

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Nils J. Diaz, Chairman  
Edward McGaffigan, Jr.  
Jeffrey S. Merrifield

**DOCKETED 01/14/04**

**SERVED 01/15/04**

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In the Matter of )  
 )  
SEQUOYAH FUELS CORPORATION )  
 )  
(Gore, Oklahoma Site) )  
\_\_\_\_\_ )

Docket Nos. 40-8027-MLA-7  
40-8027-MLA-8

**CLI-04-02**

**MEMORANDUM AND ORDER**

These cases arise from the applications of Sequoyah Fuels Corporation ("SFC") for two materials license amendments for decommissioning its Gore, Oklahoma facility. The Presiding Officer denied the hearing requests of the State of Oklahoma and the Cherokee Nation and terminated the proceedings. The Cherokee Nation has appealed. Oklahoma has not. The Commission today affirms the Presiding Officer's order.

**I. BACKGROUND**

SFC's Oklahoma facility produced uranium hexafluoride from yellowcake from 1970 until 1993 and, for a portion of this time, the facility converted depleted uranium hexafluoride to uranium tetrafluoride. The operations produced radioactive waste streams. On the basis of a Commission decision during SFC's decommissioning planning,<sup>1</sup> SFC applied to amend its source materials license to possess byproduct material, as defined by § 11e(2) of the Atomic

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<sup>1</sup> See Commission Staff Requirements Memorandum (July 25, 2002), responding to SECY-02-0095, "Applicability of Section 11e.(2) of the Atomic Energy Act to Material at the Sequoyah Fuels Corporation Uranium Conversion Facility" (June 2, 2002).

Energy Act.<sup>2</sup> Recently, the Commission denied a challenge to the reclassification of some of SFC's wastes as byproduct material under Section 11e(2).<sup>3</sup>

Earlier, the NRC Staff had issued the requested materials license amendment to SFC.<sup>4</sup> Under the terms of that amendment, SFC was to submit a reclamation plan by March 15, 2003, and a ground water corrective action plan and a ground water monitoring plan by June 15, 2003. SFC timely submitted a license amendment application requesting approval of its reclamation plan, which described SFC's proposal to build a disposal cell at the Gore site. After publication of notice of the amendment request and opportunity for a hearing under 10 C.F.R. Part 2, Subpart L, the State of Oklahoma, the Cherokee Nation, and Ed Henshaw submitted timely hearing requests.<sup>5</sup> The Presiding Officer recently granted the hearing requests of Oklahoma and the Cherokee Nation and denied the request of Ed Henshaw.<sup>6</sup>

In separate license amendment requests in June, 2003, SFC requested approval of its two ground water plans. Both the State of Oklahoma and the Cherokee Nation submitted untimely hearing requests in response to *Federal Register* notices regarding SFC's license amendment requests for approval of its ground water corrective action plan (Docket No. 40-

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<sup>2</sup>The relevant portion of the definition is that the term "byproduct material" means "(2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014e(2); AEA § 11e(2).

<sup>3</sup>*Sequoyah Fuels Corp. (Gore, Oklahoma Site)*, CLI-03-15, 58 NRC \_\_ (Nov. 13, 2003).

<sup>4</sup>See Amendment 29 to Materials License No. SUB-1010, Approval of Request to Authorize Possession of Byproduct Material (Dec. 11, 2002).

<sup>5</sup>"Sequoyah Fuels Corp.; Notice of Receipt of Amendment Request and Opportunity to Request a Hearing," 68 Fed. Reg. 18,268 (April 15, 2003). See also Docket No. 40-8027-MLA-6.

<sup>6</sup>See LBP-03-29, 58 NRC \_\_ (Dec. 23, 2003).

8027-MLA-7)<sup>7</sup> and its ground water monitoring plan (Docket No. 40-8027-MLA-8).<sup>8</sup> Specifically, the deadline for service of hearing requests was Sept. 24, 2003; Oklahoma served its request on Sept. 29, 2003, and the Cherokee Nation on Oct. 2, 2003. SFC and the NRC Staff filed answers opposing the petitions as untimely.

After consolidating the two proceedings<sup>9</sup> and inviting the petitioners to file replies to the NRC Staff's and SFC's answers, the Presiding Officer rejected both untimely requests and terminated the proceedings.<sup>10</sup> The Cherokee Nation filed an appeal of LBP-03-24.<sup>11</sup>

## II. DISCUSSION

Procedurally, the Cherokee Nation's hearing request in MLA-7 and MLA-8 was defective because it was late. Significantly, the Cherokee Nation did not avail itself of the opportunity to respond to the oppositions to its hearing request and attempt to justify its tardiness.<sup>12</sup>

Thereafter, the Presiding Officer applied the standard set out in 10 C.F.R. § 2.1205(l)(1) and

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<sup>7</sup>"Notice of Receipt of License Amendment Request From the Sequoyah Fuels Corp. to Approve a Ground Water Corrective Action Plan for Its Gore, Oklahoma Facility, and Opportunity to Request a Hearing," 68 Fed. Reg. 51,033 (Aug. 25, 2003).

<sup>8</sup>"Notice of Receipt of License Amendment Request from the Sequoyah Fuels Corp. To Approve a Ground Water Monitoring Plan for Its Gore, Oklahoma Facility, and Opportunity To Request a Hearing," 68 Fed. Reg. 51,034 (Aug. 25, 2003).

<sup>9</sup>See unpublished "Memorandum and Order (Consolidating Proceedings and Authorizing Further Filings)" (Oct. 29, 2003). Oklahoma filed a single pleading to request a hearing in both the MLA-7 and the MLA-8 proceedings. The Cherokee Nation also filed a combined request for hearing. Similarly, SFC and the NRC Staff each filed a single response to each unified hearing request. The Presiding Officer stated that "there appears to be good reason to consider the requests together." *Id.* at 2. NRC adjudicatory rules provide for consolidation of proceedings "if it is found that such action will be conducive to the proper dispatch of [the Commission's] business and to the ends of justice . . ." 10 C.F.R. § 2.716.

<sup>10</sup>See LBP-03-24, 58 NRC \_\_\_ (Nov. 19, 2003).

<sup>11</sup>The State of Oklahoma did not appeal the decision.

<sup>12</sup>See unpublished "Memorandum and Order (Consolidating Proceedings and Authorizing Further Filings)" at 3.

determined that the delay was inexcusable.<sup>13</sup> Therefore, he rejected the requests of both the Cherokee Nation and Oklahoma, referred the requests to the NRC Staff as 10 C.F.R. § 2.206 petitions,<sup>14</sup> and terminated the proceedings.

To accept a late hearing request in a 10 C.F.R. Part 2, Subpart L proceeding, the Presiding Officer must determine, under the strict terms of 10 C.F.R. § 2.1205(l)(1), both that the delay in filing was excusable and that granting the request will not result in undue prejudice or undue injury to any other participant in the proceeding. Although the Presiding Officer found that the late filing “cannot be said to have occasioned consequential prejudice or injury to either [SFC] or the Staff,” he reasonably found the Cherokee Nation’s explanation for its tardiness inadequate.<sup>15</sup> Indeed, “[t]he simple fact is that . . . the explanations for the tardiness advanced by counsel well-versed in NRC adjudicatory proceedings falls so far short of the mark that their acceptance would make a mockery of the deadline that they have failed to meet.”<sup>16</sup> Further, the Presiding Officer, noting the “relative brevity of the tardiness,” observed that “[i]f such a consideration were deemed of itself to make the tardiness excusable, the deadline would be stripped of real meaning.”<sup>17</sup>

The Commission agrees. The Cherokee Nation’s brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of the Presiding Officer’s

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<sup>13</sup>See LBP-03-24, 58 NRC \_\_\_\_.

<sup>14</sup>“If the request for a hearing on the petition for leave to intervene is found to be untimely and the requestor or petitioner fails to establish that it otherwise should be entertained on the paragraph (l)(1) of this section, the request or petition will be treated as a petition under § 2.206 and referred for appropriate disposition.” 10 C.F.R. § 2.1205(l)(2).

<sup>15</sup>See LBP-03-24, 58 NRC at \_\_\_, slip op. at 6.

<sup>16</sup>*Id.* at \_\_\_, slip op. at 8.

<sup>17</sup>*Id.*, n.9.

well-considered decision.<sup>18</sup> Accordingly, we affirm the Presiding Officer's decision to terminate these proceedings, for the reasons he gave.

### III. CONCLUSION

We *affirm* the Presiding Officer's order denying the Cherokee Nation's hearing requests for the reasons he stated in LBP-03-24.

IT IS SO ORDERED.

For the Commission

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 14<sup>th</sup> day of January, 2004.

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<sup>18</sup>See *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 26, 265 (2002). In a belated attempt to justify its tardiness, the Cherokee Nation included in its appellate brief new information not previously presented to the Presiding Officer. The Commission will not consider matters raised for the first time on appeal. See *Hydro Resources, Inc.*, CLI-00-8, 51 NRC 227, 243 (2000).