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Agency: Nuclear Regulatory Commission

Title: Sequoyah Fuels Corporation and General
Atomics (Gore, Oklahoma Site
Decontamination and Decommissioning
Funding)

Docket No. 40-8027-EA

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
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5 In the Matter of: :
6 SEQUOYAH FUELS CORPORATION :
7 AND GENERAL ATOMICS : Docket No. 40-8027-EA
8 (Gore, Oklahoma Site :
9 Decontamination and :
10 Decommissioning Funding) :
11 - - - - -X

12
13 Nuclear Regulatory Commission
14 Hearing Room 521
15 4320 East West Highway
16 Bethesda, Maryland
17 Wednesday, January 19, 1994
18

19 The above-entitled matter came on for prehearing
20 conference at 9:32 a.m.:
21

22 BEFORE:

23 JAMES P. GLEASON, Chairman
24 THOMAS O. MURPHY, Administrative Judge
25 G. PAUL BOLLWERK, III, Administrative Judge

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P R O C E E D I N G S

[9:32 a.m.]

JUDGE GLEASON: I am Judge James Gleason. With me presiding here on your right is Judge Paul Bollwerk. On your left is Judge Tom Murphy, who has just been appointed as an Alternate Judge in this case. Judge Klein, unfortunately, is still ill.

This is a prehearing conference brought by the Board which involves an October 15, 1993 order of the Nuclear Regulatory Commission. That order concerns the responsibility of the Sequoyah Fuels Corporation and the General Atomics Corporation to provide assurance and financing for the decommissioning of the NRC licensed Sequoyah facility located at Gore, Oklahoma.

Both SFC and GA have requested a hearing on the order. The Native Americans for a Clean Environment has petitioned for intervention in this proceeding.

I think at this time it would be appropriate if the parties and participants would make their appearances known for the record. We if could go with the Staff, SFC, GA, and NACE in that order, I think that would be complete.

MR. HOM: Your Honor, I am Steve Hom with the Staff. Possibly due to the weather, Susan Uttal may be here later. Dick Bachmann is also counsel for the Staff. He is away on vacation right now.

1 MS. LONGO: Your Honor, my name is Giovanna Longo.
2 I am with OGC Enforcement. I am also making an appearance
3 today.

4 MR. AXELRAD: I'm Maurice Axelrad, appearing today
5 for Sequoyah Fuels Corporation. I am with the law firm of
6 Newman & Holtzinger. Appearing with me today is John
7 Matthews, also from my firm.

8 MR. DUNCAN: I am Steve Duncan of the firm of Mays
9 & Valentine. I am here today with Brad Davenport. We
10 represent General Atomics.

11 MS. CURRAN: I am Diane Curran. I represent
12 Native Americans for a Clean Environment. With me today is
13 Paula Mesky, who is an attorney with my law firm, but who
14 will not be making an appearance or making any presentations
15 to the Board.

16 JUDGE GLEASON: This conference was ordered on
17 December 17, 1993, and was called for the purposes of
18 considering various issues and matters involved in the
19 proceeding, including an intervention petition request and
20 discovery matters in the timing and location for any
21 evidentiary hearing.

22 To that end we forwarded to the parties on January
23 13th a memorandum on a number of questions the Board the
24 Board had and has concerning the Commission's Rules on
25 Intervention and the theories of the case that the various

1 participants might care to discuss which relate to the
2 participation of General Atomics as a subject of the NRC
3 order and as a party in this proceeding.

4 In this connection, in response to our request for
5 any additional matters that the parties believe should be in
6 included in this conference, General Atomics forwarded a
7 January 14, 1994 request which I assume has been served on
8 all the participants, calling for the establishment of a
9 schedule for briefing and oral argument on a jurisdictional
10 issue concerning GA's participation and also requesting a
11 delay in discovery until that issue is resolved. At least
12 that is my interpretation of their motion.

13 The first issue that we wanted to discuss -- and I
14 think what we will do, since the Staff has the burden of
15 going forward in the burden of proof of the order that is
16 the subject of this proceeding, we will have the Staff
17 respond first, and then that be followed by counsel for the
18 SFC and then counsel for General Atomics, and then finally
19 counsel for the Intervenors.

20 Unless I ask, there may be occasions where I will
21 ask someone else to go forward. I will indicate that at the
22 time in a different arrangement.

23 Excuse me just a minute.

24 The first issue that we would like to have some
25 discussion on concerns the rules of the Commission and the

1. nature of this proceeding, whether it falls under -- really
2. whether it is a Section 189(a) proceeding of the Atomic
3. Energy Act, or if it is not, what consequences are there for
4. that conclusion as far as this proceeding is concerned. So,
5. I would ask the Staff to proceed with their understanding of
6. that matter, if they would, please.

7. MR. HOM: Your Honor, the Staff's position is that
8. this proceeding is not a 189(a) proceeding. It does not fit
9. within the enumerated categories of Section 189(a).
10. However, the Staff does not believe that there are any
11. particular ramifications flowing from the fact that it is
12. not a 189(a) proceeding. For examples, the procedures that
13. we will be using, as I understand it, in this proceeding are
14. under subpart (g). I am not sure I can articulate any other
15. differences that may flow from this proceeding, in our view,
16. not coming under Section 189(a).

17. JUDGE GLEASON: So then, Mr. Hom, you would not
18. consider that this proceeding involves an amendment to the
19. Sequoyah license?

20. MR. HOM: The Staff's view would be that this is
21. not involving an amendment to the license.

22. JUDGE GLEASON: All right.

23. Mr. Axelrad?

24. JUDGE BOLLWERK: Judge Gleason?

25. JUDGE GLEASON: Just one moment.

1 Judge Bollwerk?

2 JUDGE BOLLWERK: So you are saying then, that
3 there are no additional conditions that have been put on
4 Sequoyah Fuels or General Atomics for the time being of
5 Sequoyah Fuels' licensing in any way, that it incorporates
6 into their license by reason of that order?

7 MR. HOM: Well, I wouldn't say that there are
8 necessarily no additional conditions being imposed on the
9 license to the extent that if you are saying that,
10 therefore, that implies a 189(a) proceeding.

11 JUDGE BOLLWERK: Well, if you modify the license,
12 if you add a condition to it, if you want to call it an
13 amendment or a modification -- I don't know if that is a
14 distinction without a difference -- if you are modifying a
15 license in some way, then arguably you are coming under a
16 189(a); aren't you?

17 MR. HOM: Well, my understanding is that there are
18 times when the Staff can impose a condition not expressly
19 laid out in a license. That does not necessarily rise to
20 the level of triggering a hearing under a 189(a).

21 In any event, in this situation, the Staff's
22 position would be that we are not imposing an additional
23 condition on the licensee.

24 JUDGE BOLLWERK: Okay. I will think about that a
25 little bit. I may be back to you, Mr. Hom.

1 Mr. Axelrad?

2 MR. AXELRAD: Judge Gleason, as we have pointed
3 out in our pleadings to date, we agree that this is not a
4 189(a)91) proceeding. The Staff has not termed it into
5 modifying a license, and as just expressed, it is, in fact,
6 modifying the license.

7 The NRC has argued in other proceedings in Court
8 as we have pointed out in the TMI Alert case, for example,
9 that an order, even though it imposed restrictions on the
10 licensee -- in that case, that was an order lifting a
11 suspension -- that even though it imposed numerous
12 restrictions on the licensee, those did not amount to
13 amending of the license.

14 The Court went on to point out that if, in fact,
15 the Staff had intended, if the NRC had intended to amend to
16 license, they would have stated so explicitly, and they did
17 not.

18 The only theoretical impact that we can see as to
19 whether or not that this is an order modifying a license --
20 let me first say we agree with Mr. Hom that the procedures
21 that have to be followed in this proceeding will be the
22 subpart (g) procedures and, therefore, it makes no
23 difference whether it is a 189(a) proceeding or not.

24 The only possible impact --

25 JUDGE GLEASON: Excuse me. Would you mind repeat

1 that again for me?

2 MR. AXELRAD: The procedures that we will be
3 following in this proceeding are the procedures of the NRC
4 that apply to adjudicatory proceedings before an Atomic
5 Safety and Licensing Board. Those procedures are no
6 different, whether it is a 189(a) proceeding or not, because
7 it is a proceeding on an order, and a proceeding on an order
8 is governed by subpart (g) of Part 2.

9 The only potential difference here is that under
10 189(a), a Petitioner or an organization is entitled to a
11 hearing if it is a proceeding to amend a license and if a
12 person's interest is affected by that proceeding, is
13 entitled to a hearing.

14 But as we will point out later when we discuss the
15 actual regulation of the NRC, that is a distinction without
16 a difference. As will be shown, the Petitioner -- its
17 interest is not affected by this proceeding, and, therefore,
18 it would make no difference, even if this was an amendment
19 to a license.

20 JUDGE GLEASON: All right. I don't want to get
21 into that part of it because there is another question
22 dealing with it. I would rather keep these comments
23 together.

24 Mr. Duncan, let me say that we are aware of the
25 fact that you are just coming on board in this proceeding.

1 All the other parties have had some background on the case,
2 and you are trying to get up to speed as you have indicated,
3 I think, in one of your filings. So, at any time you just
4 want to pass, it is up to you. We won't hold that against
5 you in that sense. But we would call on you, if you would
6 care to respond at this time, we would be glad to hear it.

7 MR. DUNCAN: Thank you, Judge Gleason.

8 I really have nothing to add except to point out
9 the obvious that we have no reason to challenge that it is
10 not a 189(a) proceeding. But whether or not an amendment to
11 the license is involved, General Atomics is not the
12 licensee. So, we agree with Mr. Axelrad's view of it and
13 have no reason to challenge what the Staff has said about
14 the nature of the proceeding.

15 JUDGE GLEASON: All right.

16 Ms. Curran?

17 MS. CURRAN: As we discuss in our brief, we think
18 this is a proceeding for the amendment of a license. We
19 looked at the license and compared it to the order. It
20 seems to us that there are significant changes in the terms
21 of this license that will be imposed if this order is
22 carried out.

23 We have laid this out in our brief. I won't go
24 over all those factual details, but I would like to stress
25 that the mere fact that the Staff has labeled something as

1 not being a license amendment doesn't fully answer the
2 question as to whether it is or not.

3 In the Union of Concerned Scientists v. NRC, the
4 case that we cite in our brief, there the Commission had not
5 characterized an action suspending a deadline for compliance
6 with NRC regulations as a license amendment. The Court
7 applied a standard as to whether this option changed the
8 binding norms to which the licensee had to comply.

9 In our view, this definitely does significant
10 change the binding norms to which Sequoyah Fuels and General
11 Atomics must comply.

12 JUDGE GLEASON: I recall that case. The Court
13 said they might not have -- their implication was they may
14 not have intended an amendment, but was, in fact, an
15 amendment; isn't that correct?

16 MS. CURRAN: That's right. And that that
17 triggered Section 189(a)(1) hearing rights.

18 JUDGE GLEASON: Mr. Hom, do you have any comments
19 on that case that Ms. Curran cites?

20 MR. HOM: Your Honor, the only comment I would
21 have is that, as I understand the terms of the order, they
22 are essentially imposing requirements that the licensee is
23 currently subject to, and therefore, is not changing -- I am
24 not sure if I recall the exact term in the case we are
25 discussing -- it is essentially changing the terms of the

1 license -- the terms of the license merely may not have a
2 particular dollar amount that is discussed in terms of
3 decommissioning funding or anything of that nature.

4 But I see that as just a further extension of the
5 existing obligation under the regulations and under the
6 license.

7 JUDGE GLEASON: You would not consider the
8 changing of the dollar amount to change the nature of that
9 action?

10 MR. HOM: No, I would not.

11 MR. AXELRAD: Judge Gleason, if I may respond
12 briefly?

13 JUDGE GLEASON: Yes.

14 MR. AXELRAD: With respect to the particular cite
15 that was cited by Ms. Curran, that was a situation where the
16 licensees had a specific deadline as a licensed condition.
17 What the NRC attempted to do was to adopt a rule which
18 suspended the specific license condition, the specific
19 deadline.

20 The Court said, "Well, if the NRC is taking an
21 action that specifically changes something that is in a
22 license, that is a license amendment." That was clearly
23 true in that situation. What is happening here is far
24 different.

25 The only things that Ms. Curran has mentioned with

1 respect to the current license are items which are not, in
2 fact, changed by this order. She points out that the
3 current license has a page on which the name of the
4 corporation from New Sequoyah Fuel Corporation has not been
5 changed to Sequoyah Fuel Corporation when that change took
6 place a few years ago. That was an inadvertent mistake by
7 the licensee. It has nothing to do with this order or what
8 is going to happen as a result of the order.

9 Then she cites a provision of the license which
10 refers to the maintenance of a reserve account that was
11 committed to as part of the original license. That reserve
12 account is there. That reserve account remains. The
13 licensee continues to comply with that provision of the
14 license, and is not affected by this order.

15 What this order is doing is talking about
16 something that is completely additional and different that
17 the Commission is going to require. It doesn't absolve or
18 change the licensee's existing obligation under a license
19 condition. Therefore, there is no license amendment in
20 those two regards.

21 JUDGE GLEASON: Ms. Curran?

22 MS. CURRAN: If I could just respond to that, in
23 our view an amendment of the license could include the
24 imposition of new obligations. In fact, an amendment to me
25 conveys the concept of adding new terms as well as changing

1 the existing terms. So, I fail to see that as a legitimate
2 distinction.

3 In this case, the significant changes are a
4 substantial increase in the amount of decommissioning
5 funding that is required to be set aside and, second, the
6 use of the guaranteed decommissioning fund as opposed to the
7 mere speculation by Sequoyah Fuels that the funds will
8 ultimately be available.

9 Those are significant changes, whether they are
10 additional or they change the existing condition, they add
11 significantly to the conditions under which Sequoyah Fuels
12 can operate at that facility.

13 JUDGE GLEASON: Any response?

14 Mr. Axelrad?

15 MR. AXELRAD: As I pointed out before, the
16 Commission has argued in Court, and the Court has agreed,
17 that even though there are additional restrictions or some
18 kind of restrictions imposed upon a licensee, that is not
19 necessarily a license amendment.

20 This is a situation where the NRC is not changing
21 anything that is being imposed by the licensee by its
22 existing license conditions. It is requiring some
23 additional things be done on at least an interim basis. To
24 us, those are not license amendments. Those are apparently
25 attempts by the NRC to enforce what the NRC believes are

1 existing requirements under the regulations.

2 The merit of the Staff's position with respect to
3 whether it can properly impose those requirements is what
4 this hearing is going to be all about. But those are not
5 license amendments. The NRC clearly can impose restrictions
6 as has been shown in TMI Alert without having the imposition
7 of those restrictions considered to be 189(a) amendments of
8 a license.

9 JUDGE BOLLWERK: Let me just go back to Mr. Hom
10 for a second.

11 I take it that your argument is not that the Staff
12 cannot issue an order that modifies a license or adds
13 conditions, but simply that this order did not do so; is
14 that correct?

15 MR. HOM: That's right.

16 JUDGE BOLLWERK: Ms. Curran, would you agree that
17 there are situations where the Staff can issue an order that
18 doesn't modify the license? I mean, the order imposes some
19 kind of restrictions that they would have an reason to issue
20 it, but it doesn't necessarily modify the license to be a
21 189(a) proceeding, or arguably, does any order that the
22 Staff issues going to modify their requirements and, as
23 such, amends a license?

24 MS. CURRAN: Well, I will answer the last part
25 first. I can envision a situation in which -- well,

1 supposing the Sequoyah Fuels license said, "You will have a
2 guaranteed decommissioning fund of \$80 million," and
3 Sequoyah Fuels didn't do it.

4 Then an enforcement order would go out saying,
5 "This term is in your license and you must comply." That
6 would not be amendment to the license. That would be an
7 enforcement order to bring Sequoyah Fuels into compliance
8 with its license.

9 JUDGE BOLLWERK: Is that what this was, Mr. Hom?

10 MR. HOM: I'm not sure that Staff would agree with
11 that. I think that the ensuing proceeding would be the
12 proceeding to enforce the order, period.

13 JUDGE BOLLWERK: So you wouldn't have to issue an
14 additional order to enforce the license?

15 MR. HOM: I don't believe so. If I understand the
16 hypothetical, you have an order that is issued that becomes
17 final, imposing certain conditions. Then there is non-
18 compliance with that order. I believe the next proceeding
19 is enforcement of that order, not necessarily enforcement of
20 something in the license.

21 JUDGE BOLLWERK: Well, I guess one of the things
22 that is bothering me is your statement that all the order
23 does is indicate requirements that the licensee is already
24 subject to. I guess I am trying to figure out why issue an
25 order that tells the licensee the requirements he is already

1 subject to.

2 MR. HOM: Well, it is not subject to with the
3 specificity now contained in the order. But it is not
4 imposing something that is, let's say, not contemplated by
5 the existing regulatory scheme on decommissioning.

6 As I understand the case, with any licensee over a
7 period of time in developing a decommission funding plan, et
8 cetera, there are certain things that become more concrete
9 and specific during the various stages.

10 This order is becoming, I suppose, more specific
11 in terms of the amount of money that we are now specifying
12 be in place, et cetera. But it doesn't go to something
13 completely beyond what is contemplated in the regulations or
14 decommissioning funding.

15 JUDGE BOLLWERK: So what you are telling me is you
16 are flushing out the regulations here rather -- you are
17 flushing out some of the terms of the regulations in terms
18 of this specific case rather than modifying their license?

19 MR. HOM: Yes, although -- let me back up for a
20 second. The Staff would not claim that one could not argue
21 that almost any order which imposes some type of condition
22 or requirement on the licensee could not necessarily be
23 argued as somehow amending the license. I am not going to
24 sit here that there is a complete -- there is a solid back
25 and white distinction there.

1 The position here is that the Staff doesn't view
2 it as clearly in a 189(a) category simply by, at least at
3 the outset, the terms of 189(a). Probably for that reason
4 more than any other reason, we do not view this as a 189(a)
5 proceeding.

6 But there is not a black and white situation in
7 every case. There may not be one here. I am not sure going
8 to the next step, the ramifications of whether or not this
9 is a 189(a) proceeding -- I am not sure if there are any
10 ramifications that at least the Staff sees that fall from
11 making this determination.

12 JUDGE BOLLWERK: Well, unless as Mr. Axelrad
13 suggests -- which we will get to in a minute, the difference
14 between the language, any interest that may be affected in
15 the statute and the person whose interest is adversely
16 affected in the regulations, but we will get to that in a
17 second.

18 Just so I understand again -- I want to make sure
19 I am clear on what the enforcement scheme is -- if the
20 licensee is in violation of a provision of its license, you
21 would or would not issue an order telling them to comply, or
22 taking an enforcement action against them? I take it you
23 would have to do something.

24 MR. HOM: If there is a violation of an expressed
25 license condition, then there would be an order to require

1 compliance with that particular condition.

2 Contrast that with the situation where there is
3 not necessarily -- I suppose there could be a situation --
4 Your Honor, excuse me for consulting.

5 JUDGE BOLLWERK: Sure.

6 MR. HOM: There may be a situation as we believe
7 it to be here where there is not an express condition in the
8 license that covers the subject matter of this order, but
9 yet the Staff has the ability to issue an order to address
10 these concerns in the order. But there does not necessarily
11 have to be an expressed condition in the license that gives
12 rise to a violation leading to an order.

13 JUDGE BOLLWERK: In other words, what you are
14 saying is that in certain actions that the licensee is
15 taking, you find to not be consistent with the public health
16 and safety, and you order them not to do that, or you say,
17 "We are going to suspend your license because of those?"

18 MR. HOM: Exactly.

19 JUDGE BOLLWERK: All right. Let's keep going the
20 same way -- to Mr. Axelrad and to Ms. Curran.

21 MR. AXELRAD: Just in further response to your
22 question, Judge Bollwerk, 2.202(a)(1) in the case, that the
23 Commission can institute a proceeding to modify, suspend, or
24 revoke a license, or to take such other actions that may be
25 proper -- therefore, you know, there may be action other

1 than amending a license.

2 2.202(a)(1) says that it will either allege the
3 violations with which the licensee or other persons subject
4 to the Commission's jurisdiction is charged, or the
5 potentially hazardous conditions or other facts deemed to be
6 sufficient grounds to the opposed action.

7 So a trigger for a Commission order can either be
8 an alleged violation of something, or such other conditions
9 as the Staff deems to be appropriate. They can do that
10 either by modifying, suspending, or revoking a license, or
11 taking such other actions.

12 In this particular case, although the situation
13 isn't precisely clear to us -- and as I indicated that is
14 part of what will have to be explored in this proceeding --
15 the NRC apparently believes that Sequoyah is not, I think,
16 in violation of something, but that needs to do something
17 -- in violation of a license condition -- but needs to do
18 something in order to be in compliance with some regulation
19 of the Commission -- 40.36 or 40.42.

20 That will all be explored in this proceeding,
21 whether or not, in fact, such actions are needed and whether
22 in fact, as we dispute, Sequoyah does not have to comply
23 with provisions of that type beyond its current compliance.

24 JUDGE BOLLWERK: Ms. Curran, do you have something
25 to say?

1 MS. CURRAN: Well, I think it might help a little
2 bit to look, in characterizing or determining whether to
3 characterize this as a license amendment, to look at the
4 context out of which this comes, and that is when Sequoyah
5 Fuels submitted its license renewal application, it was
6 required by Section 40.36 to submit a decommissioning
7 funding plan which would have a guaranteed fund with funds
8 in it that were adequate to decommission the plant.

9 Had Sequoyah Fuels continued to operate and have
10 the license renewal proceeding gone on, that would have been
11 subject to licensing review, the amount of the money in the
12 fund. Of course, all that changed and Sequoyah Fuels didn't
13 continue operating. The license renewal proceeding was
14 dismissed.

15 But the Staff has now issued an enforcement order
16 which imposes these requirements on Sequoyah Fuels. But
17 those factual issues would have been licensing issues had
18 the license renewal proceeding gone forward.

19 JUDGE GLEASON: They would have been license
20 amendment issues?

21 MS. CURRAN: Well, they would have been reviewed
22 in the license renewal proceeding.

23 JUDGE GLEASON: That is not my question. Would
24 they have constituted license amendments which would then
25 bring it in -- what we are talking about is whether it would

1 be categorized as a 189(a) proceeding, then?

2 MS. CURRAN: It is not 100 percent clear to me how
3 they would have been treated, but that could have been the
4 case, that in the context of the renewal proceeding, whether
5 additional conditions were put on the license could have
6 been treated as license amendments?

7 JUDGE GLEASON: All right. So what you are
8 saying, Mr. Axelrad, is that -- were you finished?

9 MR. HOM: I have one more question. But go ahead.

10 JUDGE GLEASON: What you are saying is that in the
11 context of the existing conditions, if you will, the fact
12 that it is an attempt to make GA a co-insurer of producing
13 the financial plans, the fact that the order calls for being
14 able to be liable for additional funds even beyond the \$89
15 million, if that becomes necessary -- none of those things
16 would constitute an amendment to the license, in your view?

17 MR. AXELRAD: What I am saying is that what the
18 Commission, what the Staff is proposing in this order, does
19 not constitute amendments to Sequoyah's license. Whether or
20 not those requirements that the NRC purposes to apply can be
21 imposed upon General Atomics, that is a separate question,
22 but I think it pinpoints even further that this order cannot
23 be characterized as a license amendment because GA is not a
24 licensee.

25 JUDGE GLEASON: Well, in some respects if GA is

1 found to be involved in this proceeding, it will have to be
2 involved in some connection with your license, right,
3 otherwise they wouldn't have any responsibility?

4 MR. AXELRAD: I think that is very much the case
5 that is going to be argued by General Atomics. But I would
6 just say further whether context GA may or may be involved,
7 it is not as a licensee. The NRC has never treated it as a
8 licensee. It has never sought to impose any licensee
9 obligations upon it.

10 JUDGE GLEASON: All right.

11 MR. AXELRAD: Can I respond to just one thing that
12 Mr. Curran said?

13 JUDGE GLEASON: Go ahead.

14 MR. AXELRAD: With respect to how the
15 decommissioning plan would or would not have been treated as
16 part of the license renewal process, the compliance with
17 Section 40.36, the providing of a decommissioning funding
18 plan or financial certification by licensees has, in fact,
19 not been treated as a license amendment, and as a matter of
20 fact, has been explicitly decided not to be a license
21 amendment.

22 I was involved in another proceeding where, in
23 fact, after a licensee had submitted his decommissioning,
24 either financial certification or decommissioning funding
25 plan under the regulation, someone had asked for a -- the

1 NRC Staff then issued an amendment incorporating that
2 requirement into the license. Someone requested a hearing.

3 It was at that point, pointed out that the Section
4 40.36 is self-implementing. All it does is require somebody
5 to submit something on a particular time-frame. The Staff
6 recognized that it made a mistake, and they withdrew its
7 license amendment and indicated that a license amendment was
8 not necessary for the implementation of the 40.36. The
9 request for a hearing was denied because there was no
10 license amendment to which it could have applied.

11 JUDGE GLEASON: All right. I think we have
12 probably have had enough discussion on this subject to
13 exhaust all of us, so let's go on.

14 I think in this case I am going to ask Ms. Curran
15 to respond first because it is her Petition for Intervention
16 that is the focus of the question. Then I would ask after
17 Ms. Curran to respond to this, the Staff to respond, and
18 then finally SFC and GA.

19 We want to explore your views on NACE's claim for
20 intervention, whether it meets the judicial standard of
21 alleging an injury-in-fact, which, of course, means that the
22 Petitioner will suffer a distinct and palpable harm, that
23 such injury can be traced to the challenged action, and that
24 the injury is likely to be redressed by a favorable
25 decision.

1 Does the issue of standing change where, like
2 here, the Intervenor support an action, rather than oppose
3 it?

4 Ms. Curran?

5 MS. CURRAN: Well that's the big question in this
6 proceeding, I think. In our view, once a proceeding --
7 well, it is clear from Bellotti and other Commission cases
8 that we are not entitled to ask for a hearing on whether an
9 enforcement order is adequate or not.

10 But once a request for a hearing has been lodged
11 by the licensee, then a question arises as to whether the
12 enforcement order will be carried out or not, or whether it
13 will be defeated in the course of that proceeding. That
14 gives Intervenor, such as NACE, an interest in the outcome
15 of the proceeding.

16 JUDGE GLEASON: Are we plowing new ground here,
17 Ms. Curran?

18 MS. CURRAN: Well, I don't think so, because in
19 the Dairyland case, Intervenor were allowed to come into a
20 case for the purposes of advocating the order that was
21 proposed by the Staff and that was challenged by the
22 licensee. So there is precedent for this within the NRC.

23 JUDGE GLEASON: Mr. Hom, do you have any comments
24 in this area?

25 There may seem a time that all we are asking you

1. to do is repeat what you have already had in your motions.
2. I would not want you to go away from this proceeding with
3. that thought in mind. We read your motions very, very
4. carefully.

5. I guess what we are trying to indicate is there is
6. some concern among the Board about these issues. We are
7. looking, perhaps, for some additional edification, if you
8. will, on the subject. That is why we are bringing it up.

9. Mr. Hom?

10. MR..HOM: The Staff agrees that the reading of
11. Bellotti is that in a situation such as this where there was
12. the issuance of an order, I would say, generally in the
13. category of affirmatively increasing safety -- let's use
14. that category -- by sharing decommissioning funds -- that
15. had there been no request for a hearing by the licensee, the
16. Intervenors here under Bellotti would not have had an
17. opportunity to request a hearing, to determine the adequacy
18. of the measures in the order.

19. However, the Staff views that by reason of the
20. request that was filed for the hearing, we then go to
21. another test that maybe referred to as in La Crosse, this
22. outcome of the proceeding test, where the Staff's position
23. today is that by reference, or by measuring the outcome as
24. whether the order is sustained and in place or whether the
25. order is non-sustained, and, therefore, evaporates, is that

1 it is one of those two possible outcomes, conceivably
2 detrimental to the Intervenor.

3 JUDGE GLEASON: Well, let me ask you the same
4 question that I asked Ms. Curran. Are we plowing new ground
5 here?

6 MR. HOM: I don't believe that it is new ground.
7 I think the facts are different. There are not many, if
8 any, commissioning and licensing appeal board decisions that
9 have this set of facts. But if you use the test that was
10 used in La Crosse, a situation where the licensee and the
11 Staff apparently agreed after the issuance of the show-
12 cause order in that case, that the additional -- I think it
13 was a dewatering system there -- was not, in fact,
14 necessary. But the Board said in that case that none of the
15 Intervenor now have an opportunity to intervene in that
16 case. I don't think that it is necessarily new ground here
17 in utilizing that outcome of the proceeding test.

18 JUDGE GLEASON: Well, it is new ground in this
19 sense, I would presume, or I would suggest, at least.
20 Bellotti clearly is not applicable to this case, the way
21 -- at least I view it, reading it.

22 Bellotti involved a Petitioner asking to expand an
23 order. The licensee did not contest the order, if I recall.
24 So, he is asking, really, for a new order, if you will,
25 which is different than the facts of this case.

1 Then the question comes up as to whether La Crosse
2 has some precedential value here. Of course, as SFC has
3 argued, it is at best or at worst another licensing board
4 case. We don't really have to pay too much attention to it,
5 if I remember what you said, Mr. Axelrad.

6 If that were true, then we really are plowing new
7 ground; aren't we, because there is no case on the subject?

8 MR. HOM: Well, the phrase -- the test essentially
9 was articulated in those words in the Sheffield case,
10 although again the facts were different in that case. I
11 believe that involved the application for the renewal of a
12 license and perhaps expansion of the facility.

13 It was not an enforcement proceeding of this
14 nature. However, the test that was articulated there, as
15 far as the Staff is aware, has not been overruled or refuted
16 in some fashion by a later Commission decision.

17 Taking that test and attempting to apply it to the
18 situation here, one could interpret that test as the
19 Intervenors here having a stake, let's say, in the outcome
20 of this proceeding, whether, in fact, this order would be
21 sustained or not.

22 JUDGE GLEASON: You are referring to the Sheffield
23 case then?

24 MR. HOM: Yes.

25 JUDGE GLEASON: Did you refer to that case in your

1 response?

2 MR. HOM: I believe the case is cited, Your Honor.

3 JUDGE GLEASON: I guess I missed that.

4 JUDGE BOLLWERK: Let me just raise one question
5 about Sheffield. Sheffield has authority for the
6 proposition that I guess the Petitioner would assume if
7 someone can come in without really relevance to the way they
8 want to participate, on whose side they want to come in, it
9 cites a case called Association Data Processing Service
10 Organization where it says "camp," which is a fairly old
11 standing case.

12 You have cases like Lujan, which are much more
13 recent and seem to have tightened up the conditions for
14 standing somewhat to the degree that they seem to require
15 somewhat more of a direct injury.

16 I mean the injury here -- there is a chain which
17 you can follow but it is contingent on several things and
18 the injury strikes me under Lujan is now becoming a somewhat
19 more direct injury. In other words, the action actually
20 affects you directly and our action here, I mean one could
21 say it might at some point but maybe that is when Ms. Curran
22 comes in, when it does. If the Staff compromises, the order
23 is at the time that she intervenes?

24 MR. HOM: Your Honor, are you saying that let's
25 say the potential outcome here, that the order is not

1 sustained, is in your view an indirect injury?

2 JUDGE BOLLWERK: Well, the problem is I mean we -
3 - the Staff is here to support this order and in theory the
4 Staff is going to do the best job they can to do that. Now
5 obviously I guess at the end of the proceeding it might turn
6 out that we don't agree with the Staff's position. I
7 suppose Ms. Curran can say, well, maybe I am harmed then.
8 Maybe that's the point where she comes in, or arguably if
9 the Staff decides to compromise this order by trying to
10 settle the case with the Licensee, is that the point that
11 she comes in?

12 I mean the injury here doesn't occur until the
13 Staff has failed to do what it appears it is going to do,
14 which is to support the order.

15 You are not coming in here saying you are not
16 going to support the order?

17 MR. HOM: Right, but I mean I believe that the
18 injury is sufficiently, directly potential enough in that I
19 would not, I don't think the Staff would argue that some
20 later time if it appears that we are going to lose this
21 case, somehow that later time is a more appropriate time or
22 somehow the injury then flows more directly to the
23 Intervenor.

24 To me, at the outset of the proceeding if you can
25 determine that there are several outcomes, one of which is

1 the order is wholly unsustainable or even only sustained in
2 part, by looking at that as a realistic potential outcome
3 that you would measure the Intervenor's injury by looking at
4 the realistic potential outcome.

5 JUDGE BOLLWERK: And as far as you are concerned,
6 Lujan doesn't change that requirement at all or cases like
7 Lujan which are fairly --

8 MR. HOM: I don't believe that our position today
9 would be Lujan significantly changes that understanding.

10 JUDGE GLEASON: Mr. Axelrad, in your remarks will
11 you make some reference to the Sheffield case?

12 MR. AXELRAD: Yes, I certainly will.

13 In response to your basic question as to whether
14 or not this case ploughs new ground, we certainly believe
15 that it does in at least several ways.

16 One, it is a post-Bellotti case as opposed to the
17 other cases which have been cited which are pre-Bellotti.

18 The other cases involve different situations both
19 in terms of those that were licensing cases versus
20 enforcement cases and enforcement cases that involve
21 different kinds of orders than the orders here and it is
22 also new ground in that it is the first case -- well, not
23 necessarily, but it is a case now involving the new
24 regulations which the Commission adopted a couple years ago
25 with respect to enforcement orders and we think that the new

1 2.202(a)(3), which again we will discuss later under the
2 Board's agenda, we think provides support for the position
3 that we are about to describe to you.

4 We understand, Judge Gleason, that Bellotti
5 involved a situation wherein a Petitioner wanted to have a
6 more stringent relief than was proposed in an order and
7 therefore differs from this case in that regard, but the
8 Court in that case interpreted and then implicitly adopted
9 the Commission's position as being that only those who
10 oppose an order have an interest affected that entitles them
11 to a hearing.

12 We think that is a very sensible rule that
13 Bellotti expressed and we think it is particularly
14 applicable here.

15 We have a situation here where Petitioners could
16 not have asked the NRC to impose a more stringent or any
17 kind of action upon the licensee. The Petitioners could not
18 have forced, compelled the NRC to take enforcement action.

19 The NRC has issued an order. If the order is
20 fully sustained, obviously there will not be any injury to
21 the Petitioners, but even if the order is not sustained in
22 whole or in part, the only effect upon the Petitioners is
23 that they will be in the exact same situation that they are
24 in right now, namely --

25 JUDGE GLEASON: If the order is not sustained?

1 MR. AXELRAD: Excuse me?

2 JUDGE GLEASON: If the order is not sustained?

3 MR. AXELRAD: If the order is not sustained, they
4 will be in the same position that they would have been in
5 before the order was issued. They could not compel the NRC
6 to take action and they are not entitled to have the NRC
7 take any particular action.

8 Moreover, this particular order includes a very
9 specific reservation to the Director of NMSS to relax or
10 rescind the order upon good cause shown. Even if the order
11 were fully sustained, the situation could be that after the
12 order has been sustained the Director still has that
13 authority and could still take action which would relax or
14 rescind the order.

15 In other words, what the Petitioners are claiming
16 apparently is an entitlement to have the order in the form
17 that it was issued remain in place forever, remain in place,
18 cast in concrete, and that they cannot have. Those would be
19 clear violations of the Bellotti principles.

20 With respect to the cases which existed pre-
21 Bellotti and that might be viewed as possibly inconsistent
22 with the interpretation of Bellotti, one is the LaCrosse
23 decision. The LaCrosse decision, as I have pointed out in
24 our pleading, was a licensing board decision that was never
25 appealed --

1 JUDGE GLEASON: I don't think you have to discuss
2 that anymore, because I think you handled -- unless you want
3 to -- but the Sheffield case I would like to get your
4 comments on.

5 MR. AXELRAD: Okay. The Sheffield case -- let me
6 just point out one aspect of the LaCrosse case. It was a
7 broader order than the order in this case.

8 JUDGE GLEASON: Excuse me, it was a --

9 MR. AXELRAD: Broader order. The order did not -
10 - the issue specified in the LaCrosse case was not whether
11 the order should be sustained. The issue specified in the
12 LaCrosse case was whether the Licensee should install a
13 dewatering system or whether he should shut down the
14 facility if he doesn't install the system.

15 That gave a much broader context to the entire
16 proceeding and of course the LaCrosse case as a issued
17 decision was issued before Bellotti and was issued under the
18 regulations as they then existed as opposed to 2.202(a)(3).

19 The Sheffield --

20 JUDGE GLEASON: What you are saying is factually
21 it is not a precedent because it's a different set of
22 circumstances.

23 MR. AXELRAD: Well, not only factually but the way
24 the issue was stated. The issue was --

25 JUDGE GLEASON: That's what I mean by "factual."

1 MR. AXELRAD: Okay, but it's legal question, fine.
2 If that is what you mean, Judge Gleason, then we agree.

3 JUDGE BOLLWERK: What you are really saying is if
4 LaCrosse came up now, the Staff would not issue a -- well,
5 they don't issue a show cause. They would simply issue an
6 order saying you shall put in the dewatering system. They
7 would have already made the decision that they are going to
8 put in that --

9 MR. AXELRAD: Exactly, and the question would be
10 whether the order should be sustained.

11 JUDGE BOLLWERK: All right.

12 MR. AXELRAD: Which is a narrow issue and, as I
13 indicated before in the 2.202(a)(3) there would be a
14 different question as to who can intervene and what the
15 basis for intervention would be.

16 JUDGE BOLLWERK: Although isn't the -- I mean if
17 the Intervenor in LaCrosse wanted that dewatering system in,
18 although the Staff had made a contingent decision to do it,
19 now that they have reached an actual decision to do it,
20 arguably, why isn't their interest the same, I mean in both
21 instances, in having that order sustained?

22 MR. AXELRAD: Well, I think that the decision in
23 LaCrosse was influenced at least in part by the breadth of
24 the way the issue was worded and apparently the
25 encouragement of litigation of all aspects of whether or not

1 the dewatering system should be installed.

2 I think that when the issue is worded as whether
3 or not an order should be sustained, it puts I think in
4 starker relief the limited aspect of the proceeding, and, as
5 we will discuss later, the limited possibility of
6 Petitioners to intervene in a proceeding on whether the
7 order should be sustained.

8 With respect to the Sheffield decision, we think
9 that has a limited value in the Board's reaching a decision
10 here. The Sheffield decision was a licensing proceeding,
11 not an enforcement proceeding. It was a pre-Bellotti
12 decision and, therefore, didn't obviously take into account
13 the policy aspects of Bellotti and what Bellotti reflects.

14 In addition, the portion of Sheffield that is
15 relevant here was dicta. The Board in Sheffield had decided
16 that the Petitioners had not shown injury to either the
17 organizations involved or to their members that gave them an
18 entitlement to participate as a matter of right, and it was
19 after reaching that decision in the language of page 741 of
20 the decision. They then went on a couple of pages later to
21 also address the question of whether someone could
22 participate in a licensing hearing in support of a licensing
23 action, but that was clearly dicta.

24 The Sheffield decision has also been put in doubt
25 because of the decision we mention later on in Shoreham

1 where the appeal board, in a subsequent case involving
2 whether or not someone could participate in support of the
3 decision, specifically said that they were not reaching that
4 decision, that that would raise substantial questions which
5 they didn't have to reach and specifically declined to
6 decide it. So the appeal board clearly in the Shoreham
7 decision reflected that the question of whether someone
8 could intervene, even in a licensing proceeding, to support
9 a licensing application has not been decided and is open
10 and, even more so we believe it is open in an enforcement
11 proceeding, and we will discuss 2.203 later on.

12 JUDGE GLEASON: Did you discuss the Shoreham case
13 in your briefing paper?

14 MR. AXELRAD: Yes.

15 JUDGE GLEASON: Where is it? That is all I wanted
16 to know.

17 MR. AXELRAD: It is page 22, Note 11 in our
18 answer.

19 JUDGE GLEASON: All right, let's go on, please.

20 MS. CURRAN: Judge, could I have an opportunity.

21 JUDGE GLEASON: Yes.

22 MS. CURRAN: There were a number of questions
23 asked, and I would like a chance to respond also.

24 JUDGE GLEASON: All right, go ahead.

25 MS. CURRAN: I believe Judge Bollwerk asked

1 whether the Lujan decision changed the standard for the NRC.
2 I don't believe so. I think the language that the Court of
3 Appeals relied on its brief was basically the Supreme
4 Court's observation that it was harder for third parties to
5 achieve standing in a case where the agency was regulating
6 someone else, but that Lujan didn't change the standard, it
7 simply made that observation.

8 In this case, I think we have discussed in our
9 brief the injury that NACE would suffer through its member
10 Ed Henshaw if the order were not sustained, and I think it
11 is also important to note here that the very fact that the
12 NRC itself has determined that this order is necessary in
13 order to meet its mandate for protecting public health and
14 safety adds a great deal in terms of the potential injury
15 that would be caused if the order were not sustained.

16 Judge Bollwerk also asked, why shouldn't NACE wait
17 until some injury results, for instance if the NRC Staff
18 withdraws its order? I think, for one thing, that would
19 very impractical as this is the proceeding in which the
20 legal obligations are being established between Sequoyah
21 Fuels and General Atomics and the NRC, and that our wish is
22 to have an opportunity to influence the outcome of that
23 proceeding and ensure that the order is fully given effect,
24 and it would seem to me that it would be very impractical to
25 wait until something changed and then come in and basically

1 reopen a proceeding that was already very far down the road.

2 As I think Mr. Hom argued, one can easily enough
3 foresee there are two possible outcomes to this, either the
4 order is sustained or it isn't, and that if it isn't then
5 one can reasonably predict what the outcome would be for
6 NACE.

7 JUDGE GLEASON: Ms. Curran, there is another
8 outcome and that is potential outcome, possible I should
9 say, and that is that the order could be changed.

10 MS. CURRAN: I don't want to jump ahead in your
11 agenda, but I think that gets us into the whole question of
12 what kind of authority does this licensing board have in
13 terms of, once a hearing has been started does the NRC staff
14 have complete authority to change its order without any kind
15 of input from the licensing board, and I don't think that
16 that is --

17 JUDGE GLEASON: That gets us into another subject.

18 MS. CURRAN: Yes, and I don't want to go too far
19 ahead.

20 I believe Mr. Axelrad tried to distinguish the
21 LaCrosse case by saying that the scope of that hearing order
22 was much broader than the hearing order in this case, and it
23 seems to me that as a practical matter it is basically the
24 same thing. The question of whether the NRC's October 15th
25 order should be sustained necessarily conveys all those

1 factual issues that are embodied in the order. So I find it
2 difficult to see a distinction between what happened in the
3 LaCrosse case and what is happening here. The question is,
4 should Sequoyah Fuels and General Atomics be required to
5 make certain changes in order to meet the NRC's regulations.
6 In LaCrosse the only difference was that the licensing board
7 articulated the substantive contents of the order in its
8 hearing order, but I think the result is the same. I don't
9 think it is a grounds for distinguishing the case.

10 That is all I have.

11 JUDGE GLEASON: Thank you, Ms. Curran.

12 If we could roll on here, we have alluded to some
13 respect to the standards in 2.714 versus the standards in
14 2.202 before. Just so we can make our comments more
15 directed, that any differences and highlight those
16 differences, we would like to get your comments, starting
17 once again with the Staff, as to whether the term "person
18 whose interests may be affected," which is the standard in
19 2.714, stands in the same position or is it different than
20 the standard at 2.02 of "persons adversely affected."

21 Is my question clear, Mr. Hom?

22 MR. HOM: I think I understand it, Your Honor.

23 The Staff would more or less consider the two
24 standards the same. I believe that we would argue that any
25 person whose interests you would impute adversely affected

1 in 2.714. However, the two regulations contemplate
2 potentially two different steps in a proceeding as is the
3 situation here. In 2.202 we are speaking of parties to whom
4 an order is issued against and by reason of our earlier
5 discussion, those parties have certain rights if they are
6 adversely affected by that order. However if there is no
7 proceeding that follows because of a consent or whatever, if
8 there is no proceeding that follows, then we do not get into
9 the 2.714 area with NACE at that time. It is only until we
10 establish a proceeding by reason of the licensees, for
11 instance in this case, being adversely affected by the
12 order, requesting a hearing, beginning a proceeding, at
13 which time one would consider intervention under 2.714.

14 So the quick answer to your question, I believe,
15 is that the standards are roughly the same even though the
16 words are not identical, but they arise in different
17 contexts.

18 JUDGE GLEASON: Mr. Axelrad.

19 JUDGE BOLLWERK: I guess let everybody go around
20 and then I have some questions.

21 JUDGE GLEASON: Mr. Axelrad.

22 MR. AXELRAD: The regulations are fairly specific
23 in this area, we believe. The Board's memorandum identifies
24 five or six subsections of 2.202(a) and 2.202(b). All of
25 those refer to the licensee or the other person to whom the

1 NRC has issued the order, namely the subject of the order
2 except section 2.202(a)(3) which is a subsection which
3 indicates who can request a hearing, and that section says a
4 licensee or any other person adversely affected by the
5 order, 2.202(a)(3) specifically is not, therefore, limited
6 to just the subject of the order, but also refers to any
7 other person adversely affected by the order.

8 That language was added by the Commission,
9 specifically added by the Commission when it changed its
10 rules with respect to the enforcement orders in 1991, and
11 we believe that 2.202(a)(3) constitutes the Commission's
12 interpretation of its obligations under Section 189(a)(1).
13 In fact, when it adopted that regulation the Commission said
14 that the final rule continues, the final being 2.202,
15 continues the hearing rights afforded under Section 189 of
16 the Act and in saying that it specifically cited
17 2.202(a)(3). That appeared at 56 Federal Register 40,670 on
18 August 15, 1991, when the Commission adopted 2.202(a)(3).

19 Later on in its explanation, the Commission stated
20 that whether or not a licensee consents to an order, "other
21 persons adversely affected by an order issued under Section
22 2.202 to modify, suspend or revoke a license will be offered
23 an opportunity for a hearing consistent with current
24 practice and the authority of the Commission to define the
25 scope of the proceeding on an enforcement order," and has

1 cited Bellotti. This was at page 40,678.

2 Our view is that the Commission, therefore, in
3 adopting 2.202(a)(3) interpreted in an enforcement
4 proceeding context what they meant when it talks about a
5 person can request a hearing if its interest is affected by
6 a proceeding. The Commission decided that in an enforcement
7 proceeding it is only persons who are adversely affected by
8 the order who can request a hearing.

9 JUDGE GLEASON: Does this mean, Mr, Axelrad, that
10 no one can request a petition to intervene in a 202
11 proceeding?

12 MR. AXELRAD: No. I was going to go on to discuss
13 that.

14 JUDGE GLEASON: All right. Go ahead.

15 MR. AXELRAD: It is not precisely clear whether
16 2.714(a) authorizes petitions to intervene in an enforcement
17 proceeding, but assuming that it does, 2.714(a) talks about
18 persons whose interest may be affected by a proceeding. As
19 the Board pointed out, that is the same language that is in
20 189(a), therefore, when the Commission again in an
21 enforcement context defined in 2.202(a)(3) what constitutes
22 a person whose interest is affected by a proceeding as
23 meaning a person who is adversely affected by the order,
24 similarly that interpretation must also apply to 2.714(a).

25 If the language at 2.714(a) is any broader than

1 that, then it means that Section 2.202(a)(3) violates the
2 act because it doesn't provide a sufficient scope of persons
3 who can request a hearing. So in our view the language in
4 2.714(a), which is the same language as appears in 189(a)
5 should be interpreted in the same fashion as the Commission
6 did adopting 2.202(a)(3), namely somebody who is adversely
7 affected by the order.

8 Now we later go on to show that it really doesn't
9 make any difference because, as we have described before,
10 even if you try to give the language "person affected by a
11 proceeding" any broader meaning, Petitioners in an
12 enforcement proceeding are not affected by the order because
13 they don't wind up having any -- there is a return to the
14 status quo, even if the order is not enforced. So we don't
15 think it winds up necessarily having a practical effect, but
16 we do think that the regulations interpreted as a whole
17 indicate that only people who can show that they are
18 adversely affected by the order itself can either request a
19 hearing or petition to intervene.

20 JUDGE BOLLWERK: Why would the Commission use
21 different language to express the same thing in two
22 different spots? You are saying the language is coextensive
23 then?

24 MR. AXELRAD: Sure. I think the reason is that
25 2.714(a) is a section which applies to a petition to

1 intervene in all of the various proceedings that (g) might
2 apply to, including licensing proceedings, for example, and
3 2.714(a) was adopted well before 2.202(a)(3) was adopted.
4 It wasn't until the Commission adopted the specific
5 provision of 2.202 that referred to enforcement orders that
6 they focused on who can request a hearing in those
7 proceedings, and there was no need to go back.

8 JUDGE BOLLWERK: If I understand what you are
9 saying, 2.714 could just as readily be amended now to say
10 "any person whose interest may be adversely affected" since
11 interests who may be affected and adversely affected mean
12 the same thing, correct or not?

13 MR. AXELRAD: I think the emphasis is wrong. I
14 think we would all agree that the interests affected must
15 mean interests adversely affected. The question is, is it
16 an interest adversely affected by the order, or interests
17 adversely affected by an act under the proceeding? I think
18 the commission said it is interest adversely affected by the
19 order.

20 We go on to say that even if you treat the outcome
21 of the proceeding different than order, it doesn't make any
22 difference because we don't think the petitioners here are
23 affected that way, but the language specifically is
24 interests adversely affected by the order.

25 JUDGE BOLLWERK: So you are saying that Ms.

1 Curran's interest is not adversely affected by the order,
2 but it may be affected by the outcome of the proceeding?

3 MR. AXELRAD: No.

4 JUDGE BOLLWERK: You are saying no, but you are
5 saying there is a distinction between the two.

6 MR. AXELRAD: The language is different. The
7 Commission specifically says, the only people who can
8 request a hearing are people whose interest is adversely
9 affected by the order. We think that same language really
10 in an enforcement proceeding context is an interpretation of
11 the language in 2.714(a).

12 JUDGE BOLLWERK: But it is not as broad as what is
13 in 2.714(a)?

14 MR. AXELRAD: No, but if you read 2.714(a)
15 broader, then you must read Section 189(a) broader also
16 sand, therefore, 2.202(a)(3) constitutes an improper
17 interpretation of the act by the Commission, and I think
18 that the Board should interpret the regulations as
19 consistent with the statutes as the Commission obviously
20 wants to comply with statutes when it adopts its
21 regulations. I don't think this Board should likely decide
22 that the Commission improperly interpreted Section 189(a) of
23 the act when it adopted 2.202(a)(3).

24 JUDGE GLEASON: Maybe, and the most that should be
25 said for 202 is that it is not a model of clarity.

1 MR. AXELRAD: I think 2.202(a)(3) is a model of
2 clarity.

3 JUDGE GLEASON: You do?

4 MR. AXELRAD: Yes.

5 JUDGE GLEASON: Then I don't understand the
6 discussion we have been having for the last ten minutes.

7 MR. AXELRAD: Because we went out to 2.714(a),
8 2.714(a) is not a model of clarity because 2.714(a) does not
9 distinguish between enforcement proceedings and licensing
10 proceedings, 2.202(a)(3) specifically addresses enforcement
11 orders and who can request a hearing. I think it is very
12 clear.

13 JUDGE GLEASON: I am glad you do.

14 JUDGE BOLLWERK: Ms. Curran, do you have anything
15 to say, and then I may come back to Mr. Hom, and sort of get
16 everybody's views here, and then we will to sort this out.

17 MS. CURRAN: It appears to us that Section 2.202
18 simply sets out the process for a licensee to request a
19 hearing as a right and an enforcement, or that is issued
20 against it. The licensee doesn't have to go through 2.714.
21 That regulation is different. It applies to different
22 parties. It applies to members of the public. In our
23 view, it is broader.

24 JUDGE GLEASON: How do you fashion a path, if you
25 will, for a petition to intervene in .202?

1 MS. CURRAN: Well, the path is created by Section
2 2.714.

3 JUDGE GLEASON: I didn't ask that question. I
4 asked it to .202. How do you define the path in .202? You
5 don't, obviously?

6 MS. CURRAN: Well, .202 is restricted to defining
7 the rights of persons who are adversely affected by the
8 order. That is why we weren't able to request the hearing
9 when the order was issued because we didn't file under
10 Section 2.202. But Section 2.714 addresses people who are
11 adversely affected by the proceeding. Then we get back to
12 the outcome test in Sheffield.

13 So I don't think we ever did file under 2.202, nor
14 is it necessary for us to file in there in order to request
15 a hearing under 2.714.

16 JUDGE GLEASON: I agree with you. I am not
17 disagreeing with you. All I am trying to establish is that
18 there is no route in .202 for somebody filing a petition for
19 intervention. You must go to 2.714. I think since .202
20 came after .714, they could have clarified that.

21 MS. CURRAN: But they didn't.

22 JUDGE GLEASON: Mr. Alexrad seems to think it is a
23 model clarity. I get confused on it, but since they --
24 because they had a chance to refer to 2.714 in .202, but
25 they did not.

1 MS. CURRAN: Or, they could have amended Section
2 2.714 to say --

3 JUDGE GLEASON: Or they could have done that.

4 MS. CURRAN: -- in an enforcement proceeding, any
5 person who would be adversely affected by the order, and
6 then we would be out.

7 JUDGE GLEASON: That's right.

8 Go ahead, Paul. I think she is finished.

9 JUDGE BOLLWERK: Okay. Let me see if I understand
10 what Mr. Hom is saying. You are saying, in a nutshell, that
11 2.202 only affects licensees -- those perhaps who perhaps
12 are not licensees, but the subject of the order -- let me
13 make a third category -- and perhaps someone who in seeing
14 the Staff's order says, "The Staff says that this is
15 consistent with the public health and safety, to fix Widget
16 A. I think that Widget A, if it is fixed, is going to cause
17 total destruction of the facility. Therefore, I think my
18 interest is adversely affected by this order, and I can come
19 into the proceeding."

20 But this is not what Ms. Curran is saying. She is
21 saying she wants the order sustained. This person is saying
22 they do not want the order sustained because, in fact, it is
23 against the public health and safety to do that.

24 MR. HOM: Judge Bollwerk, if I said that, I
25 misspoke. What the Staff's position would be, would that

1 that 2.202 affects only licensees against which an order is
2 issued, or persons other than licensees such as people
3 falling under the "wrongdoer rule," for instance, which I
4 believe was the reason for the amendment in 1991 of 2.202 to
5 cover --

6 JUDGE BOLLWERK: Right, persons who are not named
7 in the license but whose activities affect the license or
8 involve the license.

9 MR. HOM: Exactly, exactly. That would be -- the
10 Staff's understanding of the scope of the parties that would
11 be addressed by 2.202 --

12 JUDGE GLEASON: Excuse me a minute. Without
13 trying to get to a new subject, does GA fit within that
14 category of other persons in this proceeding?

15 MR. HOM: GA, for the purposes of this order, does
16 fit in that category.

17 JUDGE GLEASON: All right. Thank you.

18 JUDGE BOLLWERK: They're named in the order, I
19 guess?

20 MR. HOM: They are named in the order. The order
21 is issued against them. They are adversely affected by that
22 order.

23 Persons in NACE's position would not come under
24 2.202, but would have to seek intervention under 2.714.

25 JUDGE BOLLWERK: So, what flows from that, if I

1 understand you, then, is that the order that was issued and
2 the notice for persons adversely affected to request a
3 hearing, was not noticed to NACE, because they were not one
4 of those persons?

5 MR. HOM: That's correct.

6 JUDGE BOLLWERK: So, what follows from that, then,
7 is the Commission, essentially, has never issued a notice
8 for people like NACE to come in. We have never issued a
9 2.714 notice that says, "All Intervenors, now is the time,"
10 who don't fall under 2.202, but nonetheless are persons
11 whose interest may be affected?

12 MR. HOM: I don't know what the Commission has
13 done in the past, Your Honor.

14 JUDGE BOLLWERK: Well, the problem is the
15 Commission hasn't done any of this in the past. There has
16 never been any order, any notice issued other than what is
17 in the enforcement order. Now, maybe the Commission should
18 have been. I guess the question is: Is that what we should
19 be doing now?

20 MR. HOM: Well, I think there may be a gap here --

21 JUDGE BOLLWERK: Maybe.

22 MR. HOM: -- in the sense that -- I think it is
23 fairly, well, at least the Staff's position is that under
24 2.202, and an order of this nature, the notice goes to those
25 affected by the order, such as SFC, GA, and other persons

1. adversely affected by that order as the order itself said.

2. If NACE were somehow adversely affected by that
3. order, then they would --

4. JUDGE BOLLWERK: Well, let's put it in context.
5. Ms. Curran has said she is adversely affected in some way,
6. but you are saying she was not adversely affected by the
7. order, but by the proceeding.

8. MR. HOM: Right. I believe Ms. Curran said in one
9. of her filings that she was not adversely affected by the
10. order, and, in fact, that the order would be beneficial to
11. NACE's interests.

12. But she is saying, as I understand it, that if you
13. look at the outcome of the proceeding, if there is such a
14. proceeding which now we have, but stepping back there may
15. not have been one had GA and SFC consented, but given that
16. there is a proceeding now, she is arguing that there is one
17. outcome, and another outcome -- one outcome could adversely
18. affect NACE's interests.

19. So, you don't get to analyzing NACE's interests
20. until you have come to the point where a proceeding has
21. begun on determining whether the order is to be sustained,
22. and 2.202 only goes to those parties to whom the order is
23. adversely affecting, not whether the sustaining of the order
24. not would adversely affect them.

25. JUDGE BOLLWERK: Now, Section 189(a) talks about

1 in any proceeding under this Act for the granting,
2 suspending, revoking, or amending of any license.

3 Does the proceeding begin when the application
4 comes in, or does the proceeding begin when the Notice of
5 Hearing is issued? I mean, we are in a pretty -- I mean,
6 this has some broad effect from 189(a) in terms of what we
7 are talking about here.

8 Of course, there is an argument that the 189
9 doesn't even apply, but given the regulations probably --
10 the language, anyway, seems to track it.

11 MR. HOM: Your Honor, I believe, that I have seen
12 the term "proceeding" used differently, unfortunately, in
13 the work -- in things that I have come across since I have
14 been in the Commission.

15 JUDGE BOLLWERK: I guess in this context, did the
16 proceeding begin when you issued the order, or did the
17 proceeding begin when the Notice of Hearing was issued after
18 -- or when SFC and GA requested a hearing and then the
19 Commission then sent it over for the Board to convene in a
20 hearing?

21 MR. HOM: In this context for the purposes of the
22 regulations that we are discussing now, the Staff's position
23 would be that the proceeding did not begin until SFC and/or
24 GA requested a hearing on the matter.

25 JUDGE BOLLWERK: So, therefore, the notice and the

1 order that was issued did not tell Ms. Curran to do
2 anything?

3 MR. HOM: That is correct, assuming she was --

4 JUDGE BOLLWERK: So she essentially -- well, she
5 knows about it, obviously, but other Intervenors that are
6 out there may not and we should issue a notice saying,
7 "Intervenors, now come in"?

8 MR. HOM: Assuming she was not adversely affected
9 by the order, the order did not tell her to do anything.

10 JUDGE BOLLWERK: You are saying someone in her
11 situation who wants to sustain the order, in fact, is not
12 adversely affected?

13 MR. HOM: That's correct.

14 JUDGE BOLLWERK: Okay.

15 JUDGE GLEASON: Mr. Axelrad?

16 MR. AXELRAD: In response to your question, Judge
17 Bollwerk, when the Commission adopted these regulations in
18 on August 15, 1991, at page 40,678, they talk about this
19 changed regulation -- and this was a change away from the
20 Order to Show Cause adopting a new demand for information
21 regulation, and adopting the explicit provision of 2.202
22 that applies now.

23 JUDGE BOLLWERK: I have a copy of that in front of
24 me, but it doesn't have the page numbers on it. Can you
25 give me a reference or a footnote or something where that is

1 hear? It is undifferentiated in terms of pages.

2 MR. AXELRAD: Well, it is under III, the new
3 regulations.

4 JUDGE BOLLWERK: Okay. All right. Just a second,
5 here; III.

6 MR. AXELRAD: Under III(a), Revisions to
7 Procedures to Issue Orders.

8 JUDGE BOLLWERK: All right. Just a second,
9 III(a). Okay.

10 MR. AXELRAD: There is a sentence which reads,
11 "This revision to the regulations governing orders changes
12 the rules in Dairyland Power Cooperative, and Consumers
13 Power Company" --

14 JUDGE BOLLWERK: Okay. I have that.

15 MR. AXELRAD: -- by setting the point at which a
16 proceeding begins for purposes of triggering the
17 adjudicatory rights under Section 189(a) of the Atomic
18 Energy Act to the point of issuance of an order compelling a
19 licensee or other person to take or refrain from certain
20 actions rather than the point where the Agency merely
21 demands information to show why no action should be taken.

22 So, I think with respect to your specific
23 question, the proceeding begins when the order has been
24 issued.

25 But apart from that, I guess the only response

1 that I have to what the Staff has indicated, is that I
2 believe that the Staff ignores that 2.202(a)(3) constituted
3 the Commission's interpretation of the rights under 189(a)
4 and that by the Commission interpreting the right to request
5 a hearing as being limited to persons who are adversely
6 affected by the order, the Commission was interpreting the
7 language of persons whose interests can be affected by a
8 proceeding in 189(a).

9 That governs, as far as we are concerned, not only
10 who can request a hearing under the 2.203(a)(3) provisions,
11 but also if somebody can somehow request to intervene under
12 2.714(a), that that person has to be one and the same.

13 Because of the Commission's interpretation and
14 because of the explanation we have given before, if you
15 could not request a hearing, you could not petition to
16 intervene, either.

17 JUDGE BOLLWERK: Well, if this is not a 189(a)
18 proceeding, are we governed by what this says?

19 MR. AXELRAD: I think we are governed by the
20 Commission's regulations.

21 JUDGE BOLLWERK: Well, it talks about triggering
22 the adjudicatory rights under Section 189(a). Now, your
23 argument is there are not adjudicatory rights under 189(a)
24 because this isn't a 189(a) proceeding.

25 MR. AXELRAD: No, but it is a proceeding under

1 2.203(a)(3). It is a proceeding under 2.202. What I was
2 giving was a background of how 2.202 was adopted and what it
3 means.

4 JUDGE BOLLWERK: Right, but one way to read that
5 is that in 189(a) proceedings, that is what it now means.
6 But this isn't a 189(a) proceeding. I mean, in fact, the
7 Commission didn't speak to this situation.

8 MR. AXELRAD: No, but to the extent that the
9 issuance of an order triggers a proceeding, I don't perceive
10 any difference as to when the proceeding will be triggered
11 under 189(a) versus any other kind of an order. I think the
12 Commission has issued a regulation talking about --
13 specifying who can request a hearing. That is what 2.203(a)
14 provides.

15 Now, theoretically if this is not a 189(a)
16 proceeding, then no one has a statutory right to a hearing.
17 However, the Commission has provided a right to a hearing
18 under its regulation and the order issued here, which
19 implements -- which is consistent with the regulations,
20 specified that a hearing could be requested by Sequoyah, GA,
21 or any other person adversely affected by the order. It
22 followed 2.203. They are one and the same.

23 JUDGE BOLLWERK: So the bottom line with your
24 argument is -- let's put aside -- I recognize you don't
25 agree that Ms. Curran is a person whose interest may be

1 affected, or under 189(a) or under the regulation -- but if
2 she were to be such a person, if we were to interpret the
3 statute that way, which you read as consistent with the
4 language in the regulation, that 189(a) says that any person
5 whose interest may be affected is the same as .202 saying
6 any persons whose interest may be adversely affected.

7 MR. AXELRAD: Adversely affected by the order.

8 JUDGE BOLLWERK: By the order.

9 MR. AXELRAD: Right.

10 JUDGE BOLLWERK: All right. If we were to read
11 those as reaching the same group of people, then in theory,
12 that her notice was at the time the order was issued, and
13 that was the only notice she was entitled to?

14 MR. AXELRAD: Yes, and as a matter of fact, the
15 notice -- the order was published in the Federal Register,
16 thereby providing notice to the world at large, which is
17 quite often the way the notices are provided when
18 unspecified people who may or may not be adversely affected
19 by any action, that the notice they get is the notice in the
20 Federal Register.

21 It turns out in this particular case in addition
22 to that, that the order was sent directly to NACE and
23 others. So they had actual notice in addition to
24 constructive notice in the Federal Register.

25 JUDGE BOLLWERK: Right, although as a legal

1 matter, to whom the notice is issued sort of controls who
2 has notice. I mean, if you are not a person adversely
3 affected, if there is a difference in the language, if you
4 read the order and said, "Well, I am not adversely affected,
5 you never had notice.

6 Well, I don't want to get into that. You heard my
7 discussion with Mr. Hom.

8 MR. AXELRAD: Let me just add one word. I would
9 think that if the Commission was specifically aware of
10 people who were adversely affected by the order, they would
11 have sent a copy of that to the people adversely affected;
12 therefore, they sent copies to Sequoyah. They would name
13 them in the order and issue -- and send them a copy of the
14 order.

15 The reason for the language in the order, which is
16 published in the Federal Register that says "other persons
17 adversely affected by the order can also request a hearing,"
18 is to make sure that the world at large is aware that they
19 can also request a hearing if they are adversely affected.

20 JUDGE GLEASON: Let's travel on here.

21 I would like to ask about the governing -- I think
22 you have already answered this question about the governing
23 standards for a late filed petitioned under .202 -- and I
24 presume you just read .714 into that, or how would you
25 answer that, Mr. Axelrad?

1 MR. AXELRAD: With respect to the late filed
2 answer, Your Honor?

3 JUDGE GLEASON: The late filed petition, yes,
4 under .202.

5 MR. AXELRAD: Well, the late filed answer under
6 2.202, the order is not specific about that, and the 2.202
7 regulation is not specific. I think that an argument could
8 be made that late filed answers are not permitted at all,
9 but it does seem to us that that is not the -- that the
10 filing time, the 20-day period, is not a jurisdictional-
11 type requirement. It is not a statute of limitations, and
12 that, therefore, late filed answers would be permissible.

13 In the absence of a specific regulation that
14 covers that, I think the NRC would probably use the 2.714
15 provisions as being the --

16 JUDGE GLEASON: As being the model of clarity that
17 you are just referring to again, I want to remind you.

18 [Laughter.]

19 JUDGE GLEASON: All right. Thank you.

20 Anyone else want to comment on that?

21 MS. CURRAN: I would.

22 JUDGE BOLLWERK: I think we skipped one question.

23 JUDGE GLEASON: I wanted to.

24 JUDGE BOLLWERK: Well, I would like to get an
25 answer.

1 JUDGE GLEASON: All right.

2 Yes, Ms. Curran?

3 MS. CURRAN: The question of the application of
4 the late filed contingent standard, perhaps related to Judge
5 Bollwerk's question about when the proceeding began. Mr.
6 Axelrad cited a Federal Register notice that said it began
7 at the time that the order was issued.

8 But the fact remains that our interests were not
9 adversely affected until Sequoyah Fuels and GA requested a
10 hearing on the order. So that in terms of the timeliness or
11 good cause of NACE's Petition to Intervene, I think that
12 still has to be to the Judge from the time when the hearing
13 requests went out.

14 JUDGE BOLLWERK: Aren't you saying that your
15 interests were adversely affected, but it was a contingent,
16 it was contingent on them filing their hearing request?
17 Your interest has always been the same, which is seeing that
18 the order is sustained. Now, under Bellotti, until they
19 came in and filed their hearing request, you couldn't act on
20 the interest, but the interest was still there?

21 MS. CURRAN: I suppose that might be one way of
22 putting it, but certainly it hadn't come to fruition and
23 there are many instances in the Sequoyah Fuels licensing
24 case or previous enforcement proceedings in which Sequoyah
25 Fuels didn't challenge enforcement orders, and so our

1 interest never really ripened into an adverse --

2 JUDGE BOLLWERK: What is to preclude Intervenor
3 though from being required to file a petition, and then if
4 there is no request for hearing by the Licensee the
5 proceeding is simply over?

6 MS. CURRAN: Well, that might be all right if we
7 hadn't been told on several other occasions by the NRC that
8 that wasn't appropriate, that we might as well not bother
9 because we were not considered to be persons adversely
10 affected by that order in any respect.

11 JUDGE BOLLWERK: Who told you that? I'm
12 interested to know who is --

13 MS. CURRAN: Well, in the Bellotti case, for one,
14 that we had no right to a hearing on that order, period.

15 JUDGE BOLLWERK: Well, in the Bellotti case you
16 had no right to an order given that the Licensee was not
17 contesting the order. I mean that --

18 MS. CURRAN: That's right, that's right.

19 JUDGE BOLLWERK: All I am saying is clearly your
20 interest has a contingency that has to follow, which is they
21 have to request a hearing, but why does that keep you from
22 filing an intervention petition in line with the order --

23 MS. CURRAN: Well, we relied on --

24 JUDGE BOLLWERK: -- if your interest was in fact
25 affected.

1 MS. CURRAN: I think that we did have a right to
2 rely on the specific language of the order, which said to us
3 any person whose interest is adversely affected by this
4 order may request a hearing. That order did not apply to us
5 by its own terms and I think that we have the right to rely
6 on the language, the plain language of the order in deciding
7 what to do.

8 I don't think we were required to guess what
9 hidden meaning might be there.

10 JUDGE BOLLWERK: So you are saying the problem
11 with the order and with the regulation is that the word
12 "proceeding" is what is important to you, not the word
13 "order." Your interests are adversely affected by the
14 proceeding but the regulation says "the order," even though
15 the Commission in this rulemaking in the background
16 statement seems to define the proceeding as beginning with
17 the order.

18 MS. CURRAN: Whether or not the proceeding begins
19 with the order, the proceeding does not begin to affect our
20 interests adversely until a hearing is requested by the
21 Licensee, General Atomics.

22 I think that is the key factor for the
23 Intervenor.

24 It doesn't really answer the question of when our
25 interest is adversely affected to say the proceeding begins

1 when the order issues.

2 JUDGE BOLLWERK: Well, again, unless the
3 Commission is recognizing that your interests may be
4 contingent but nonetheless want you to file an intervention
5 petition when the proceeding begins, which is when the order
6 is issued.

7 MS. CURRAN: Well, again, that was -- the plain
8 language of the order did not appear to apply to us.

9 JUDGE BOLLWERK: Okay. Mr. Axelrad?

10 MR. AXELRAD: Just one small point. Even though
11 NACE relies on the LaCrosse precedent in a number of
12 respects, I would note that in the LaCrosse situation the
13 Petitioner there did file within the time specified for
14 request for a hearing.

15 MS. CURRAN: LaCrosse was also before Bellotti, in
16 which it was clarified that there was no point.

17 MR. AXELRAD: I'm glad that Ms. Curran admits that
18 Bellotti changes LaCrosse in a number of respects.

19 MS. CURRAN: At least in that one minor one, Mr.
20 Axelrad.

21 JUDGE BOLLWERK: Did we get a response from the
22 Staff on this question?

23 JUDGE GLEASON: No.

24 JUDGE BOLLWERK: One of the things in trying to
25 understand the way all these regulations work together is

1 the question of what an answer requires in terms of an
2 answer under 2.202 requires versus what an intervention
3 petition must contain at some point under 2.714 and 2.202
4 talks about simply a specific statement of the issues of law
5 or fact that are raised or controverts it -- I'm sorry. You
6 have to have bases for contention. Basically for the answer
7 all you have to do is accept or deny what is in the order.

8 I think the thing that is confusing me or I am
9 having trouble understanding is when you file contentions,
10 Ms. Curran, what are your contentions going to say other
11 than what an answer would say, which is we agree with the
12 Staff on this point or we don't?

13 MS. CURRAN: Well, I think that in this case that
14 may be what the contentions amount to, but Section 2.714 is
15 pretty clear that we do have to file contentions and I think
16 it may be that the practical result in an enforcement
17 proceeding in which we are only entitled to raise the issues
18 that have already been raised by the Staff is that we
19 identify for you those issues that we want to raise and that
20 we rely on the Staff's enforcement order as basis for those
21 issues. It may be that our contentions look a lot like the
22 enforcement order but Section 2.714(b) does seem to apply to
23 us, so that's what we would do in response.

24 JUDGE BOLLWERK: So there is really not much
25 difference between what you would file, if you filed an

1 answer under 2.202 and what you would file under 2.714 to
2 meet the contention requirement. Is that correct or not?

3 MS. CURRAN: Well, I'm thinking that the answer of
4 the Licensee was to admit or deny various allegations and
5 the regulations require us to provide specificity and basis,
6 so I think we'd probably have to go into some more detail
7 about the basis for our position, which would rely for the
8 most part on the enforcement order and might add additional
9 facts where we felt it was necessary.

10 JUDGE BOLLWERK: Let me just -- this is where I'm
11 coming from, you understand that -- there are two possible
12 ways this can be read. One is that 2.202 encompasses this
13 whole thing, that everything that you needed to do was
14 within that regulation. In other words, that 2.202 applies
15 to one set of persons, the Licensee and some others; the
16 2.714 applies to other folks like you.

17 If 2.202, and I guess what I am trying to
18 understand is is there a distinction between the two in
19 terms of the contentions or the answer which would indicate
20 that 2.714 wants something more from an Intervenor as
21 opposed to simply what you would file if you were required
22 to file an answer.

23 MS. CURRAN: Well, I don't think 2.202 applies to
24 us.

25 JUDGE BOLLWERK: Let's assume it did. Is there

1 something, can you point to anything that is different in
2 what you have to file in 2.714 with regard to what you have
3 to file under 2.202 in an answer?

4 MS. CURRAN: Well, I believe 2.714 the
5 requirements are more specific, requiring specificity and
6 basis for the allegations, so --

7 JUDGE BOLLWERK: Although you said the basis of
8 your contention is going to be the Staff's order --

9 MS. CURRAN: Right.

10 JUDGE BOLLWERK: -- which is essentially what the
11 answer says, which is admit or deny what is in the Staff's
12 order.

13 MS. CURRAN: Right.

14 JUDGE GLEASON: Except you are going to just
15 provide more detail in the contentions than just the we
16 agree, we disagree that you have already supplied.

17 MS. CURRAN: I think that sums it up, what we
18 would be required to do.

19 JUDGE BOLLWERK: And -- I'm sorry, go ahead.

20 MS. CURRAN: I am not sure that the Commission
21 anticipated the problem.

22 JUDGE BOLLWERK: That may well be the case.

23 Anybody else have anything on that subject? I
24 don't want to belabor it if there's --

25 MR. AXELRAD: Only that I do agree. I think, like

1 Ms. Curran was saying implicitly, is that they would have to
2 provide more information in terms of specificity and basis
3 for any contention they raise and then just a denial or
4 admission with respect to any of the allegations by the
5 Staff.

6 For example, they do have to provide a concise
7 statement of alleged facts or expert opinions supporting the
8 contention that they rely upon, and I think they are going
9 to have to identify what those facts are and what expert
10 opinion they are relying on and I don't believe they are
11 just saying they are relying on the Staff would be what's
12 intended here. They would have to show what they are going
13 to bring to the party, what kind of expert opinion they are
14 going to rely on.

15 JUDGE GLEASON: We have already crossed that road,
16 Mr. Alexrad

17 JUDGE BOLLWERK: Mr. Hom, your position again on a
18 late-filed answer, is there such a thing and what standards?

19 MR. HOM: On a late-filed answer, I would say
20 there is no standard expressly applicable in the
21 regulations.

22 You could make reference to the standards for
23 late-filing in 2.714, but I believe that the only one that
24 really is applicable and of any import is good cause for a
25 late-filed answer and the only thing I would --

1 JUDGE BOLLWERK: We're really talking about the
2 discretion of the Board, fairly broadly.

3 MR. HOM: Right, okay.

4 JUDGE GLEASON: All right. The next area, the
5 terms of the October 15th order authorizes that for good
6 cause the conditions of the order can be relaxed or
7 rescinded by the Director of the Office of Nuclear Materials
8 And Safeguards.

9 Since NACE cannot object to the Staff action on
10 that order, it is contended that NACE's interest is too
11 illusory to provide its standing, and I guess we would like
12 some more comments in depth on that.

13 Is not NACE affected? Maybe, Mr. Axelrad, you
14 could go first on this. Is NACE not affected if in fact
15 that order is relaxed or changed?

16 MR. AXELRAD: As I indicated before, Judge Gleason,
17 the order has a specific provision within it that retains
18 the authority on the part of the Director to relax or
19 rescind the order.

20 There is good public policy for such a provision.
21 the Director is the individual who has been delegated by the
22 Commission the responsibility to enforce the provisions of
23 licenses and regulations. The Director is the individual
24 who has to decide whether his enforcement objectives are
25 being satisfied or have been satisfied. The Director is the

1 individual who has to determine how to allocate his
2 resources, whether to apply them to in the field enforcement
3 actions, inspections, or whether to apply them in the course
4 of legal proceedings, so there are many good public policy
5 reasons for a Director having that responsibility.

6 Even if the order were fully sustained, that
7 provision would remain in the order. It is an integral part
8 of the order.

9 Accordingly, the provision could not be deleted in
10 the course of the proceeding. It would stay there even if
11 the order were fully sustained. Now whether the Director
12 can exercise that function during the proceeding, we believe
13 that he can and we have cited a recent Commission decision
14 which recite as background facts in the oncology case where
15 an order had been issued. The Director lifted part of the
16 suspension that was provided for in the order even before
17 the hearing was requested and after the hearing was
18 requested he lifted part of it again.

19 There were actions taken by the Director both
20 before and after the hearing began which relaxed the
21 provisions of the order, and there was no indication that we
22 could tell that the Presiding Officer, the Board in that
23 proceeding, had to review or approve in any fashion that
24 particular action.

25 We agree of course under 2.203, if there is a

1 compromise or a settlement of the order, that would have to
2 be approved by the Board but there are any number of actions
3 which we believe the Director could take which would be
4 short of a compromise or a settlement of the order and we
5 think that that authority of the Director remains and must
6 remain as a matter of good regulatory policy.

7 JUDGE GLEASON: Well, I guess the more specific
8 question is whether that order can impact the Intervenor's
9 position. You know, it may be good public policy but also a
10 Director can make a wrong decision in relaxing or changing
11 the order.

12 Would that not have an impact on the Intervenor's
13 position?

14 MR. AXELRAD: Well, as I have indicated before,
15 Judge Gleason, the Director could have made theoretically an
16 improper decision in deciding not to issue an order in the
17 first place or in issuing a wrong order and the Intervenor's
18 were not entitled --

19 JUDGE GLEASON: But, you know, there is no sense
20 in going back to what was or never happened. We are where
21 we are and we are with an order with that provision in it.

22 MR. AXELRAD: What I was trying to express, Judge
23 Gleason, is I don't believe that the Intervenor's have any
24 greater control or ability to affect the Director's exercise
25 of his discretion, the discretion he has been granted by the

1 Commission itself, before the order is issued than it has
2 after the order has been issued.

3 The Board will have the ability to approve any
4 settlement compromise if anything of that kind takes place
5 but the Director's ability to exercise his discretion as
6 specifically retained under the order is not something that
7 can be influenced by the Petitioners.

8 It is incongruous, it would seem to me, that
9 somebody who could not have, like the Petitioner, could not
10 have forced a proceeding in the first place, could not have
11 forced the Director to take any action in the first place,
12 somehow would have the ability to force the Director to
13 participate and be part of a prolonged proceeding when they
14 had no ability to force him to take action in the first
15 place.

16 JUDGE GLEASON: This is the next question, but it
17 relates to this one, so might as well consider it at the
18 same time. Does the Board itself have any authority over
19 that Director's activities in that connection? Can the
20 Board tell the Director "shove off" -- keep your hands off
21 this case. It's before us now and you've got an order here
22 and it's either going to go up or down or some other way?

23 MR. AXELRAD: I believe not, Your Honor. The
24 basic purpose of a hearing on an enforcement order is to
25 protect the rights of the individuals to whom the order has

1 been issued or individuals who are adversely affected by the
2 order.

3 This Board will have to decide whether the order
4 as issued should be sustained. If the Director relaxes the
5 order in some fashion in the course of this proceeding,
6 which may or may not happen, then the Board's function would
7 be to decide whether the order as partially modified,
8 whether that order should be sustained, but it is the
9 Director's, the Director who has been granted the authority
10 by the Commission to make those kinds of enforcement
11 decisions and that authority has been explicitly retained
12 under the order.

13 JUDGE GLEASON: All right. Ms Curran?

14 MS. CURRAN: I want to answer your questions
15 separately because I think they are very distinct.

16 JUDGE GLEASON: They are two different questions.

17 MS. CURRAN: Yes. In the first instance I think
18 the fact that the Staff can retract or modify its order is
19 not really what is relevant here.

20 What the purpose of this proceeding is to
21 determine whether the Staff has the authority to impose
22 those requirements that it seeks to impose through the
23 October 15th order.

24 That is what we are seeking to uphold here is
25 Sequoyah Fuels and General Atomics have challenged the NRC's

1 regulatory authority to impose the decommissioning fund.
2 It's challenged the adequacy of the amount of the fund.
3 It's challenged many aspects of that order.

4 We want to see that order fully defended in this
5 proceeding whether or not the NRC at some later point
6 chooses to relax or rescind it, the crucial issue here is
7 whether this Board is going to give full effect to the
8 provisions of that order and maybe later on the NRC will
9 choose not to exercise all those, but we still have a
10 critical interest in seeing that the order is vindicated.

11 JUDGE GLEASON: Let me ask this question a
12 different way. You are not concerned that the order might
13 be relaxed by the director for good cause?

14 MS. CURRAN: Well, that gets to your second
15 question. I think your first question had to do with how
16 does --

17 JUDGE GLEASON: Well, my second question was
18 really whether the board itself had any kind of
19 jurisdictional control over that provision of the order.
20 That was my second question.

21 MS. CURRAN: All right. Well, we are -- we
22 certainly would be concerned if the order would be relaxed,
23 but the point is that whether -- we are not at that point.
24 The NRC is seeking to enforce that order, and we are in this
25 -- trying to get in this proceeding for the purpose of

1 defending the contents of that order, so if --

2 JUDGE GLEASON: Excuse me for interrupting, but
3 isn't one of your positions the fact that you do not want
4 this order relaxed?

5 MS. CURRAN: Yes, and I think that is -- it is a
6 harder question as to whether the licensing board has the
7 authority to -- whether the licensing board has the
8 authority to prevent the Staff from rescinding the order, or
9 from relaxing it.

10 And in our reading of the cases which we cited in
11 our brief, it appeared to us that the NRC rule is that once
12 a proceeding has started, then the hearing that has been
13 convened has to encompass the issues raised at the
14 initiation of the proceeding, and that if -- I believe in
15 the La Crosse case, the licensing board said that the Staff
16 could change the terms of the order along the way, through
17 the proceeding, but that that wouldn't change the scope of
18 the hearing, so that the issues would still have to be
19 heard.

20 And then it gets into the difficult question of,
21 well, if you are making a decision on some aspect of this
22 order in terms of whether it is required by the regulations
23 to protect public health and safety, and then the Staff is
24 also deciding that it wants to rescind that, there is a
25 conflict there between what you are doing and what the Staff

1 is doing, and I would think that your authority would have
2 to govern in that situation.

3 But I still don't think that that implicates our
4 standing in the case.

5 JUDGE GLEASON: I presume that your participation,
6 if it is granted in this proceeding, is to support the order
7 except that provision which allows them to relax it, if, in
8 fact, they go to relax it. You are in there to provide the
9 reasons why this order should not be relaxed in any degree.
10 Am I incorrect in that?

11 MS. CURRAN: No, you are correct.

12 JUDGE GLEASON: All right. Thank you. Mr. Hom,
13 do you have any comments in this general area?

14 MR. HOM: Your Honor --

15 JUDGE GLEASON: I really raised two questions.

16 MR. HOM: Let me see if I -- if I don't answer
17 both of your questions, please let me know, but the way --
18 the Staff's position would be that during -- if the -- as I
19 sort of conceptualize this, if the order is sustained and
20 there is an order from the board saying that, essentially,
21 the order is sustained, then that terminates a proceeding.

22 Is the question then whether the board somehow has
23 continuing jurisdiction over this relaxation provision? The
24 Staff's position, if that is the question -- if that is a
25 question, the Staff's position would be no.

1 However, during the proceeding, if there is an
2 attempt by the director of NMSS or whatever to modify the
3 order or issue an order that would affect the terms of this
4 order while we are in litigation, it appears that under
5 2.717 the board would be able to have the final say in the
6 matter, 2.717(b).

7 JUDGE GLEASON: I'll have to check to see what it
8 says. Yes, okay. All right.

9 Paul, do you have any follow-up on this?

10 JUDGE BOLLWERK: Let me take a quick look at
11 2.717(b).

12 [Pause.]

13 JUDGE BOLLWERK: So, you are essentially saying
14 that that regulation indicates that Mr. Axelrad's argument
15 is incorrect?

16 JUDGE GLEASON: I'm not sure if I know exactly
17 what aspect of Mr. Axelrad's argument you are referring to.

18 JUDGE BOLLWERK: Mr. Axelrad's argument is that we
19 can't -- that we have no authority to effect anything that
20 the licensing -- that the Staff, excuse me -- may do in
21 terms of modifying the order under the terms of the order
22 that provides that it can be modified.

23 And what you are saying is this regulation says
24 specifically that, in effect, that's incorrect?

25 JUDGE GLEASON: I believe that the Staff's answer

1 would be dependent upon the time at which the director would
2 attempt to modify, revoke or rescind the provision of the
3 order.

4 For instance, if this proceeding has been
5 concluded and there is later -- the order is in place, and
6 there is later a time that the director determines some
7 provision or condition should be relaxed, then the Staff's
8 position would be that this licensing board here today would
9 not have continuing jurisdiction to review that director's
10 relaxation.

11 However, during the pendency of this proceeding, I
12 believe that the licensing board would have the authority to
13 review other orders that would impact on this order that the
14 director would issue, or changes to this order given we are
15 in litigation over this order.

16 And that -- I believe that the licensing board
17 would have the ultimate authority to make the final
18 determination on that.

19 JUDGE BOLLWERK: So -- okay. Let me take two
20 situations then. We have the situation here where someone
21 is trying to intervene.

22 If there is no one trying to intervene, does that
23 mean that the board, sur response, should review all
24 modification that the Staff puts out?

25 I'll use the oncology case as an example. Should

1 the board have stopped the Staff from saying, "You can
2 modify that license, come to us" -- that order, "come to us
3 now; we need to approve that modification"?

4 JUDGE GLEASON: I would say that the -- that the
5 board would have the authority and the jurisdiction to
6 require whatever provision it deems necessary that would
7 somehow affect the proceeding, if there is, indeed, some
8 impact on that proceeding.

9 It is not necessary to do so, but that would be in
10 the discretion of the board.

11 JUDGE BOLLWERK: Okay.

12 MR. AXELRAD: Judge Gleason?

13 JUDGE GLEASON: Yes.

14 MR. AXELRAD: Can I just respond? In our view,
15 2.717(b) refers to a situation where the director takes
16 action which is not otherwise explicitly provided for by an
17 order. For example, the La Crosse situation: there was no
18 such provision in the order in La Crosse that would
19 explicitly authorize the director, NMSS, to relax and
20 rescind through requirement of the order.

21 I think in the situation where an order explicitly
22 retains that authority to the director, that authority is an
23 independent retention by the director, and, therefore, would
24 not be subject to 2.717(b) review by the board.

25 The board's review would be limited to the 2.203

1 provisions in the case of a settlement or compromise, and
2 there would have to be a decision on the facts of any
3 particular circumstance as to whether it is a relaxation or
4 recision, or whether it is a compromise or settlement.

5 JUDGE GLEASON: Okay. The next question is --

6 JUDGE BOLLWERK: Let me just ask Mr. Hom. You
7 don't agree with that interpretation, however?

8 MR. HOM: If Mr. Axelrad is saying that the terms
9 in the order that is being litigated are free from
10 interference by the board in every respect during the
11 pendency of the litigation, I believe the Staff's position
12 would be that is not true. That the licensing board, given
13 the pendency of the litigation, would have ultimate
14 authority to take it upon review of a decision within that
15 order given that the order has not finally been determined
16 to be a final order, and has -- there has been no issuance
17 of an order saying that the order is finally sustained.

18 JUDGE BOLLWERK: Even where the order allows us to
19 have to modify the order, which is the situation here?

20 MR. HOM: Yes. Yes. Although, again, with the
21 understanding that there is no -- I believe all the Staff is
22 saying: that the licensing board does not have to exercise
23 any particular authority in that respect, but it is not
24 restricted or it is not -- that authority has not been
25 withheld from him.

1 JUDGE GLEASON: The final question in this area -
2 - I don't think it has been answered -- and Mr. Axelrad, we
3 will ask you again to go first, if you don't mind.

4 The question is whether discretionary intervention
5 is permissible at all in enforcement cases?

6 MR. AXELRAD: I didn't read that as being the
7 question, but we -- I don't think we would argue that
8 discretionary intervention is not possible at all. However,
9 we believe that in an enforcement proceeding, the standard
10 would be quite different and more stringent than our
11 licensing proceeding.

12 The Pebble Springs decision, which has been cited
13 as the hallmark of discretionary -- how the Commission views
14 discretionary intervention, specifically referred to broad
15 participation and domestic licensing proceedings. That's at
16 page 616.

17 In our view, even though discretionary
18 interventions may be possible in licensing situations, in
19 those cases, a licensee is going to be given new or
20 different authority to conduct activities not previously
21 authorized, and, therefore, the interest of the public, may
22 be -- should be allowed to participate through broad grants
23 of rights.

24 An enforcement proceeding, however, we think the
25 situation is different. As I mentioned before, the basic

1 purpose of the hearing rights in an enforcement action is to
2 protect those that are adversely affected by the order.

3 The issue in a enforcement proceeding -- it could
4 be this one -- is limited to whether the order should be
5 sustained. The NRC Staff has the burden of proof in an
6 enforcement proceeding, and is well-equipped to protect the
7 public interest.

8 There is no need for a duplicate prosecutor,
9 particularly Petitioner, who, presumably, has not been able
10 to show that he can intervene as a matter of rights, since
11 he is requesting only limited participation.

12 As known in Pebble Springs, discretionary
13 intervention is more readily available when the Petitioner
14 shows a significant ability to contribute on issues -- and I
15 will quote -- "Which would not otherwise be properly raised
16 or presented," closed quote.

17 That often can be the case in a licensing
18 proceeding where the Petitioner and the Staff might be in -
19 - taking different positions. However, it is not at all
20 true in an enforcement proceeding where a Petitioner is
21 simply trying to support the Staff. And since the Staff
22 issued the order, knows the spaces, and can be relied upon
23 to properly raise and present the basic issues, there is
24 much less of a need and much less of a reason to provide for
25 discretionary intervention.

1 JUDGE GLEASON: So your bottom line is that in 202
2 Proceedings it is much more difficult to meet the Pebble
3 Springs intervention test?

4 MR. AXELRAD: Particularly by someone who just
5 supporting the Staff. If someone, you know, can't quite
6 meet the test of he's adversely affected by the order, but
7 can show that the order can have some potential impact on
8 him which doesn't entitle him, as a matter of right, to
9 participate, then obviously he should have an opportunity to
10 present that. But someone who is just trying to duplicate
11 what the Staff is doing, that certainly is not a proper
12 basis for discretionary intervention.

13 JUDGE GLEASON: Ms. Curran?

14 MS. CURRAN: I was trying to find the page in my
15 brief. We cited a case where I think it was the licensing
16 board that said, in terms of the standing standards, the
17 Commission doesn't apply a different standard to enforcement
18 proceedings than it does to licensing cases, and I would
19 assume the same type of logic would apply to discretionary
20 intervention.

21 I would also note that although discretionary
22 intervention was not allowed, and the factual circumstances
23 were different, in Public Service Company of Indiana Marble
24 Hill Nuclear Generating Station, CLI 80-1011 NRC 438 (1980),
25 the Commission did discuss the prospect of allowing

1 discretionary intervention to some intervenors who had
2 requested a hearing at an enforcement action, and it was
3 denied. So it hasn't -- it hasn't been ruled out.

4 In terms of whether -- whether or interests would
5 be fully satisfied by the Staff's work in this case, I think
6 there are many issues that are raised in this enforcement
7 proceeding, and I would assume that some may get higher
8 priority, or more emphasis than other, and I don't think
9 that one can presume that the Staff is going to fully
10 address, to the extent that we would, all of the issues, and
11 that we may have a different perspective on some of these
12 issues, and have additional information that would be
13 helpful to the board. So I don't think it can be presumed
14 that the Staff will fully carry out all our interest in this
15 case.

16 JUDGE GLEASON: All right. Mr. Hom?

17 MR. HOM: In terms of whether there is some
18 different standard that should be applied for discretionary
19 intervention in enforcement proceedings versus licensing
20 proceedings, the Staff's position would be that there really
21 is not significant distinction to be made so long as the
22 intervenor would satisfy Pebble Springs requirements with
23 specificity to warrant granting discretionary intervention.

24 But other than the distinction between licensing
25 versus enforcement, the Staff does not have a strong view

1 that there should be any distinction.

2 JUDGE GLEASON: All right.

3 MR. DUNCAN: Could I speak to the issue just
4 briefly, Judge Gleason?

5 JUDGE GLEASON: I thought you had? Oh, excuse me.

6 MR. DUNCAN: No.

7 JUDGE GLEASON: You realize that I've not been
8 calling on you, and taking the position that if you wanted
9 to intervene at any time, you would.

10 MR. DUNCAN: I appreciate that. My comment will
11 be brief, and since I'm new to the case -- since we are new
12 to the case, I've not gotten involved in the conversation on
13 some of the distinctions of the cases, but I do bring to
14 this issue some experience as a former federal prosecutor,
15 and I will simply observe, as a personal matter -- I hope I
16 am not improper here -- that I was waiting to hear the
17 proposed intervenors assert that they could do something
18 that the Government could not do. But when I used to stand
19 up in a courtroom with the entire resources of the United
20 States government behind me, it never occurred to me that I
21 needed someone from outside the Government to come in and
22 help me do my job.

23 And I guess, as I read the Atomic Energy Act, and
24 with the whole legislative purpose to bring private
25 companies in to the nuclear industry for a whole variety of

1 reasons, I can't conceive that Congress ever contemplated
2 that there would come a time where, not only would a private
3 company who might be involved in some way, direct or
4 indirect in the nuclear industry, would have to come under
5 the jurisdiction of federal agencies, which we all accept in
6 the scope of the law, but they would have to be looking over
7 their shoulders at private entities coming in and asserting
8 that the Government can do it job, and, therefore, it needs
9 this private entity's help in an enforcement proceeding.

10 I've waited, and I've listened with thirsty ear
11 this morning for something that would distinguish what the
12 NACE that the Government can't do. All I hear is that NACE
13 wants to come in to see that the order is fully defended,
14 and I have heard nothing that would suggest that the Staff
15 is incapable in any way of fully enforcing whatever it
16 decides to enforce.

17 I guess, just from our standpoint, leaving aside
18 the cases that affect the issue -- and Mr. Axelrad has
19 eloquently addressed those, and we joined in those arguments
20 -- I just can't believe it is in the public interest, or was
21 ever contemplated by Congress to be in the public interest,
22 that we would have to defend against anyone who might want
23 to intervene, even though they purport to do nothing more
24 than to help the Government defend the order.

25 Thank you.

1 JUDGE GLEASON: Thank you, Mr. Duncan. I might
2 say just very briefly that, of course, a whole Atomic Energy
3 Act, at least the licensing sections in Section 189(a),
4 provides opportunities for members of the public to be
5 involved in these proceedings, even though, as often is the
6 case, the Staff is on the other side of the issue, so that
7 we do have cases here where interests are, in that sense,
8 adverse, and they are not like your typical Government case.

9 We appreciate having your comments, and will
10 consider them.

11 MR. DUNCAN: Thank you.

12 JUDGE GLEASON: What I would like to do is take
13 about a five minute recess now, and then we will go into the
14 other questions we have regarding the theories of the case.

15 [Recess.]

16 JUDGE GLEASON: I would like to say at the outset
17 that I would like to get this prehearing conference over in
18 a relatively short time because of the severity of the
19 weather out there. People tell me it is even worse than it
20 was, if that is possible, and I don't think we have that
21 much more, so we won't recess for lunch.

22 We have decided that we will, contrary to what I
23 had assumed in our last get-together, we will not be making
24 an oral decision today, or decision announced orally on the
25 intervention petition. We have received today a motion for

1 leave to file by NACE, and we hope to be making our decision
2 known on that in the near future. We may be giving an oral
3 ruling in several days and followed-up by a written opinion
4 supporting it.

5 I will say this also, Ms. Curran, that in the
6 event, and I don't want to predict it or cast it one way or
7 the other, in the event that you are provided an opportunity
8 to intervene, I think that time period of 30 days is too
9 much for the presentation in contention or the submission of
10 a contention because you have had this time period and I
11 presume you have done some work on it, so we will be cutting
12 that time period down to a two-week period at most.

13 MR. AXELRAD: Judge Gleason?

14 JUDGE GLEASON: Yes.

15 MR. AXELRAD: May I ask just one question?

16 JUDGE GLEASON: Yes.

17 MR. AXELRAD: Ms. Curran did file a motion for
18 leave to file something which she handed to us this morning.
19 Will we have an opportunity to respond to whether or not the
20 motion should be granted?

21 JUDGE GLEASON: Yes, if you would like to. Yes,
22 certainly.

23 MR. AXELRAD: I haven't had a chance to read it.

24 JUDGE GLEASON: Absolutely.

25 MR. AXELRAD: How long do we have?

1 JUDGE GLEASON: I would like you to do that in as
2 much a hurry as possible, certainly by three or four days,
3 that kind of thing.

4 JUDGE BOLLWERK: Can you get it in by Friday,
5 close of business?

6 MR. AXELRAD: Until I read it, I can't tell you,
7 Judge Bollwerk.

8 JUDGE GLEASON: We wanted to get some discussion
9 going about, if you care to present it, we don't want to be
10 interfering in the deliberations of your case, but we do
11 have some questions in our own mind about the theories
12 supporting this case with respect to the participation of
13 General Atomics and, in that connection, we all have
14 received the request by GA asking it to be discussed at this
15 conference asking for the scheduling of a briefing and oral
16 argument session on a jurisdictional question and postponing
17 discovery until that issue is resolved.

18 In your comments, you can -- I will hold off the
19 latter question until we get to discussion on the theory of
20 the case and make those separate matters for comment.

21 Mr. Hom, as I indicated before, of course as we
22 know the NRC will have the burden of proof on this issue.
23 Could you give us some understanding of your theory of this
24 case, would you care to give us some information on that
25 subject?

1 MR. AXELRAD: Judge Gleason, could I just raise
2 one threshold question before Mr. Hom responds?

3 JUDGE GLEASON: Yes.

4 MR. AXELRAD: This is an unusual situation because
5 there has been no ruling with respect to NACE's motion to
6 intervene.

7 JUDGE GLEASON: That's right.

8 MR. AXELRAD: I would assume, or at least strongly
9 suggest that any discussion, substantive or otherwise with
10 respect to the theory of the case or anything else would be
11 limited to just the parties in this case, and would not
12 include NACE which has not yet been admitted. I don't think
13 it is appropriate for a Petitioner who has not yet achieved
14 any formal status in this case to be able to discuss the
15 substantive matters.

16 JUDGE GLEASON: He's right.

17 MR. DUNCAN: I join in that request, if it is a
18 request.

19 JUDGE GLEASON: I beg your pardon?

20 MR. DUNCAN: I simply said, Judge, I said I would
21 join in that request if it is a request.

22 JUDGE GLEASON: I think you are giving more
23 substance to this thing than it deserves, Mr. Axelrad,
24 because all we are trying to do is really get some
25 discussion on the theory of the case, and we can treat her

1 as amicus for this purpose or as to anything else, but I
2 don't think we want to preclude her from making any comments
3 if she has some to make.

4 Essentially, I think this is a matter that goes
5 between you and the Staff -- or not between you and the
6 Staff but between General Atomics and the Staff, and those
7 are the comments we would like. In fact, if you didn't want
8 to even discuss your theory, that would be all right with
9 me, but there are some members of the Board that are
10 concerned about it, and it is my responsibility to raise it.

11 Mr. Hom?

12 MR. HOM: Your Honor, without getting into very,
13 very specific matters and, again, with the caveat that the
14 Staff's theory can be developing based upon facts that are
15 later discovered, I think the Staff is willing to make some
16 comments in this area.

17 We do have the three theories so to speak that
18 came with the January 13 memorandum and the Staff will say
19 that the theory of this case will not be based on, as I read
20 Item Number 2, we are not charging deliberate misconduct on
21 the part of any party at this time and, therefore, that does
22 not provide a basis in support of the Staff's theory.

23 With respect to Item Number 3, the Staff at this
24 time is not relying upon a contract or quasi-contract theory
25 stemming from purported reliance by the Commission on

1 statements of General Atomics.

2 The Staff's theory is more akin to, with obvious
3 factual distinctions, but more akin to the common law,
4 corporation/contract, sometimes tort action involving
5 parent-subsidary relationships where a claimant attempts to
6 pierce the corporate veil between the subsidiary and the
7 parent to reach the parent based fundamentally on day-to-
8 day or intimate control of the parent over the subsidiary.

9 JUDGE GLEASON: Does that do it, Mr. Hom?

10 MR. HOM: Pardon me?

11 JUDGE GLEASON: Does that do it?

12 MR. HOM: Yes.

13 JUDGE GLEASON: Mr. Duncan, I think we will ask
14 you to go next, please.

15 MR. DUNCAN: You will appreciate, Judge Gleason,
16 as you already have twice and I thank you for that, that we
17 are relatively new to the case and I am not prepared to
18 argue the merits of the jurisdictional issue this morning
19 except to say that thus far I can represent that we have
20 searched diligently in all of the statutes that we can find
21 that would appear to be relevant at all as well as all other
22 applicable law, and we can find nothing that poses
23 jurisdiction in the NRC to make this kind of claim against a
24 non-licensee and to purport to oppose non-civil penalty
25 financial liability upon a non-licensee in the circumstances

1 of this case, whether the theory being common law theory, or
2 whether it be a Federal statutory theory. We simply don't
3 think the Commission has jurisdiction over General Atomics i
4 the circumstances of this case. So we are prepared to
5 submit arguments to that effect at a later date in writing
6 and orally as the Board would wish.

7 JUDGE GLEASON: Mr. Axelrad?

8 MR. AXELRAD: I don't have any comment with
9 respect to the theory of the case with respect to General
10 Atomics.

11 JUDGE GLEASON: Ms. Curran?

12 MS. CURRAN: I don't have any comment at this
13 time, Your Honor.

14 JUDGE GLEASON: Thank you.

15 MR. DUNCAN: Judge, if I could have one other
16 comment. As we understand what the Staff has just said it
17 looks to us like the Staff has conceded that the order has
18 been narrowed considerably, that is to say that there is no
19 theory based on contract or quasi-contract or reliance by
20 anyone, and that the theory is based exclusively, to the
21 extent that it exists at all on some form a common law
22 piercing the corporate veil. If that is the case, and this
23 may be premature, but at some point we would certainly want
24 to see the scope of the order narrowed then so that we know
25 what we are dealing with here, because it appears to be much

1 broader than was represented by the Staff this morning.

2 JUDGE GLEASON: Mr. Hom?

3 MR. HOM: Your Honor, I am not sure. I might need
4 to address my question ultimately to Mr. Duncan, but I am
5 not sure what broader legal theory that we may have -- if I
6 did propose that there was a broader legal theory underlying
7 this case, I may have misspoken. I don't remember
8 discussing any legal theory this morning underlying the
9 case, but I would agree that to the extent that there is
10 conceivably a quasi-contractual reliance theory, I will say
11 again that that is not one that the Staff at this time
12 intends to pursue, but I am not sure what need be done with
13 the order, the order to the Staff clearly put General
14 Atomics on notice that we were concerned with the day-to-
15 day control of GA as we have alleged over the licensee, and
16 that that principally is the angle that we were taking.

17 MR. DUNCAN: Maybe I misspoke, the order seems to
18 be much boarder than the theories being asserted by the
19 Staff this morning. The order is replete with comments and
20 allegations about purported reliance upon comments, upon
21 letters, upon things. If that is irrelevant to what is the
22 nature of the order, then it seems to me that should be
23 withdrawn from the order so that if we ever get to the point
24 of discovery that we are under no illusion that we have to
25 be going into those kinds of areas.

1 JUDGE GLEASON: Mr. Duncan, I don't interpret Mr.
2 Hom's comments as saying anything in that order is
3 irrelevant to his basic theory, and I think what he is doing
4 is trying to satisfy the Board's request that they are
5 leaning in one direction or certain directions rather than
6 the other, but they are not being tied to any theory at the
7 present time.

8 MR. HOM: That's correct, Your Honor.

9 JUDGE GLEASON: So it nothing that you can really
10 sink your teeth in at this point.

11 MR. DUNCAN: I apologize, perhaps I was premature,
12 perhaps we do need to sharpen the issue then by written
13 reason and so forth as I have proposed.

14 JUDGE GLEASON: All right.

15 MS. CURRAN: Judge Gleason, I just wanted to ask a
16 clarifying question. Are you now considering Mr. Duncan's
17 request that a briefing be scheduled in order to --

18 JUDGE GLEASON: That is the next item I was going
19 to raise.

20 MS. CURRAN: Okay, because I would like to have a
21 chance to address that.

22 JUDGE GLEASON: I was discussing something else
23 with Judge Bollwerk. Let's hold it a minute.

24 Let's go to the other item that is before us and
25 that is the General Atomics' request regarding scheduling a

1 briefing and oral argument session on the jurisdictional
2 question and postponing discovery until that issue is
3 resolved.

4 Would you want to comment on that further than
5 your motion, Mr. Duncan?

6 MR. DUNCAN: I don't have much to add, Judge,
7 except to say that it seems to me that this is such a
8 fundamental issue to this proceeding with respect to General
9 Atomics. It's at least a threshold issue.

10 If this Commission has no jurisdiction, no
11 personal or other kinds of jurisdiction over General Atomics
12 in the circumstances of this case, I can't imagine why we
13 should be forced to engage in what by any standard is going
14 to be expensive discovery or other prehearing proceedings
15 until that issue is resolved, so I was simply suggesting as
16 a matter of, frankly, trying to hold down unnecessary costs
17 which may prove ultimately to be unnecessary, that we delay
18 discovery some reasonable amount of time until the Board has
19 had an opportunity to have the issues crisply and sharply
20 presented to it for decision on the jurisdictional issues,
21 understanding that that should not take forever but while
22 that is going on it seems like it's sufficiently important
23 and sufficiently a threshold issue that we should focus on
24 that before we proceed.

25 Now one could say, well, then perhaps General

1 Atomics shouldn't have to engage in discovery but discovery
2 by the other parties should proceed. That puts me in an
3 impossible position because obviously to represent General
4 Atomics adequately I can't permit discovery to proceed in
5 the abstract and not know what is going on and not
6 participate, and since the length of time we are asking is
7 limited only by the time that it takes to brief or present
8 the issues to the Board, which should not take all that
9 long, I think it is a reasonable request and that is why I
10 requested that all discovery be temporarily delayed until
11 such time as we can resolve the threshold and fundamental
12 issue of jurisdiction.

13 JUDGE GLEASON: Well, the difficulty that I have
14 with your request is you seem to be supporting a proposition
15 that discovery into facts relevant to jurisdiction is not
16 permissible, because you are asking to withhold any
17 discovery until after that issue is decided.

18 JUDGE BOLLWERK: Are you saying permissible or
19 necessary? I guess that's the question.

20 MR. DUNCAN: I believe that it is not necessary.
21 I don't think it is necessary for the Board -- see, right
22 now --

23 JUDGE GLEASON: Excuse me, Mr. Duncan. Right now
24 as far as I am concerned, as far as this Board is concerned,
25 discovery could -- and I told Mr. Duncan or Mr. Axelrad this

1 several weeks ago, discovery could be under -- being
2 undertaken.

3 There is something holding it up, so I am not sure
4 that I am understanding why discovery should be prohibited
5 from an inquiry into jurisdictional facts.

6 MR. DUNCAN: Well, I can only liken it, Judge, to
7 a pure motion on the pleadings in a civil action in a
8 federal court where you don't get to issues of fact; that on
9 the face of the allegations of the complaint that it is
10 clear that a claim has not been stated.

11 It might be a 12(b)(6) motion, it might be a
12 motion for judgment on the pleadings, but that there are
13 certain issues of law that the Board can rule upon without
14 even addressing any facts, and that it is unnecessary for
15 the parties to seek facts. I mean, just looking at the face
16 of the order itself, and what is the basis, the legal basis,
17 for the assertion of jurisdiction over General Atomics in
18 the circumstances of this case.

19 You don't have to get to issues of whatever the
20 theory may be involving piercing a corporate veil. What is
21 the -- what is the threshold jurisdiction that would permit
22 the Commission to even assert such claims over someone who
23 is an admitted non-licensee, someone who is in the
24 circumstances set forth in the Commission's own pleading.
25 So you don't have to reach the facts.

1 JUDGE GLEASON: Are you entitled to -- are you
2 entitled to seek discovery of those jurisdictional facts
3 underlying their claim? Underlying their order?

4 MR. DUNCAN: What I was proposing is that we would
5 not take discovery. No one would take discovery. We would
6 simply --

7 JUDGE GLEASON: Well, I realize what you are
8 proposing. But what I'm -- well, let's let the Staff
9 respond. Excuse me.

10 MR. HOM: Your Honor, I can -- the only situation
11 I can see where something of the nature, I believe, Mr.
12 Duncan is proposing is where, perhaps, we assume for the
13 purposes of the pleadings to be filed or the argument that
14 certain facts exist such as -- not necessarily limited to
15 this, but such as General Atomics has defacto day-to-day
16 control over SFC.

17 I mean, to the extent that we could assume
18 arguendo certain facts that would be more or less
19 jurisdictional facts in this case in lines with the theory
20 underlying the case, then I can see, perhaps, a benefit in
21 that respect. But it would have to -- I believe that we
22 would have to assume certain facts exist and GA, as I would
23 see it, would be arguing notwithstanding the existence of
24 any set of facts that exist, that Staff did not have somehow
25 the authority to issue this order.

1 MR. DUNCAN: That's correct. That is correct,
2 Judge. That is to say the issue that would be presented in
3 the briefing while discovery was held temporarily in
4 abeyance would be under any of the facts asserted by the
5 Staff in its October 15, 1993 Order.

6 Assuming them all to be true, has it stated a
7 claim that establishes that the NRC has jurisdiction over
8 General Atomics. Assuming the facts as stated in the
9 October 15, 19 -- so we don't need to go into discovery on
10 those facts, for the purposes of the first motions that
11 would address the jurisdiction of the Commission.

12 JUDGE GLEASON: So you, in effect, are making a
13 motion for summary judgment?

14 MR. DUNCAN: Summary disposition. Something of
15 that nature.

16 JUDGE BOLLWERK: Well, there are not affidavits
17 involved. There is nothing -- I mean, in theory you are
18 making a straight motion to dismiss under 12(b)(b) if you
19 look --

20 MR. DUNCAN: It's accurate. Yes, sir.

21 JUDGE BOLLWERK: -- to the federal practice. That
22 would be it.

23 MR. DUNCAN: Yes, sir.

24 MR. HOM: Your Honor, if I can comment. I would -
25 - the order itself gives some facts as illustrations, but by

1 no means has the Staff enumerated every fact that it intends
2 to rely upon to meet its burden, and if there is some
3 understanding that there may be facts that the Staff may
4 rely on not explicitly laid out in the order, then I can see
5 some benefit, perhaps.

6 But if it is a situation where the pleadings are
7 based purely on the specific facts alleged in the order, we
8 would not agree that that would be an appropriate limitation
9 because there are certainly -- there is certainly a
10 potential of facts that the Staff is unaware of that we
11 believe would properly be potentially admissible in this
12 case to prove our case.

13 MR. DUNCAN: Judge, the outrageousness of that
14 argument is apparent on its face. Under that theory, which
15 we think the law under no circumstances permits, any federal
16 agency could file an order of any form and say, "By the way,
17 we are not bound by this order. There are probably a lot of
18 facts we don't know about, and you can't even attack to the
19 jurisdiction until we are able to complete discovery, and
20 since we almost go through an evidentiary proceeding, but at
21 least complete discovery."

22 Obviously, I think the Commission is bound by the
23 facts as stated in the October 15, 1993 Order. They were
24 the one that initiated the order.

25 If there are additional facts they wish to

1 discover, perhaps that is appropriate for the parties that
2 are subject to that order, but the threshold question for us
3 is: do they, on the facts that they plead themselves, have
4 jurisdiction over General Atomics? We believe they don't,
5 and we believe that they are legally obligated -- purely a
6 question of law -- to state those facts in the order.

7 And to the extent they have not stated them, that
8 is not our problem. We are entitled to attack the
9 jurisdiction of the Commission on the facts, as stated in
10 the order, assuming those facts to be true for the purposes
11 of the legal question that would be presented to the Board,
12 the narrow legal question of jurisdiction.

13 JUDGE GLEASON: Well, I don't concur with you, Mr.
14 Duncan, that that order would outline the entire case that
15 one would want to present, and that is what you seem to be
16 saying.

17 MR. DUNCAN: If it did not, Judge, we would be
18 bound to essentially having to go through an entire
19 litigation proceeding to find out what facts it was upon
20 which the Staff based the originally order to assert
21 jurisdiction over General Atomics.

22 JUDGE GLEASON: I don't think that is necessary
23 either, but let me pause for just a minute here.

24 [Brief pause for Board to confer.]

25 JUDGE GLEASON: The proper resolution, it seems to

1 us, Mr. Duncan, for the issues that you've raised here --
2 and we concur that it is a primary issue in the case, the
3 question of jurisdiction, is for you to file a motion to
4 dismiss, and you would have to support that, of course, and
5 then the Staff would have the responsibility to respond.

6 And barring that, I don't think we could -- we
7 would be willing to issue an order, you know, having some
8 kind of briefing schedule because I think it would be better
9 to file this in the context of your motion, and I certainly
10 do not think that we should or would want to stop any
11 discovery until that matter is done because every party is
12 entitled to find out the basis for a lot of things in any
13 proceeding, as you know. So I think that would be our
14 ruling.

15 Are there any other matters that can be -- of kind
16 of giving us some kind of a feeling as to what your
17 intentions are, could you disclose those?

18 MR. DUNCAN: Well, we will be filing an
19 appropriate motion, and I guess we are already commencing
20 work on it. I guess -- I am not quite sure -- I didn't
21 anticipate that we'd be also having to deal with
22 discoveries, so I am not quite sure what is a reasonable
23 time, but we're working as fast as we can on it, and we will
24 commit to continuing to do that.

25 JUDGE GLEASON: All right. The earlier the

1 better.

2 MS. CURRAN: Judge Gleason?

3 JUDGE GLEASON: Yes?

4 MS. CURRAN: I'd like to ask that if General
5 Atomics is going to file a motion to dismiss, if we are to
6 be admitted to the proceeding, that we be given an
7 opportunity to respond as well.

8 JUDGE GLEASON: I think that we will have a
9 decision, at least orally, on your standing issue prior to
10 that motion being decided, certainly.

11 Whether we will have something on the contention
12 issue, I just don't know. I can't foresee that far in
13 advance because I don't know what you are going to have.

14 All right. Let's see. I am not sure whether
15 there are any other matters that can really be
16 satisfactorily discussed at this prehearing conference
17 because -- excuse me a minute.

18 [Brief pause.]

19 JUDGE GLEASON: As I have indicated to you, you
20 are free to start discovery at any point. You understand
21 that? Is that right? You understand that, Mr. Hom?

22 MR. HOM: Yes. Yes, Your Honor.

23 JUDGE GLEASON: Okay, fine. Until that is started
24 -- and I presume there will be -- we really can't get into
25 discussing a hearing schedule, evidentiary hearing. So the

1 quicker that is done, why, the better off the proceeding
2 will be as far as pacing is concerned and timeliness is
3 concerned.

4 I think the Board would like to receive -- even
5 though it is not, you know, four-square involved in the
6 issue of the order and is certainly behind the order,
7 receive some kind of a report on what is going on in the
8 decommissioning of this Sequoyah facility, the status of it;
9 and if we could get something from SFC and also something
10 from that Staff on that, we would appreciate it. It just
11 keeps us advised as to what's going on.

12 MR. HOM: Your Honor, would this be a periodic
13 report?

14 JUDGE GLEASON: No, just an initial report as to
15 what is going on.

16 MR. HOM: Is there a particular date that you
17 would like this by?

18 JUDGE GLEASON: Anytime in the next month would be
19 fine.

20 All right. I think we are ready to recess this
21 hearing, unless somebody else has something.

22 JUDGE BOLLWERK: Just as a general matter, does
23 anybody have a feeling for how long they think discovery is
24 going to take in this case?

25 MR. HOM: Your Honor, I believe discovery could be

1 fairly extensive in this case, and to give you a ball park,
2 I would -- I would -- to be safe, to err on the side of
3 being too long, I would err on the side of saying well into
4 the summer, potentially.

5 JUDGE BOLLWERK: We are talking at least six
6 months?

7 MR. HOM: Yes. The reason being we are talking
8 about a case that potentially may need to rest heavily on a
9 number of sworn statements, and it is not a matter of one
10 round of document production or interrogatories, anything of
11 that nature.

12 The Staff believes it will be needing to speak to
13 a number of employees at various entities. As you may know,
14 there are -- there is a fairly complex corporate structure
15 surrounding General Atomics, its parent, major stockholders
16 of the parent, intervening holding companies between SFC and
17 GA.

18 Also, there is -- I've been informed by the latest
19 filing, or at least one of the answers filed by one of the
20 parties -- that there is a new arrangement in connection
21 with the ConverDyne joint venture, and that there has been a
22 transition in stock ownership and partnership arrangements
23 there. I mean, we are looking at a fairly complex number of
24 different entities involved that could very likely bear on
25 the issue of control. We don't have simply GA and SFC

1 involved in this proceeding.

2 JUDGE GLEASON: All right.

3 JUDGE BOLLWERK: Mr. Axelrad, do you have anything
4 to add on that?

5 MR. AXELRAD: No. I agree with Mr. Hom that it
6 would probably take a lengthy period for discovery. Six
7 months is probably a minimum.

8 JUDGE BOLLWERK: Any settlement negotiations
9 between the parties?

10 MR. HOM: None have been undertaken at this time
11 as far as I'm aware. I believe that, hopefully, all parties
12 would always be receptive to any reasonable proposals.

13 JUDGE GLEASON: Anything anyone else wants to add?

14 MR. HOM: As a housekeeping matter, Your Honor --

15 JUDGE GLEASON: Yes?

16 MR. HOM: Mr. Bachmann is not here, but he has
17 informed me to request, if appropriate and reasonable, that
18 for any applicable filings that are made between the parties
19 where a computer disk, the transfer of a computer disk might
20 be helpful in speeding things along in terms of responses to
21 particular questions or whatever, that I would just like to
22 request cooperation and perhaps your approval of such a
23 procedure.

24 JUDGE GLEASON: We certainly approve of such a
25 procedure. It is up to the parties as to whether they will

1 cooperate on it.

2 Anything else, Mr. Hom?

3 MR. HOM: Not at this time, Your Honor.

4 JUDGE GLEASON: Any of the parties want to respond
5 to that request?

6 MR. AXELRAD: I don't have any response right now.

7 MS. CURRAN: Sounds reasonable.

8 JUDGE GLEASON: All right. The prehearing
9 conference will adjourn, and we thank you very much.

10 [Whereupon, at 12:21 p.m., the prehearing
11 conference was adjourned.]

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REPORTER'S CERTIFICATE

**This is to certify that the attached proceedings
before the United States Nuclear Regulatory
Commission
in the matter of:**

NAME OF PROCEEDING: Sequoyah Fuels Corporation

DOCKET NUMBER: 40-8027-EA

PLACE OF PROCEEDING: Bethesda, MD

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

Jon Hurdley
Official Reporter
Ann Riley & Associates, Ltd.