

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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In the Matter of)

Docket No. 40-8027-EA

SEQUOYAH FUELS CORPORATION)
and GENERAL ATOMICS)

(Decontamination and
Decommissioning Funding)

(Gore, Oklahoma Site))

March 17, 1994

**SEQUOYAH FUELS CORPORATION'S REPLY BRIEF
IN OPPOSITION TO THE RULING IN SECTION II.A OF LBP-94-5**

Sequoyah Fuels Corporation ("SFC") hereby submits this Reply Brief in opposition to the Atomic Safety and Licensing Board's ("Licensing Board") ruling in section II.A of its Memorandum and Order issued February 24, 1994 ("LBP-94-5").^{1/}

On March 11, 1994, SFC filed its "Initial Brief In Opposition to the Ruling in Section II.A of LBP-94-5" ("SFC's Initial Brief"). Concurrently, the NRC Staff filed a "Brief in Response to Commission Order of March 3, 1994" ("NRC Staff's Initial Brief"), in which the Staff maintained that review by the Commission is not merited and that the Licensing Board's ruling should be sustained. Finally, NACE filed its "Initial Brief Regarding Appropriateness of Commission Review of LBP-94-5 and Whether Ruling in Section II.A Should Be Sustained" ("NACE's

^{1/} This proceeding was initiated when the Director, Office of Nuclear Material Safety and Safeguards ("NMSS"), issued an order directed to SFC and General Atomics ("GA") on October 15, 1993. 58 Fed. Reg. 55,087 (the "Order").

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Initial Brief"), in which NACE maintained that Commission review is premature and inappropriate, and that the Licensing Board's ruling should be sustained.

For the reasons stated in SFC's Initial Brief and those discussed herein, the Commission should reject the arguments of the NRC Staff and NACE, accept immediate review, and reverse the Licensing Board's ruling.

ARGUMENT

I. COMMISSION REVIEW IS APPROPRIATE

As stated in SFC's Initial Brief, the Licensing Board's ruling in section II.A of LBP-94-5 poses significant legal and policy questions that will affect the basic structure of this and other enforcement proceedings in a pervasive and unusual manner. It is therefore important that the Commission accept immediate review of this question pursuant to 10 CFR § 2.786(g).

NACE asserts that Commission review of the Licensing Board's ruling is premature because NACE has not yet been admitted as a party to this enforcement proceeding. NACE Initial Brief at 3. However, the fact that SFC will have the right to file an appeal of any final decision admitting NACE as a party, ^{2/} is irrelevant to the Licensing Board's authority under 10 CFR § 2.730(f) to refer a ruling to the Commission under appropriate circumstances. The Licensing Board's ruling grants standing to NACE based upon the unprecedented legal conclusion that a petitioner that favors an enforcement order can be

^{2/} See 10 CFR § 2.714a(c).

adversely affected by an adjudicatory hearing on whether the order should be sustained. This is the first time that a petitioner has been granted standing for the purpose of acting as a "private prosecutor" in an enforcement proceeding. Therefore, the Licensing Board correctly concluded that this ruling "is of some moment for the structure of this proceeding, as well as the Commission's adjudicatory process generally," and it appropriately referred its ruling on this matter to the Commission for its "immediate review." LBP-94-5, slip op. at 38-39. ^{3/}

Both the NRC Staff and NACE assert in their initial briefs that the participation of NACE as a party in this proceeding will not threaten other parties with irreparable harm and that immediate review therefore is not warranted under 10 CFR § 2.786(g)(1). NRC Staff's Initial Brief at 5-6; NACE's Initial Brief at 6. However, neither NACE nor the NRC Staff account for the threat that the parties may be irreparably harmed by the

^{3/} NACE appears to suggest that judicial economy might be served by deferring consideration of the referred question because NRC's rules provide "adequate procedural relief should an actual controversy arise between the parties at a later point." NACE's Initial Brief at 4. Any such suggestion is clearly erroneous both because the Licensing Board's ruling has significant policy and legal implications for the Commission's adjudicatory processes generally, and because deferring the question will only result in the need to revisit this issue in the coming months. If NACE is denied party status for lack of an admissible contention, it will undoubtedly appeal. Thus, regardless of the Licensing Board's ultimate ruling on NACE's party status, an appeal would be filed which would wastefully require all parties to re-brief the referred ruling and repeat the arguments set forth in the Initial Briefs and Reply Briefs that are now before the Commission for decision.

unprecedented participation by NACE as a private prosecutor in this enforcement proceeding.

The NRC Staff suggests that under the Commission's decision in Oncology Service Corporation a licensee's "due process" interests must be threatened before a Licensing Board's ruling would implicate potential irreparable harm that could warrant interlocutory review. NRC Staff's Initial Brief at 6 (citing Oncology, CLI-93-13, 37 NRC 419 (1993)). However, this interpretation of Oncology is far too narrow. Although Oncology establishes that potential harm to due process rights may present an appropriate circumstance for interlocutory review of a Licensing Board decision, it does not suggest that threats to due process interests present the only circumstances under which such review is appropriate. Clearly, interlocutory review would be appropriate in circumstances where a Licensing Board ruling threatened irreparable harm to a party's statutory rights, to constitutional rights other than due process rights, or to other significant interests.

Both NACE and the NRC Staff concede that NACE's participation may cause additional delay and expense to the parties to this proceeding, but they nevertheless maintain that the effects of NACE's participation is insufficient to warrant interlocutory review. NRC Staff's Initial Brief at 6; NACE's Initial Brief at 6. These arguments minimize the tangible adverse effect that NACE's participation would have on other

parties in this proceeding. ^{4/} They also ignore the fact that such participation will alter this enforcement proceeding in fundamental ways. For example, NACE's participation as a party could limit the Director of NMSS' flexibility in exercising his delegated enforcement discretion and would subject SFC and GA to duplicative prosecution by a private party. Moreover, under the circumstances of this case, the Commission may appropriately consider the potential irreparable effect of the additional expenses that will be born by SFC. ^{5/}

^{4/} For example, SFC has relied upon highly confidential commercial information relating to ConverDyn, including sensitive sales and cost information, in order to demonstrate the adequacy of its plan for assuring funding for the completion of decommissioning. SFC has already provided this information to the NRC, but it has done so pursuant to the confidentiality provisions of 10 CFR § 2.790, because public dissemination of this confidential information could threaten ConverDyn's business and jeopardize SFC's funding. NACE's participation in this proceeding therefore will require protective orders and special procedures in order to permit review of such information.

^{5/} It is well-established that there are exceptions to the general proposition that economic injuries do not constitute irreparable harm. See, e.g., Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841, 843 & n.2 (D.C. Cir. 1977).

In Holiday Tours, the D.C. Circuit concluded that although "destruction of a business is . . . an essentially economic injury," such an injury is not a temporary monetary loss that is insufficient to be considered irreparable harm. Id. Another appropriate exception should apply in this case, where the public interest in decommissioning the Sequoyah facility could be irreparably harmed to the extent unnecessary litigation expenses are imposed upon SFC. The assets of SFC and the funds available to SFC for the decommissioning of the Sequoyah facility are not unlimited. Every dollar expended by SFC in unnecessary litigation caused by NACE's participation will be one less dollar

(continued...)

Finally, both the NRC Staff and NACE suggest that NACE's participation in this proceeding will not affect the basic structure of this proceeding in any pervasive or unusual manner under 10 CFR § 2.786(g)(2). NRC Staff's Initial Brief at 6-7; NACE's Initial Brief at 6-7. Contrary to these assertions, the unprecedented circumstances presented by this decision and its pervasive impact on this proceeding were so unusual that the Licensing Board, on its own initiative, referred this question for "immediate review" by the Commission.

As SFC demonstrated in its Initial Brief at 9-15, the rule articulated by the Licensing Board poses significant legal and policy questions for the structure of this and other enforcement proceedings because it would permit a petitioner to act as a "private prosecutor" when a licensee or other person opposed to an enforcement order challenges the Commission. Once NACE is admitted to this enforcement proceeding for purposes of acting as a private prosecutor, the Commission's enforcement discretion may be severely limited. Moreover, NACE may seek to compel the Commission to implement proposed enforcement actions that NACE could not compel the Commission to propose or otherwise undertake in the first instance.

For these reasons, and those previously stated in SFC's Initial Brief, it is important that the Commission accept review of this question.

^{5/}(...continued)

available for decommissioning activities that are clearly in the public interest.

II. THE LICENSING BOARD'S RULING IN SECTION II.A OF LBP-94-5
SHOULD NOT BE SUSTAINED

As noted in SFC's Initial Brief (at 15-18), the D.C. Circuit's decision in Bellotti v. NRC, 725 F.2d 1380, 1381 (D.C. Cir. 1983) is the guiding, if not controlling, authority in reviewing the Licensing Board's ruling in LBP-94-5. In contrast, NACE suggests that the Commission should rely upon the dissenting opinion in Bellotti, wherein Judge Skelly Wright argued that the public might have an interest in an enforcement proceeding if a licensee requested a hearing to challenge the proposed action. Indeed, NACE appears to suggest that the Commission should reject Bellotti altogether, because its "vitality has been all but destroyed." NACE's Initial Brief at 11 & n.6. ^{6/}

SFC believes that Bellotti not only continues with full force, but its fundamental conclusions are directly applicable to this case. To the extent that the characterization of a court's holding by a dissenting opinion is of any moment, SFC notes that Judge Adams of the Third Circuit has explained in a dissenting opinion in another case:

Bellotti holds that the Commission has broad discretion in limiting the scope of a license amendment proceeding at its outset and that where it limits it to whether a safety plan, developed wholly outside the proceeding, should be adopted, only those parties

^{6/} NACE's new found skepticism with regard to the vitality of Bellotti is curious in light of its consistent reliance upon Bellotti before the Licensing Board. For example, in its November 18, 1993 Motion for Leave to Intervene NACE argued that its intervention request was timely, because it was not "adversely affected" by the order under the terms of Bellotti. NACE Motion at 3. See also NACE Motion at 4.

opposing the adoption of the plan have a right to request and participate in a hearing.

In re: Three Mile Island Alert, Inc. ("TMI Alert"), 771 F.2d 720, 746 n.11 (3d Cir. 1985) (Judge Adams, dissenting) (emphasis added), cert. denied sub nom., Aamodt v. NRC, 475 U.S. 1082, reh'g denied, 476 U.S. 1179 (1986). Notably, Judge Adams recognized that under Bellotti a petitioner that favors an enforcement action has neither the right to request a hearing, nor the right to "participate in a hearing."

The NRC Staff correctly notes that Bellotti itself makes the point that participation by a petitioner "at a hearing may be denied only when the Commission is seeking to make a facility's operation safer." NRC Staff's Initial Brief at 9 n.7 (quoting Bellotti, 725 F.2d at 1383 (emphasis added)). Thus, the Bellotti analysis applies with equal measure to the right to request a hearing and the right to participate in a hearing requested by another, i.e., the two rights are co-extensive.

The NRC Staff attempts to distinguish Bellotti and denies its applicability in this case, because no party had requested a hearing in Bellotti. NRC Staff's Initial Brief at 9 n.7. However, this distinction is of no moment. The point of Bellotti is that a petitioner who favors a proposed enforcement action cannot be adversely affected by the proceeding, because the proceeding is intended to make the facility safer. Even if no action is taken, this will not make the facility less safe, but rather will return the facility to

the status quo ante. Therefore, such a petitioner cannot be adversely affected by any possible outcome of the proceeding.

NACE's assertion that the Order at issue in this proceeding involves a license amendment triggering the hearing rights of section 189a is incorrect. ^{7/} In any event, NACE's assertion is of no moment, because "this issue has no practical impact in these circumstances." LBP-94-5, slip op at 10 n.4. Both the intervention rights provided in 10 CFR § 2.714 and the hearing rights afforded under section 189a are limited to those petitioners "whose interest may be affected by a proceeding." ^{8/} Thus, the Bellotti analysis applies with equal force in assessing whether a petitioner is adversely affected by a section 189a proceeding ^{9/} or by other NRC proceedings covered by 10 CFR § 2.714.

Finally, the NRC Staff's assessment of the Appeal Board's decision in Sheffield supports SFC's position that the Licensing Board's decision in LBP-94-5 relies upon dicta. See Nuclear Eng'g Co. (Sheffield, Illinois, Low-Level Radioactive

^{7/} NRC Staff has agreed that issuance of the Order did not initiate a proceeding falling within the terms of section 189a. See LBP-94-5, slip op. at 10 n.4. The provisions of SFC's current license (including provisions with respect to the reserve account noted by NACE) remain in effect, and SFC is obligated to remain in compliance with these license requirements. The Order seeks to impose additional requirements upon SFC and GA; it does not seek to change the license provisions cited by NACE. Any change in those provisions would be beyond the scope of this proceeding.

^{8/} 10 CFR § 2.714(a). The language of section 189a is virtually identical. 42 U.S.C. § 2239(a)(1).

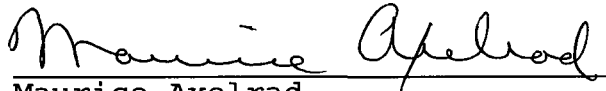
^{9/} Bellotti itself involved a section 189a proceeding.

Waste Disposal Site), ALAB-473, 7 NRC 737 (1978). As the NRC Staff notes, after finding that the petitioners had failed to show that they were adversely affected by an outcome of the proceeding, "[t]he Appeal Board went on to state that its decision does not 'foreclose all attempts at intervention in support of an application.'" NRC Staff's Initial Brief at 8 (quoting Sheffield, ALAB-473, 7 NRC at 743). This appropriate characterization of the Sheffield decision emphasizes that the Appeal Board's holding was that the petitioners were not "adversely affected" by the proceeding. The Appeal Board's suggestion that petitioners might be permitted to intervene in support of a license renewal application under other circumstances was an afterthought that was understandably devoid of any thoughtful analysis. The subsequent discussion of this question in Shoreham made clear that the Appeal Board believed that this question had not yet been resolved. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 n.4 (1983); SFC's Initial Brief at 19-20.

CONCLUSION

FOR THE FOREGOING REASONS, the Commission should accept immediate review of the Licensing Board's ruling in section II.A of LBP-94-5, reverse that ruling, and remand this case to the Licensing Board for issuance of a decision consistent with the ruling of the Commission.

Respectfully submitted,



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I hereby certify that copies of "Sequoyah Fuels Corporation's Reply Brief In Opposition To The Ruling In Section II.A of LBP-94-5" were served upon the following persons by hand delivery or by deposit in the United States mail, first class postage prepaid and properly addressed as indicated by an asterisk (*) on the date shown below:

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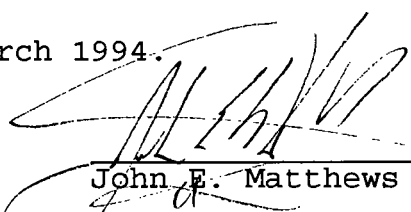
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