues the license in effect with respect to possession of "residual source material present as contamination," nowhere in the regulation is it stated that as a prerequisite to falling under 10 C.F.R. § 40.42(e), the licensee may only possess source material present as contamination, or that this is a "major condition" of 10 C.F.R. § 40.42(e). Rather, 10 C.F.R. § 40.42(e) must be read in conjunction with 10 C.F.R. § 40.42(c)(1)(iii) -- while 10 C.F.R. § 40.42(e) provides that each specific license continues in effect with respect to possession of residual source material present as contamination, 10 C.F.R. § 40.42(c)(1)(iii) mandates that a licensee who does not submit an application for license renewal under 10 C.F.R. § 40.43 must

¹⁷In 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."

properly dispose of source material. As explained in response to Question 3, *supra*, once the Presiding Officer granted SFC's request to withdraw its pending license renewal application, SFC was not authorized to operate its facility and was required to achieve compliance with all of the requirements of 10 C.F.R. § 40.42, including those of 10 C.F.R. § 40.42(c)(1)(iii), and dispose of all source material present on site.

In sum, the Petitioners' arguments with regard to 10 C.F.R. § 40.42(e) are without merit, and do not provide a basis for denial of SFC's withdrawal of its license renewal application and the termination of this proceeding.

5. What Prejudice, if any, Occurs to the Intervenors' Hearing Rights Under the Atomic Energy Act From the Presiding Officer's Approval of the Withdrawal of the Renewal Application?

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 license terms under which SFC will continue to operate. Petitioners' Brief at 24. In this connection, they raise several issues, which can be summarized as follows: (1) The Licensing Board has effectively granted SFC an indefinite extension of its 1985 license with regard to non-production activities. Thus, the Licensing Board has deprived Petitioners of the hearing to which they are entitled, under Section 189a of the Atomic Energy Act (AEA), on the terms under which SFC's license should be renewed; (2) Given the recent discoveries of extensive contamination at the site, and SFC's history of unsafe operation, a public re-examination is critically important to determine whether activities conducted under SFC's renewed license will be carried out in a manner that adequately protects public safety and the environment; (3) It may be years before Petitioners are given a hearing on SFC's

decommissioning activities, and by that time, many of the issues raised by Petitioners concerning activities under its expired license will have become moot; (4) The Licensing Board holds out the possibility that the Staff "may require additional license amendments for decommissioning activities which could open other hearing opportunities to scrutinize the Licensee's operations." However, no license amendments will be issued for activities already authorize^d by the license; (5) Under *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983), Petitioners have no right to challenge the sufficiency of license amendments that are ordered by the Staff in enforcement actions. Thus, even if they were held, such proceedings would provide no substitute for a licensing proceeding; and (6) With respect to the prospect for future license amendments, SFC will not apply for such license amendments prior to submitting its final Plan for Completion of Decommissioning. If SFC does not seek license amendments, Petitioners will have no hearing rights. Petitioners' Brief at 24-30.

The Petitioners assert that they have been deprived of a "hearing to which they are entitled, under Section 189a of the Atomic Energy Act" *Id.* at 24. Section 189a (1)(A) of the AEA provides, in pertinent part:

In any proceeding under this Act, for the granting, suspending, revoking or amending of any license or construction permit, or application to transfer control, . . . 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)(A).

As was recently pointed out by the Commission, the Supreme Court has noted that this hearing requirement is not without limitation, but has been limited to licensing

proceedings. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-03, ___ NRC ___, slip op. at 5 (March 18, 1994) (citing *Florida Power & Light v. Lorion*, 470 U.S. 729, 739 (1985)). As the Commission emphasized, "the only 'right' to an opportunity for a hearing under Section 189 exists for those actions which are identified in Section 189." *Id.*

A major flaw in the Petitioners' position that they are entitled to a hearing is their premise that SFC is still in a renewal posture. As has been said many times, SFC is not seeking to renew its license. Accordingly, a hearing on renewal issues is not warranted. As already discussed in response to Question 4, *supra*, 10 C.F.R. § 40.42(e) does not provide for the "renewal" of a license. Rather, the purpose of this regulation is to ensure that following expiration of a license, a license will remain in effect strictly for the limited purpose of completion of the decommissioning effort and related activities, as a positive regulatory control in the interest of public health and safety. *See supra* pp. 20-24. Petitioners have a legal right to a hearing only so long as there is an outstanding request for agency action, *see Yankee Nuclear*, CLI-94-03, slip op. (March 18, 1994), and have established a resultant interest and injury sufficient to confer standing. *See* 10 C.F.R. § 2.714(a). The termination of activities at the SFC site, combined with SFC's withdrawal of its license renewal application, removes both the agency action and alleged "injury" which was the basis of the Petitioners' standing to intervene. Here, the Petitioners were determined to have standing to intervene in SFC's license renewal proceeding. *See Sequoyah Fuels Corporation*, LBP-91-5, 33 NRC 163 (1991). SFC has now decided to withdraw its license renewal application -- the very

application which served as the basis for the Petitioners' intervention; accordingly, the threat of contamination from operation of the facility, which might have resulted from a renewal of the license, and which formed the basis of the Petitioners' alleged injury and standing, has now been eliminated, as has the Petitioners' right to hearing on that application.

In support of their claim that the recent discoveries of contamination at the SFC site and SFC's history of unsafe operation mandate public re-examination, the Petitioners cite several specific examples, many of which are addressed in *supra* note 2. In addition to those issues addressed in note 2, Petitioners cite the November 17, 1992, release of nitrogen dioxide and the failure of the emergency plan. Petitioners' Brief at 26-27. That incident was a result of production activities, which SFC is no longer performing, and it has been resolved through enforcement action. See Inspection Report Nos. 92-30 (December 18, 1992) and 92-31 (January 21, 1993); Notice of Violation and Proposed Imposition of Civil Penalty, EA 93-010 (March 25, 1993). Petitioners also allege that the withdrawal of the renewal application will subvert the National Environmental Policy Act, 42 U.S.C. § 4322 (NEPA), requirements for an Environmental Assessment (EA) and an Environmental Impact Statement (EIS). Petitioners' Brief at 28-29. Petitioners fail to note that in this case decommissioning may require an EIS. The Staff has informed SFC that it must submit an Environmental Report pursuant to 10 C.F.R.

§ 51.60 because its proposed decommissioning alternative "would be considered a major federal action affecting the quality of the human environment."¹⁸

None of the six issues raised by the Petitioners demonstrate that a license renewal hearing is required. Neither do they demonstrate that the Presiding Officer was in error when he held that these issues relate to decommissioning and he did not have jurisdiction to decide them in the context of the license renewal proceeding.

Petitioners further argue that "it may be years before Petitioners are given a hearing on SFC's decommissioning activities; and by that time, many of the issues raised by Petitioners concerning activities conducted under its expired license will have become moot." Petitioners' Brief at 24. Although Petitioners may be correct in their assertion that a hearing on SFC's decommissioning activities may not soon be forthcoming, as already noted, there is no action requested of the NRC at this time concerning SFC that gives rise to any hearing rights under Section 189 of the AEA. The Petitioners have not identified any action taken to this date in connection with the decommissioning of SFC which constitutes an action identified in Section 189a for which an opportunity for a hearing is required. See *Yankee Nuclear*, CLI-94-03, slip op. at 5 (March 18, 1994).

Petitioners argue, in addition, that "no license amendments will be issued for activities already authorized by the license." Petitioners' Brief at 29. Thus, they assert, a license amendment proceeding "would be limited to the issues raised by the amendment application, and thus would not cover all of the relevant terms of the *existing* 1985

¹⁸ Letter Robert M. Bernero, Director, NMSS to John H. Ellis, SFC, Re: U.S. Nuclear Regulatory Commission Staff's Review Of The Sequoyah Fuels Corporation's Preliminary Plan For Completion Of Decommissioning (November 26, 1993).

license, which continues to govern SFC's decommissioning-related activities." *Id.* There is absolutely no basis for the Petitioners' implication that any of the conditions of or amendments to SFC's license which have already been approved should be re-evaluated. Any amendments or changes which have been made to SFC's license have been noticed in the *Federal Register*, and Petitioners had the opportunity to contest these at that time. As such, Petitioners cannot now complain that any future license amendment proceeding will not revisit these matters.

Petitioners next argue that they have no right to challenge the sufficiency of license amendments that are ordered by the Staff in enforcement actions; thus, even if they were held, such proceedings would provide no substitute for a licensing proceeding. Moreover, they assert that the Licensing Board is incorrect in holding that an enforcement petition under 10 C.F.R. § 2.206, which is discretionary and for which the Petitioners bear the burden of proof, is an effective substitute. Petitioners' Brief at 29-30. Furthermore, the Petitioners assert that, under *Bellotti*, 725 F.2d at 1380, they do not have a right to challenge the sufficiency of license amendments ordered by the Staff in enforcement actions. Petitioners' Brief at 29. While under *Bellotti*, it is correct that the Petitioners do not have a right to a hearing on the adequacy of Commission orders requiring additional or better safety measures, 725 F.2d at 1383, the Presiding Officer was correct in referring to the Commission's regulations at 10 C.F.R. § 2.206 as a remedy available to Petitioners. LBP-93-25, 38 NRC at 327. The Commission has recently reaffirmed the value and availability of this procedure for raising issues before the agency. See Memorandum for W.C. Parler and J.M. Taylor from S.J. Chilk,

Re: SECY-93-355 - Review of Regulations and Practice Governing Citizen Petitions Under 10 C.F.R. § 2.206 (February 1, 1994).

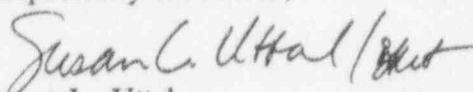
As their final argument, Petitioners assert that their hearing rights have been prejudiced because, with respect to the prospect for future license amendments, SFC will not apply for license amendments prior to submitting its final Plan for Completion of Decommissioning, and if SFC does not seek license amendments, Petitioners will have no hearing rights. Petitioners' Brief at 30. As has already been fully explained above, Petitioners do not have an unfettered right to a hearing under Section 189 of the AEA. *See Yankee Nuclear*, CLI-94-03, slip op. at 5 (March 8, 1994).

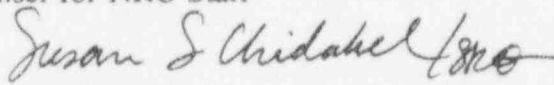
In sum, the Petitioners have not demonstrated that the Presiding Officer's granting of the motion to withdraw SFC's renewal application has deprived them of any hearing to which they are entitled under the AEA. As SFC is no longer seeking to renew its license, a hearing on renewal issues is not warranted. In addition, the Petitioners have failed to identify any action at this date which constitutes an action identified in Section 189a of the AEA for which an opportunity for a hearing is required. Consequently, no prejudice occurs to the Petitioners' hearing rights under the AEA from the Presiding Officer's approval of the withdrawal of the renewal application.

CONCLUSION

For the above reasons, LBP-93-25 should be sustained.

Respectfully submitted,


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Counsel for NRC Staff


Susan S. Chidakel
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of June 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
NRC

BEFORE THE COMMISSION

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

Docket No. 40-08027-MLA

'94 JUN 17 P5:14

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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 17th day of June 1994.

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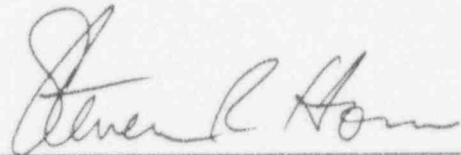
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