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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING AND
ADMINISTRATION

In the Matter of)	
)	Docket No. 40-8027-MLA
SEQUOYAH FUELS CORPORATION)	
(Gore, Oklahoma Facility)	(EA 86-91)

NRC STAFF'S ANSWER OPPOSING REQUEST
FOR A HEARING BY
ENVIRONMENTAL ACTION OF TULSA, ET AL

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October 21, 1986

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NUCLEAR REGULATORY COMMISSION

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HEARING BY ENVIRONMENTAL ACTION OF TULSA ET AL

I. INTRODUCTION

On October 2, 1986, the Director, Office of Inspection and Enforcement, issued an immediately effective Order Modifying License (Order) requiring extensive corrective actions by the licensee, Sequoyah Fuels Corporation, at the Sequoyah Fuels facility in Gore, Oklahoma. The Order provided an opportunity for a hearing by the licensee or any other person adversely affected by the Order.

Sequoyah Fuels Corporation has not contested the Order or requested a hearing. However, on October 16, 1986, Environmental Action of Tulsa, Carlisle Area Residents Association, National Water Center, Citizens Action for Safe Energy, Barbara Synar, Charles Gourd and Ed Henshaw (Petitioners) requested a formal adjudicatory hearing on the Order prior to plant restart. "Request for a Formal Adjudicatory Hearing on Order Modifying License" (Petition). For the reasons provided below, the Staff submits that the holding of a hearing is not required by law and should not be held as a matter of discretion, and that the Petitioners' request for a hearing therefore should be denied.

II. DISCUSSION

A. The Commission Is Not Required By Law To Hold a Hearing On the Order Modifying License

1. The Order Was An Immediately Effective Enforcement Action That Imposed New Restrictions On The Sequoyah Fuels License for the Purpose of Making the Facility Safer

At the outset, it should be understood that the Director's Order is an enforcement action. The Commission has a variety of enforcement sanctions at its disposal to compel licensees to cure violations of the Commission's regulatory requirements and to abate hazards that jeopardize public health and safety. Enforcement sanctions include notices of violation, civil penalties, and orders to modify, suspend or revoke a license, as well as informal actions to ensure compliance. See "General Statement of Policy and Procedure for NRC Enforcement Actions," 10 C.F.R. Part 2, Appendix C (1986). The Director's Order is just such an enforcement sanction. It imposes additional requirements on Sequoyah Fuel Corporation's preexisting authorization under License No. SUB-1010 to operate the Sequoyah Fuels facility. ^{1/}

The Order was imposed because the Director determined that the violations which had been identified as a result of inspections following the accident, the seriousness of the January 4th accident, and information provided by the licensee demonstrated that there was a need for signifi-

^{1/} In a separate enforcement action, on October 14, 1986, a Notice of Violation and Proposed Imposition of Civil Penalties was issued to the licensee proposing civil penalties of \$310,000 for certain violations related to the Order.

cant improvement in the licensee's control and supervision of licensed activities and UF₆ processing operations. The Director also concluded that further oversight of facility operations is necessary to provide reasonable assurance that the licensee will be in compliance with Commission requirements if the facility is permitted to resume operations. The Order imposed these improvements and the oversight as binding requirements. The sole purpose and result of the Order was to make the facility safer than the facility would be if the Order had not been issued. The Order expressly stated that it did not authorize restart. ^{2/}

2. Petitioners Are Not Adversely Affected by the Order and Are Therefore Not Entitled to a Hearing on the Order

Section 189a of the Atomic Energy Act of 1954, as amended, requires the Commission to grant a hearing upon request of any person who has an interest affected by any proceeding for the granting, suspending, revoking, or amending of a license. Both in licensing proceedings as well as enforcement proceedings such as this, the Commission applies judicial concepts of standing in determining rights to a hearing under section 189a of the Atomic Energy Act. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 439 (1980), aff'd, Save the Valley v. NRC, 714 F.2d 142 (6th Cir. 1983);

^{2/} The NRC has not formally suspended the authority for the licensee to operate. Rather, the licensee agreed to suspend operations and this agreement was confirmed by a Confirmatory Action Letter. (See 10 C.F.R. Part 2, Appendix C. V. E(3)). Except for this informal agreement, the licensee could restart its facility without NRC approval. In such an event, the NRC would no doubt issue an Order suspending operations.

Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 613-14 (1976). See also 10 C.F.R. §§2.714(a)(2), (d). To satisfy this test of "standing" in the context of an enforcement action like the Order, it must appear that the petitioner has been or will be injured in fact by the order and that the petitioner's interest is within the zone of interests protected by the Atomic Energy Act. Marble Hill, supra, 11 NRC at 439 (citing Portland General Electric Co., supra, 4 NRC at 610). The injury-in-fact aspect of the standing test has been described as a test of "whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another." Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). As clearly established in Bellotti v. NRC, 725 F.2d 1380. (D.C. Cir. 1983), intervention is a right only of those adversely affected by the proceeding.

The Petitioners assert that they have been adversely affected by the Order, and therefore have standing. In support of this assertion they raise several arguments.

Petitioners first argue that they are adversely affected by the Order since it authorizes plant operation upon compliance with certain technical commitments, despite a general finding that the licensee lacks the fundamental qualifications of competence and character. Petition at 1. There is simply no merit to this argument. As already discussed, the Order explicitly states that it "does not authorize restart" of plant operations. Order at 5. Furthermore, while the Director determined that there is a need for significant improvement in the licensee's control and supervision

of licensed activities and UF₆ processing operations, there has been no "general finding that the licensee lacks the fundamental qualifications of competence and character."

Petitioners next argue that the Commission has found the licensee qualified to operate the plant only by delegating existing license responsibility to ensure compliance with the license, NRC regulations and the Atomic Energy Act to an unlicensed third party who need not meet license qualifications under the Atomic Energy Act or NRC regulations. Petition at 1-2. This argument also is without merit. The Order does mandate that the licensee, prior to restart, obtain the services of an independent oversight organization to maintain a 24-hour daily surveillance during operation of plant processing operations to assure compliance with procedural and regulatory requirements and to perform other actions. However, the function performed by this oversight organization is an inspection function which has been imposed in addition to the efforts which must be undertaken by the licensee, not in lieu of the licensee's responsibilities. As explicitly stated in the Order: "Nothing in this Order relieves the licensee of its responsibilities under the license to safely operate the facility and direct its shutdown if problems are identified." Order at 8. Thus, there has been no delegation of license responsibilities to an unlicensed third party and the licensee remains fully responsible and accountable for all licensed activities. ^{3/}

^{3/} If anything, the Order protects the Petitioners' interests by adding a third party with the authority to suspend operations in addition to the licensee and the NRC. The third party provision also provides

The Petitioners also argue that the proposed corrective actions do not make the plant safer, and that the NRC proposes to allow the licensee to operate the plant by imposing ineffective corrective action which has not eradicated the underlying deficiencies which led to the accident. Petition at 3. However, the Order does not authorize restart. Rather, it imposes additional restrictions on the licensee. For example, the Order removes flexibility of the licensee, imposes additional safeguards, provides for additional procedures, and provides for additional audits and monitoring. The Order cannot be read as making the plant less safe.

The Petitioners also argue that their interests are adversely affected by the Order since it addresses the broad issue of management competence and character, and thus the scope of the enforcement action at issue is the adequacy of certain managerial and technical changes in order to assure safe plant operation in the future. Petition at 2. In this manner, the Petitioners argue that this case differs from Bellotti, in which the NRC denied the Attorney General of the State of Massachusetts a public hearing on a license amendment imposed during an enforcement hearing which made the plant more safe. The Petitioners assert that whereas in Bellotti the intervenor had asked to impermissibly expand the narrow scope of that proceeding, here, "'improvement of management' is the precise issue" of the Order. Id. at 3.

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additional assurance by supplementing the NRC resources to inspect and monitor the licensee's performance.

Contrary to the Petitioners' assertion, the Commission has not broadly defined the scope of the enforcement action at issue in this case as the "adequacy" of the licensee's managerial and technical changes. Neither does the Order address the issue of whether the licensee has adequate management competence, character and technical resources to operate the Sequoyah facility. Rather, just as the Commission did in the Bellotti case, the Commission has in this case defined the scope of the proceeding as being whether the Order should be sustained (i.e., whether there is a necessity for the conditions imposed by the Order).

This case is not distinguishable from Bellotti. Indeed, in this case, as was the case in Bellotti, the Commission amended a license to require additional or better safety measures. As the court explained in Bellotti, although requested public participation is automatic with respect to all Commission actions that are potentially harmful to the public health and welfare, participation in a hearing may be denied when the Commission as is being done here is seeking to make a facility's operation safer. In such an instance the Commission clearly has the power to define the scope of a proceeding, and a decision by the Commission to narrowly define the proceeding will be upheld unless it is found to be arbitrary. Bellotti, supra, 725 F.2d at 1382-83. ^{4/}

^{4/} This case is thus distinguishable from such cases as Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), which involved a situation in which the Commission denied a hearing on an action that was potentially harmful to the public health and welfare (namely promulgating a rule providing that the licensing board did not need to consider results of emergency preparedness exercises in a licensing hearing before authorizing a full power license).

Here, as in Bellotti, the Commission's decision to so limit the scope of the proceeding was not arbitrary. That decision was made in both instances pursuant to the Commission's policy of directing agency resources toward the inspection rather than the adjudication process. See Marble Hill, supra, 11 NRC at 441. See also Pacific Gas and Electric Co., (Diablo Canyon Nuclear Power Plant, Units 1 and 2) CLI-83-27, 18 NRC 1146, 1148 (1983). The Petitioners here impermissibly seek to broaden the scope of the proceeding to litigate the "adequacy" of the corrective actions, ^{5/} precisely what Bellotti held Petitioners have no right to do. Although the Petitioners may not be satisfied that the Order went far enough, they are not entitled to be granted an ill-defined hearing which, in essence, would amount to a "virtually interminable, free-ranging" investigation. Bellotti, supra, 725 F.2d at 1381. The law does not require the Commission to use its enforcement resources in such a fashion.

In sum, Petitioners have failed to show that they will be adversely affected by the proceeding which the Order properly defined. As such, they are not entitled to a hearing on the Order as a matter of law.

B. The Commission Should Not Order a Hearing As a Matter of Discretion

The Commission has the discretion to hold hearings where such action is not strictly required as a matter of law. Marble Hill, supra, 11

^{5/} Petition at 2, 3. This case consequently differs from Three Mile Island Alert v. NRC, 771 F.2d 720 (3d Cir. 1985), in which the

NRC at 442; Portland General Electric Co., supra, 4 NRC at 614-15. In circumstances like these in which the licensee has not contested imposition of an order, the Commission has indicated that such discretion should be exercised sparingly. See Marble Hill, supra, 11 NRC at 441. In Portland General Electric Co., supra, 4 NRC at 616, the Commission noted factors that weigh in favor of allowing discretionary intervention (expected contribution of the petitioner to a sound record, the nature and extent of the petitioner's interest, and the effect of any order entered in the proceeding on the petitioner's interest) and factors that weigh against discretionary intervention (availability of other means of relief, the extent to which the petitioner's interest will be represented by other parties, and the extent to which the petitioner's participation will inappropriately broaden or delay the proceeding). Consideration of these factors lead to the conclusion that a discretionary hearing is not appropriate in this instance.

In a decision to permit participation in a proceeding or to hold a hearing on a discretionary basis, the most important factor to be considered is the extent of the contribution which might be expected of the petitioner. See id. at 617. Although the nature and extent of the information that the Petitioners would contribute is not apparent on the face of their request for a hearing, it should be emphasized again that no issues of law or fact are required to be resolved to sustain imposition of the

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Commission broadly defined the material issues to include the necessity for and sufficiency of conditions suggested by the NRC Staff in the hearings to deal with management integrity problems.

terms of the Order. The Order was immediately effective. The licensee has not contested the Order. The Petitioners have not shown that the interests they represent are adversely affected by the Order.

Litigating the issues raised by the Petitioners would impermissibly broaden the proceeding and could result in a burdensome and costly hearing. Such a hearing would divert Commission resources from inspection and engineering reviews to the conduct of an adjudicatory proceeding when such a proceeding is not required. This may make the Staff less likely to utilize in the future formal regulatory mechanisms such as Orders. Moreover, Petitioners have available another forum for raising the concerns raised in their request for a formal adjudicatory proceeding through the use of 10 C.F.R. §2.206 procedures.^{6/} In a similar circumstance, the Commission did not provide an opportunity for a discretionary hearing. See Wisconsin Electric Power Co. (Point Beach, Unit 1), CLI-80-38, 12 NRC 547 (1980).

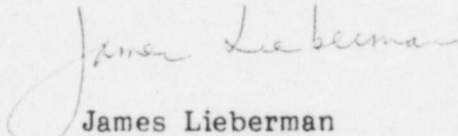
In summary, the Commission should not hold a hearing as a matter of discretion.

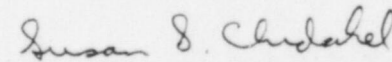
^{6/} Some of the organizations joining in this request for a hearing have used the § 2.206 process seeking action. The Director of the Office of Inspection and Enforcement issued a decision on their request on October 15, 1986 (DD-86-13).

III. CONCLUSION

The Petitioners have not established that they have been adversely affected by the Director's Order Modifying License such that they have a right to a hearing. Because the licensee has not contested imposition of the Order, no hearing is necessary to sustain the Order. Nor should the Commission order a hearing as a matter of discretion. Such a discretionary hearing would not be an appropriate commitment of the Commission's resources. For these reasons, the Petitioners' request for a formal adjudicatory hearing on the Order Modifying License should be denied.

Respectfully submitted,


James Lieberman
Counsel for NRC Staff


Susan S. Chidakel
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Dated at Bethesda, Maryland
this __ day of ___, 1986.

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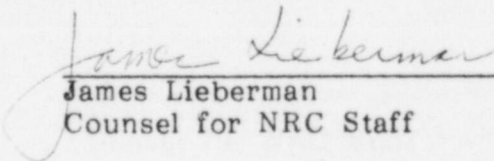
In the Matter of)
SEQUOYAH FUELS CORPORATION)
(Gore, Oklahoma Facility))

Docket No. 40-8027 - MLA
(EA 86-91)

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713 the following information is provided:

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Dated at Bethesda, Maryland
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)	Docket No. 49 -8027 - MLA
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(Gore, Oklahoma Facility))	(EA 86-91)

NOTICE OF APPEARANCE

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Susan S. Chidakel
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Dated at Bethesda, Maryland
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)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF'S ANSWER OPPOSING REQUEST FOR A HEARING BY ENVIRONMENTAL ACTION OF TULSA ET AL and NOTICES OF APPEARANCE in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 21st day of October 1986.

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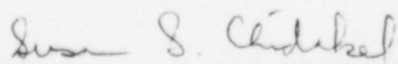
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