UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

SERVED 01/17/01

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of:	
SEQUOYAH FUELS CORPORATION	Docket No. 40-8027-MLA-4
Gore, Oklahoma Site Decommissioning	

CLI-01-02

MEMORANDUM AND ORDER

I. Introduction

Sequoyah Fuels Corporation has appealed the Presiding Officer's December 16, 1999 order, LBP-99-46, 50 NRC 386, which granted Oklahoma's request for a hearing with respect to Sequoyah's proposed site decommissioning plan for its Gore, Oklahoma uranium conversion facility. Sequoyah claims, pursuant to 10 C.F.R. §2.1205(o), that the request for hearing should have been denied in its entirety. We agree with the Presiding Officer that Oklahoma has standing and has met its burden under 10 C.F.R. Part 2, Subpart L, to detail its areas of concern. See 10 C.F.R. §2.1205(o). We decline, however, to consider Sequoyah's remaining points of error, which we find are not properly the subject of interlocutory review.

II. Background

Sequoyah operated a uranium processing facility at its Gore site between 1970 and 1993. The facility produced uranium hexafluoride and converted depleted uranium hexafluoride to uranium tetrafluoride. The soil and groundwater are contaminated with uranium and uranium decay products, as well as nitrates, which are nonradioactive pollutants not regulated by the NRC.

In dispute is Sequoyah's Second Revised Site Decommissioning Plan, which it submitted on March 26, 1999. Sequoyah's plan would decommission the facility for restricted release using an on-site, above-ground disposal cell for the permanent disposal of radioactive waste, pursuant to 10 C.F.R. § 20.1403. Sequoyah's current source materials license requires that the site be decommissioned for unrestricted use.

Oklahoma submitted a timely request for a hearing. After the NRC staff and Sequoyah opposed the request, Oklahoma, with the Presiding Officer's permission, supplemented its pleading to provide additional detail with respect to its affected interests and areas of concern. The Presiding Officer granted a hearing on the basis of Oklahoma's supplemental hearing request. The Presiding Officer found Oklahoma had met its burden to establish standing because of potential radiation injury to the State's citizens and pollution of its land, water and air. He rejected an argument that Oklahoma had an interest in establishing appropriate decommissioning standards, which might have precedential effect with respect to other NRC licensed sites within Oklahoma. He also found several asserted areas of concern to be germane to the proceeding.

Although our regulations generally discourage interlocutory appellate review, Sequoyah appeals under a special provision, 10 C.F.R. § 2.1205(o), which allows immediate appeal where the licensee contends the hearing request should have been denied "in its entirety." Sequoyah argues on appeal that Oklahoma has failed to meet the redressability element of standing and that it has failed to state any of its areas of concern with specificity. In addition, Sequoyah's appeal raises four claims of error on issues relating to some, but not all, of Oklahoma's areas of concern.

Oklahoma and the NRC staff support the Presiding Officer's rulings and oppose Sequoyah's appeal.

III. Standing

To demonstrate standing in materials licensing cases under Subpart L, a petitioner must allege (1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act (or other applicable statute, such as the National Environmental Policy Act) and (4) is likely to be redressed by a favorable decision. See Quivira Mining Company (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998). Subpart L specifically requires the Presiding Officer to consider the petitioner's right under the Atomic Energy Act to be made party to the proceeding, the nature of its interests potentially affected by the proceeding, and the possible effect on the intervenor of any order that may be entered in the proceeding. See 10 C.F.R. §2.1205(h). An intervenor must also explain in detail the issues on which it wants to be heard: in Subpart L's terminology, an "area of concern" that is "germane" to the proceeding. See 10 C.F.R. §2.1205(h).

Sequoyah contends that Oklahoma has failed to meet the Commission's standing requirement because it has failed to show that its injuries are likely to be redressed by a favorable decision. Redressability requires the intervenor to show that its actual or threatened injuries can be cured by some action of the tribunal. Sequoyah argues that Oklahoma's complaints about the proposed decommissioning plan could only be remedied by an order that the site be decommissioned to an unrestricted use standard, which would require decontamination in a manner that is not cost-effective and is beyond Sequoyah's financial resources. Because Sequoyah cannot afford to clean the site to unrestricted use, the Presiding Officer cannot order it to do so, Sequoyah reasons. Therefore, Sequoyah concludes, Oklahoma cannot show that its injuries are redressable.

The Commission rejects Sequoyah's redressability argument for a number of reasons. First, the Presiding Officer's judgment that a party has standing is entitled to substantial deference unless there has been a clear misapplication of facts or law. See Private Fuel Storage, L.L.C., (Independent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999). Here, the Presiding Officer carefully considered Oklahoma's redressability concern and found, reasonably, that a hearing could lead to a "substantial modification" or disapproval of Sequoyah's decommissioning plan-"both potential results completely in accord with what Oklahoma seeks in this proceeding." See Sequoyah, 50 NRC at 395.

Second, under judicial concepts of standing, which the Commission follows to the extent feasible,[(1)] Oklahoma clearly would meet the standing doctrine's redressability requirement. Sequoyah's argument is akin to saying, in a civil lawsuit, that a plaintiff's standing requires proof that the defendant can pay the damages sought. The United States Court of Appeals for the District of Columbia Circuit recently rejected this argument, finding that "[t]he redressability element [of standing] does not depend on the defendant's financial ability to pay a judgment against it. Courts do not deny a plaintiff his day in court simply because the defendant may be unable to pay all or part of a potential judgment against it." America's Community Bankers v. Federal Deposit Insurance Corp., 200 F.3d 822, 828 (D.C.Cir. 2000). The same is true here. Sequoyah's asserted inability to finance Oklahoma's preferred remedy does not defeat Oklahoma's standing to contest Sequoyah's proposed decommissioning plan at a hearing.

Third, it has not yet been established that the proposed plan is the only possible one within Sequoyah's financial abilities. It would be improper for the Presiding Officer to dismiss Oklahoma's hearing request on Sequoyah's bald assertions that it cannot pay for any form of decommissioning that deviates from the plan it has itself proposed. Standing is a threshold legal question, which does not require the Presiding Officer to conduct a full-blown factual inquiry concerning the licensee's ability to finance various decommissioning plans. "[W]e must bear in mind the oft-repeated admonition to avoid the familiar trap of confusing the standing determination with the assessment of petitioner's case on the merits." Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, 68 (1994), aff'd, CLI-94-12, 40 NRC 64 (1994) (internal quote and citation omitted). We follow "the fundamental principle that the ultimate merits of the case have no bearing on the threshold question of standing." Campbell v. Minneapolis Public Housing Authority, 168 F.3d 1069, 1074 (8th Cir. 1999).

Sequoyah has not shown that none of Oklahoma's areas of concern could be alleviated without decommissioning to unrestricted release. Although the State apparently would like the entire site decommissioned to unrestricted use, it is still possible that some of the State's concerns could be eliminated or mitigated through modifications of the restricted use plan. For example, the State complains that the proposed disposal cell lacks a liner and leachate collection system. See State of Oklahoma's Supplemental Request for Hearing, pp. 39-41. That area of concern could be satisfied by requiring a liner and leachate collection system, if appropriate, while still approving a plan that allowed for onsite disposal and restricted use decommissioning.

Sequoyah argues that Oklahoma has not proposed an alternative of its own, other than the "patently unrealistic" option of unrestricted release, that would alleviate the State's complaints. We reject that argument, as it would not be appropriate to require the State to propose a fully-fleshed out, alternative decommissioning plan in order to obtain standing for a hearing on appropriate areas of concern.

In short, Sequoyah's claim that the Presiding Officer cannot redress Oklahoma's injury suggests that the Presiding Officer is powerless to decline or modify Sequoyah's current application. The Presiding Officer was understandably unwilling to make such a ruling at this threshold stage of the proceeding. We see no basis for upsetting the Presiding Officer's view of his potential remedial powers.

We therefore find that the Presiding Officer did not err in determining that Oklahoma has standing in this case.

IV. Specificity

Sequoyah argues that Oklahoma failed to met the Subpart L requirement that it state its areas of concern "in detail." See 10 C.F.R. § 2.1205(e)(3). Sequoyah claims that Oklahoma's hearing request is so vague and so broad as to potentially cover all questions under review by the NRC staff. As a result, Sequoyah claims, the Presiding Officer could not have made a proper determination that these areas of concern were actually germane.

In support of this argument, Sequoyah points to the Presiding Officer's statement that the parties must identify "issues for litigation" prior to the hearing. See LBP-99-46, 50 NRC at 406. The Presiding Officer, while finding several broad areas of concern to be germane, also stated that "specific issues" may be further "particularized" prior to the hearing. See, e.g., 50 NRC at 398-401, 403, 406. Sequoyah reasons that if it is necessary for Oklahoma to narrow its concerns prior to the hearing, they must not be specific enough to trigger a hearing.

We defer to the Presiding Officer's view that Oklahoma has presented a number of "germane" areas of concern. Notably, the Presiding Officer examined each of Oklahoma's concerns carefully, accepting some and rejecting others. See LBP 99-46, 50 NRC at 395-406. He rightly did not insist on comprehensive pleading or extrinsic support, for Subpart L itself does not. Compare 10 C.F.R. § 2.1205(e)(3) with 10 C.F.R. §2.714(b)(2) (Subpart G). Under Subpart L, the intervenor's pleading burden is modest. The would-be intervenor must only state his areas of concern with enough specificity so that the Presiding Officer may determine whether the concerns are truly relevant--i.e., "germane"--to the license amendment at issue. See, e.g., Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47, 52 (1994); International Uranium (USA) Corporation (Receipt of Material from Tonawanda, New York), LBP-98-21, 48 NRC 137, 142-43 (1998).

In addition, the intervenor cannot be expected to substantiate its concerns exhaustively before it has access to the hearing file:

> It would not be equitable to require an intervenor to file its written presentation setting forth all its concerns without access to the hearing file. Of course, the intervenor is required to identify the areas of concern it wishes to raise in the proceeding, which will provide the presiding officer with the minimal information needed to ensure the intervenor desires to litigate issues germane to the licensing proceeding ....

Statement of Consideration, "Informal Hearing Procedures for Materials Licensing Adjudication," 54 Fed. Reg. 8,272 (Feb. 28, 1989). Here, the hearing file is not complete because the staff has not completed its environmental impact statement and safety evaluation report for the site. These documents may not be ready for another two years. See Sequoyah Fuels Corporation (Gore, Oklahoma Site Decommissioning), Memorandum and Order (Scheduling Conference), 3/23/00, p. 2.

We reject Sequoyah's argument that the Presiding Officer improperly deferred the requirement for Oklahoma to further specify its areas of concern until the prehearing conference. The applicable regulations authorize the Presiding Officer to order the parties to narrow the issues prior to the hearing. See 10 C.F.R. §2.1209(c). As this is specifically authorized in the regulations, it does not amount to a concession that Oklahoma's original concerns were stated with insufficient specificity. Further, the Presiding Officer here carefully considered each area of concern and found sufficient detail for each concern that was determined to be germane. For example, Oklahoma claims that Sequoyah has not offered adequate financial assurances because it has not budgeted sufficiently for maintenance of physical controls at the site. Oklahoma's hearing request listed 15 items, such as repair and replacement of the disposal cell cap and groundwater monitoring, for which it claims Sequoyah has not budgeted. See Supplemental Hearing Request at 37-38. It is hard to see how the area of concern could be more specific, unless Oklahoma were to provide actual budget figures for these items (a requirement that would be clearly in excess of our standards in a Subpart L proceeding).[(2)] We therefore find little basis for Sequoyah's charge that Oklahoma has stated its area of concern "in such broad terms that they envelop virtually the full scope of the NRC staff's review of the application."

We therefore reject Sequoyah's claim that Oklahoma failed to state any concerns with the particularity necessary to determine whether they are germane to the pending licensing decision. The Presiding Officer properly permitted Oklahoma to move forward with its case.

V. Review of Remaining Points of Error

Under 10 C.F.R. §2.1205, parties in Subpart L proceedings generally may not take interlocutory appeals. Commission regulations make an exception where the petition to intervene has been wholly denied or where the applicant contends the petition should have been wholly denied. See 10 C.F.R. §2.1205(o). It is under this exception that Sequoyah appeals, arguing that Oklahoma is not entitled to a hearing at all. Our holding that Oklahoma has standing and has presented one or more legitimate areas of concern ends Oklahoma's §2.1205(o) appeal. Sequoyah also asks us to address four particular grievances related to various admitted areas of concern. We decline this invitation by Sequoyah to fine tune the Presiding Officer's decision.

Much of Sequoyah's appeal does not relate to the issue of whether the hearing request should have been denied in its entirety. If we had ruled in Sequoyah's favor on either the standing or specificity arguments, Oklahoma's hearing request would be denied. In contrast, even if we were to rule in Sequoyah's favor with respect to all four of its remaining points of error, the hearing must still take place, albeit with a narrower scope.

Sequoyah first asks the Commission to rule that 10 C.F.R. Part 40, Appendix A has no applicability to its site.[(3)] Next, it asks the Commission to rule that no hearing may be held on Oklahoma's area of concern relating to nitrate contamination [(4)]

of the groundwater. Third, Sequoyah wants the Commission to rule that radiation doses that may occur more than 1000 years after decommissioning are outside the scope of the hearing.[5] Finally, Sequoyah asks the Commission to rule that it is not required to identify the long-term custodian who will enforce institutional controls at the site.[6] We are not prepared to rule on these questions with the case in its current posture.

We have held that in a Subpart L hearing, a party may seek an interlocutory appeal only where the decision will cause the adversely affected party to suffer serious, immediate and irreparable harm or will have a "pervasive and unusual" effect on the proceedings below. See, e.g., Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 (1998) (incorporating into a Subpart L proceeding the standard for interlocutory review found at 10 C.F.R. § 2.786(g)). Sequoyah does not contend that any of these four allegedly erroneous rulings will cause it irreparable serious harm or have a pervasive effect on the structure of the hearing below. The admission of an area of concern, or use of an inappropriate legal standard, while possibly resulting in unnecessary litigation, does not meet this standard for interlocutory review. See, e.g., Pennsylvania Power & Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550 (1981) (denial of partial summary disposition of contention did not meet interlocutory review standard). Just as an intervenor cannot use interlocutory appeal to expand the scope of a hearing to include rejected areas of concern, the applicant cannot use interlocutory appeal to narrow the hearing's scope.

Our standards for interlocutory appeal do not instruct us what to do when, as here, the appellant has legitimately invoked our appellate jurisdiction for some aspects of the case, but has also raised issues that do not go to the question whether the hearing request should have been denied altogether. The Commission has not previously considered the question whether we should consider such issues as a matter of "pendent" appellate jurisdiction. The now-defunct Appeal Board did at least twice consider the question whether 10 C.F.R. § 2.714a(c) (which parallels the language of section 2.1205(o)) required the Appeal Board to limit its inquiry after finding one contention properly admitted. In Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 n.9 (1973), the Appeal Board found that once one contention was shown to be admissible, there was no need to consider the admissibility of a second contention because the petitioner was entitled to the requested hearing. In Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 25-27 (1987), however, the Appeal Board concluded that, after finding one contention properly admitted, in the interest of judicial economy, it would consider whether two additional contentions were properly admitted. Reading Vermont Yankee and Grand Gulf together suggests that the Commission has the option, but not the obligation, to consider the merits of those of Sequoyah's points of error that address specific areas of concern rather than simply the question whether the hearing should have been wholly denied.

Because the Commission's appellate function is analogous in some respects to that of a federal appeals court, we may look to judicial reasoning for guidance in deciding whether to review those points of error that would not dispose of the entire case. The U.S. Court of Appeals for the District of Columbia Circuit has held that it will exercise pendent appellate jurisdiction where otherwise unappealable issues are "inextricably intertwined" with appealable issues, such that consideration of all issues is necessary to ensure meaningful review. See Gilda Marx, Inc. v. Wildwood Exercise, Inc., 85 F.3d 675, 679 (D.C. Cir. 1996). That court also found that pendent review of the otherwise unappealable issues is appropriate where such review could dispose of the entire litigation. See 85 F.3d at 679. The Court indicated that it disfavored pendent review where there is a lack of an adequate record; where the issue involved in the pendent review could be altered or mooted by further proceedings below; or where complex, multi-issue pendent review would predominate over a relatively insignificant, but final and appealable order. Id. at 679.

Neither of the two factors favoring review discussed in Gilda Marx is applicable to Sequoyah's four remaining points of error. None of the four is "inextricably intertwined" with the two issues that are immediately appealable, i.e., Oklahoma's standing and whether it stated any concerns with adequate specificity. Further, as discussed above, a review of the pendent issues cannot dispose of the entire litigation. If there were any potential to dispose of the entire litigation, the appeal would come under the exception at §2.1205(o), permitting appeals of an order granting a hearing.

On the other hand, several of the factors discussed in Gilda Marx weighing against pendent appellate review are present here. The record is as yet undeveloped. Arguments and evidence as to the appropriateness of using Appendix A as guidance, the need to address groundwater nitrates in the decommissioning plan, the need to identify the custodian, and the effect of doses beyond 1000 years have not yet been heard. Rather, Sequoyah in this appeal is attempting to save itself the trouble of substantively addressing these issues at the upcoming hearing. In addition, the issues may be mooted or changed by further proceedings below. For example, Sequoyah may be able to show that its proposed disposal cell design is superior to the impoundments described in Appendix A, or that its proposed solution to groundwater nitrate contamination (natural attenuation) is the best method.

Finally, Sequoyah's redressability and specificity arguments-which are appealable under NRC rules-may well be overshadowed by Sequoyah's other (unappealable) claims, were we to entertain them.[7] In discussing the appropriateness of pendent appellate jurisdiction, the U.S. Supreme Court has cautioned that "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay [final collateral] orders into multi-issue interlocutory appeal tickets." See Swint v. Chambers County Comm'n, 514 U.S. 35, 49-50 (1995). Because we do not want to encourage interlocutory appeals "riding on the coattails" of appealable issues, we decline to take review of the pendent issues here.[8]

The Presiding Officer did not err in granting Oklahoma's hearing request. For the foregoing reasons, we decline to exercise our discretion to examine the additional issues raised by Sequoyah's appeal.

IT IS SO ORDERED.

For the Commission[9]:

/RA/

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland
this 17th day of January, 2001

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1. See Private Fuel Storage, CLI-99-10, 49 NRC at 322-23. This is not to say that the Commission must follow judicial standing concepts or that it does so in all cases. See Envirocare of Utah v. NRC, 194 F.3d 72, 75 (D.C. Cir. 1999).

2. The Presiding Officer found that seven items were germane because they represented either required or reasonably anticipated expenses. Other cost items were rejected because Oklahoma had not shown that they were reasonably likely to be incurred. In addition to the cost-based area of concern, the Presiding Officer admitted obviously germane areas of concern involving, among other matters, dose limits, groundwater remediation, and disposal cell design. It is hard to see how issues like these would not be germane to a decommissioning plan approval, particularly where, as here, the NRC staff is examining the very same issues in connection with its ongoing review.

3. Although Part 40, Appendix A applies to uranium milling facilities, not uranium conversion facilities like the one being considered, the staff has said that certain design criteria in Appendix A provide relevant guidance as to the safe design of Sequoyah's proposed waste disposal cell. We also note that no area of concern claims a "violation" of Appendix A per se; therefore, no area of concern "depends" entirely on the applicability of Appendix A, as Sequoyah argues.

4. Although NRC does not regulate nitrates, the staff contends that its responsibilities under the National Environmental Policy Act require it to consider the environmental impact of approving a decommissioning plan that does not address nitrate contamination that was directly caused by NRC-licensed activity.

5. The regulations require the licensee to calculate doses only for the first 1000 years after decommissioning. See 10 C.F.R. §20.1401(d). The staff, however, has said that, due to the long-lived radionuclides that Sequoyah proposes to dispose of onsite, peak radiation doses will occur long after the first 1000 years. The staff contends that this is a reasonably foreseeable effect of the decommissioning that it must consider under NEPA. See "NRC Staff's Answer to Sequoyah Fuels Corporation's Appeal from the Presiding Officer's Decision to Grant a Hearing," pp.21-22.

6. Although our regulations require that a site decommissioned for restricted release must have in place legally enforceable institutional controls (See 10 C.F.R. §20.1403(b)), Sequoyah argues that it need not identify who will take on the responsibility of ensuring enforcement of these controls. Oklahoma maintains that the identity of the custodian is necessary to determine whether the custodian is willing and able to undertake this responsibility. See State of Oklahoma's Counterstatement in Opposition to Sequoyah Fuels Corporation's Appeal, pp 41-42.

7. Eleven pages of Sequoyah's 25-page brief deal with the pendent issues.

8. Unlike a federal appeals court, of course, the Commission sometimes exercises general supervisory jurisdiction over unappealable orders where they present "novel issues that could benefit from early Commission review." Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998). See, e.g., Hydro Resources Inc., CLI-98-16, 48 NRC 119 (1998). Here, though, none of Sequoyah's "pendent" issues is sufficiently developed in the record to warrant immediate decision by the Commission.

9. Chairman Meserve did not participate in this matter.