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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III

Thomas D. Murphy
Alternate Board Member

In the Matter of	Docket No. 40-8027-EA
SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS	Source Material License No. SUB-1010
(Gore, Oklahoma Site Decontamination and Decommissioning Funding)	ASLBP No. 94-684-01-EA
	December 8, 1995

MEMORANDUM AND ORDER
(Granting Additional Stay of Discovery)

By memorandum and order issued November 13, 1995, we continued the existing stay of discovery in this proceeding to provide General Atomics (GA) and the NRC staff with an opportunity to provide additional information in support of their November 3, 1995 request for a further stay extension to conduct settlement negotiations. See Memorandum and Order (Extending Discovery Stay Pending Submission of Additional Settlement Status Information) (Nov. 13, 1995) at 11 (unpublished) [hereinafter November 13, 1995 Stay Extension]. In separate November 27, 1995 filings, both GA and the staff have provided more information they assert supports a discovery stay extension. See Supplemental

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Status Report on Settlement Negotiations and Motion for Extension of Stay of Discovery Beyond December 8, 1995 (Nov. 27, 1995) [hereinafter GA Stay Filing]; NRC Staff's Additional Information in Support of Stay of Proceedings (Nov. 27, 1995) [hereinafter Staff Stay Filing]. Intervenors Native Americans for a Clean Environment (NACE) and the Cherokee Nation continue to oppose any discovery stay extension. See [NACE's] and Cherokee Nation's Opposition to Motions for Additional Stay of Discovery (Dec. 4, 1995) [hereinafter Intervenor Opposition].

For the reasons set forth below, we extend the discovery stay for an additional three months. In addition, we establish a schedule for an interim status report on settlement negotiations and party filings relating to any additional stay extension request.

I. BACKGROUND

We first granted a stay of discovery to permit settlement negotiations between GA and the staff in late August 1995. As we outlined in our November 13 memorandum and order, up to that time we had extended the stay twice. In our November 13 issuance, based on our review of the November 3, 1995 GA/staff extension request, we concluded they had failed to provide sufficient information to satisfy the twin criteria we previously established for further extending the discovery stay, i.e., that there had been

"significant progress" toward settlement by a date certain and that not extending the discovery stay would cause "substantial prejudice" to the settlement process. Nonetheless, recognizing the importance of the general policy favoring the settlement of litigation, we extended the stay for a limited period sufficient to give GA and the staff an opportunity to provide additional information. See November 13, 1995 Stay Extension at 7-8.

In doing so, we declared that to meet the "significant progress" factor GA and the staff should demonstrate they "have established a procedural framework for the negotiation process that will keep the process moving forward at a steady pace." Id. at 9. We suggested that in addressing this factor we would find relevant GA and the staff showings regarding the level of senior corporate and staff management involvement in the negotiation process; the parties' process for identifying the number and types of issues in dispute through their internal strategy and negotiating sessions; and their schedule for internal strategy sessions, which would be indicative of an overall organizational scheme intended to ensure negotiating sessions on a regular basis. We also indicated that to address the "significant progress" factor, GA and the staff should provide a reasonable estimate of the time the negotiation process is expected to take. Further, concerning the other factor of "substantial prejudice," we declared that GA needed to provide more

specific information supporting its claims that simultaneous negotiations and discovery litigation would prove an intolerable resource drain and would "poison" the negotiating process. See id. at 9-10.

Addressing the "significant progress" factor in its November 27 pleading, GA states that the first negotiation session was on August 31, 1995, and was followed by a series of either face-to-face or telephone negotiating sessions held at approximately three-week intervals through the beginning of November. Participants at the initial meeting included litigation counsel for both parties and GA's General Counsel. After internal discussions, litigation counsel for the parties held a follow-up series of negotiation discussions in late September. See GA Stay Filing at 2.

A second negotiation meeting was held October 10, 1995. In addition to litigation counsel, GA personnel attending included GA's General Counsel, Senior Vice President/Chief Financial Officer, and Senior Vice President for Administration while staff participants included litigation counsel, the Sequoyah Fuels Corporation (SFC) Gore facility Project Manager, a Division of Waste Management, Low-Level Waste and Decommissioning Projects Branch Team Leader, and two staff consultants. After more internal discussions and an information exchange, on November 1 a third negotiation meeting was conducted by litigation counsel, which was

followed by a telephone conference with litigation counsel and GA's General Counsel. Thereafter, discussions between litigation counsel have continued, and a fourth negotiation meeting in which GA's General Counsel will participate is scheduled for December 8, 1995. See id. at 2-3.

Regarding the substance of the settlement talks, GA states that the parties have outlined the structure for a possible settlement and have made significant progress in resolving some disputed issues. GA also declares, however, that the resolution of other issues must await information that is not yet available to the parties and the results of both parties' ongoing internal deliberations. GA nonetheless notes that when questions are raised about the resolution of a particular matter, dates generally are established for an information exchange or a party position statement on the matter. Finally, referencing the six-month period that apparently was needed to negotiate the SFC/staff settlement recently approved by the Board, see LBP-95-18, 42 NRC ___ (Oct. 30, 1995), GA suggests that the more far-reaching and complex nature of the dispute between GA and the staff cannot be settled in any shorter period of time. See GA Stay Filing at 4-5. GA thus asks that discovery be stayed for an additional ninety days. See id. at 9.

For its part, the staff adopts GA's description of the settlement process between the parties. It also describes

various internal discussions that have taken place regarding settlement, including daily settlement-related communications between staff counsel and the Gore facility project manager; weekly division meeting briefings for Office of Nuclear Material Safety and Safeguards (NMSS) senior personnel, including the relevant branch chief and the division director, regarding key settlement matters that arise; and two briefings for the NMSS Director regarding major settlement issues that have arisen. See Staff Stay Filing at 3.

The staff further declares that, because any settlement with GA over the Gore facility potentially impacts GA's ability to fund decommissioning at other facilities for which GA holds NRC licenses, there have been internal discussions with senior management officials in the Office of Nuclear Reactor Regulation regarding the terms of a possible settlement. The staff also states that the Executive Director for Operations (EDO) and the Deputy EDO for Nuclear Materials Safety, Safeguards and Operations Support have been briefed regarding the settlement talks and have provided views. In addition, according to the staff, because the United States Department of Energy (DOE) may have certain obligations to contribute funds to decommissioning certain GA licensed facilities, the staff has been meeting regularly with DOE officials to obtain information regarding DOE liability. Finally, the staff

declares its belief that at least another four months will be needed to reach a settlement, if that is possible. See id. at 3-6.

Relative to the issue of "substantial prejudice" to the settlement process, GA challenges intervenors' earlier assertion that GA is a large corporation that can undertake multiple litigation related activities simultaneously. GA maintains that a recent series of substantial setbacks to the advanced technology research and development activities that are its lifeblood, including congressional action eliminating company funding for the development of gas-cooled nuclear reactor technology and reducing fusion program funding, have hurt it financially. Among other things, this has required that it terminate some two hundred employees, many with advanced degrees and years of company service. In addition to reducing GA's ability to absorb attorney fees for simultaneous litigation activities, GA also asserts that these financial problems make it a particularly bad time to have its executives and key employees involved in time consuming litigation activities regarding intervenors' broad discovery requests rather than conducting and expanding the company's business. It made the decision to put its efforts into settlement, GA assets, to try any avoid this type of time drain. See GA Stay Filing at 6-7.

GA also renews its assertion that permitting discovery to go forward will "poison" the settlement negotiation process. This is so, GA declares, because the disputes that are likely to arise between GA and the intervenors are likely to increase the hostility between these parties. To force GA to continue in such rancorous litigation even while it engages in efforts to settle the underlying staff claims is untoward, GA asserts. Moreover, because intervenors will have an opportunity to challenge any settlement agreement, GA contends that their current attempts to obstruct settlement through their demands for discovery requires they assume a "heavy" burden of demonstrating why the negotiations should suffer any interference. Intervenors have not made such a showing, according to GA. See id. at 7-8.

Although declaring that it cannot speak to the issue of GA's litigation resources, the staff nevertheless expresses a concern that, given the number of apparent discovery disputes between GA and the intervenors, permitting discovery to go forward will substantially impact the settlement process. The staff further points out that the type of discovery sought by intervenors is substantially documentary, thus alleviating any concern that a further discovery stay will lead to the disappearance of witnesses or faded memories. See Staff Stay Filing at 6-7.

In their opposition to the GA and staff filings, intervenors NACE and the Cherokee Nation assert that GA and the staff have failed to fulfill the conditions set by the Board for obtaining a discovery stay extension. Intervenors declare that GA and the staff have not adequately addressed the issue of "significant progress" because they have not (1) shown they are involved in a continuing series of internal strategy meetings and negotiation sessions; (2) given the Board any idea about the specifics of the type and number of issues that they have identified as relevant to the settlement process or their progress in resolving those issues; and (3) provided any concrete schedule for moving the negotiations forward. See Intervenor Opposition at 2-3.

Also relevant, intervenors maintain, is the fact that the status quo is being altered during the negotiations. This has come about, they assert, by reason of the fact that (1) GA is moving assets and revenues out of the country (and potentially the reach of the agency) by attempting to move its San Diego, California TRIGA research reactor fuel fabrication operation to France without providing sufficient decommissioning resources for the facility; and (2) by GA's own admission, long-standing GA employees may be terminated, thus affecting GA's ability to respond fully to intervenors' discovery requests. See id. at 4-5.

Finally, according to intervenors, GA's claims regarding the burdens of discovery are exaggerated and

frivolous because the jurisdictional issue involved is well-defined and any discovery will be well within the demands of ordinary litigation. At the same time, GA's claims that discovery activities will destroy its incentive to settlement are disingenuous, intervenors declare, because the progress of this litigation demonstrates that GA has only been willing to settle when spurred on by litigation pressure. See id. at 5-6.

In response to this intervenor filing, on December 6, 1995, GA sought leave of the Board to file a reply.[1] In its reply, GA describes the circumstances surrounding its formation of a joint venture with a French company to market and sell GA's TRIGA research reactor fuel worldwide. GA notes that the transfer of fuel fabrication technology that will be involved has been reviewed and approved by the Department of Energy, with the concurrence of the Department of State and after consultation with the Departments of Defense and Commerce, the Arms Control and Disarmament Agency, and the NRC. GA further declares that the issue of the ability of General Atomic Technologies Corporation, GA's parent guarantor, to back the decommissioning costs for the San Diego facility is outside the scope of this proceeding and the Board's jurisdiction and, in any event, is not a matter that has been the subject of any staff challenge as

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[1] Acting pursuant to 10 C.F.R. § 2.730(c), we grant GA's request to file a reply.

part of the application process. On the question of employee terminations, GA maintains that these individuals will still be available for any appropriate intervenor discovery. Finally, GA declares that the company's small management structure and the importance of the issues under consideration make it clear that GA senior management has been involved in both internal deliberations and settlement negotiations. See [GA's] Reply to Intervenors' Opposition to Motions for Additional Stay of Discovery (Dec. 6, 1995) at 4-8.

II. ANALYSIS

As we indicated in our November 13 memorandum and order, there is a tension here between competing interests: we must encourage the settlement of litigation while at the same time ensuring that any settlement-related delay in discovery does not unfairly impact the ability of several parties excluded from settlement negotiations to litigate their admitted contentions at the appropriate time. In requesting a stay of discovery proceedings, GA and the staff bear the burden of establishing that the balance between these interests favors permitting the settlement-related delay.

"Delay generally favors one party or the other," is an often mentioned litigation axiom. By requiring that GA and the staff show "significant progress" in their settlement

efforts and "substantial prejudice" to the process if the requested delay is not granted, we are attempting to ensure that the delay that the settlement process engenders is not being unduly prolonged by either settlement participant, thereby permitting it to gain some advantage over the intervenors, who are not participants in that process.[2]

Although GA is not as forthcoming with some of the details as it might be, based on the parties' recent filings it nonetheless appears that both internal strategy sessions and negotiating sessions between the parties are being conducted on a fairly regular basis. At the same time, the parties apparently are attributing the requisite importance to the settlement process, as is demonstrated by the regular involvement of senior management and policy personnel in strategy and negotiating sessions. GA and the staff also indicate that they have made progress in identifying the major issues involved and have resolved some of those matters.[3] Finally, they suggest a tentative time frame --

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[2] Certainly, such a concern in this proceeding is not untoward. GA's continual objection to intervenor discovery requests, including those ordered answered by the Board, strongly suggests that it wishes to delay providing discovery to intervenors for as long as possible.

[3] In this regard, however, intervenors correctly observe that neither GA nor the staff has provided us with any detailed information about the type and number of major issues that have been identified for resolution -- an important factor in measuring the progress of the settlement process. At this point, we attribute this lack of detail to the nascency and confidentiality requirements of the process

(continued...)

three to four months -- for concluding negotiations. On balance, these showings establish that the settlement process GA and the staff have undertaken has achieved "significant progress" and, as importantly, that the parties have established a procedural framework for the negotiations that is likely to keep the process moving forward at a steady pace.

On the issue of "substantial prejudice," although it is a somewhat closer question, we again find that GA and the staff have made the necessary showing. That GA recently has had a number of business and financial setbacks is a matter of public record. This undoubtedly has some impact on its ability to fund this litigation. Of more moment to the Board, however, is the concern expressed by the staff that, given the nature of the existing discovery disputes between GA and the intervenors, renewed discovery will require a substantial expenditure of time by GA legal counsel and, perhaps more significantly, GA management personnel that will detract materially from GA's ability to pursue settlement expeditiously.

In addition, both GA and the staff highlight a related factor that merits some consideration in this context -- what actual prejudice to the intervenor's discovery efforts

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(...continued)
rather than an unwillingness to address this factor. We anticipate that the parties will provide more of a discussion of this factor in future filings.

accrues from the delay. The staff observes that because intervenors' discovery is essentially documentary, i.e., they have propounded interrogatories and document production requests rather than seeking to take depositions, any concerns about witness disappearances and fading memories that might otherwise be associated with stay-related delay are not present here. Intervenors counter that they could be prejudiced by the employee terminations described by GA, which might displace some individuals needed to provide information to respond to their pending discovery requests.

We do not find this intervenor concern sufficient to discontinue the stay. At best, if a settlement is not reached this might provide some basis for permitting additional discovery to determine if terminations during the stay had any impact on discovery responses. As GA has indicated, the fact that certain individuals are no longer in its employ does not make them unavailable for discovery.

Finally, we do not find compelling intervenors purported concern about a change in the "status quo." According to intervenors, this status quo change arises from GA's intent, as expressed in its pending possession-only license (POL) application for its San Diego facility, to move that fuel fabrication operation to France and from the questions allegedly raised in the staff's application review about the availability of funds for facility decommissioning. Because the staff's negotiations with GA

to settle this case apparently are being conducted against the wider backdrop of GA's liability for decommissioning other facilities in which it directly holds a license, the status of GA's San Diego facility undoubtedly is of interest to the staff as it negotiates with GA. In answering the question whether discovery regarding the regulatory jurisdiction issue in this proceeding should be stayed, the matter simply has no relevance.[4]

We thus conclude that GA and the staff have fulfilled their burden relative to their stay extension requests. This leaves the question of the length of any extension and what, if any, conditions should be included. Although previously we have granted extensions of thirty days or less, the parties showings demonstrate a structured

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[4] In their December 1 filing, as a follow-on to a similar suggestion in an November 8, 1995 filing, intervenors declare that in light of the apparent scope of the settlement negotiations between GA and the staff, they should be allowed now to take discovery regarding decommissioning costs and GA's ability to pay such costs both for the Gore facility and any other facilities for which GA directly holds a licenses. They assert this is necessary to be ready to contest any settlement agreement that might be reached. See Intervenors Opposition at 6-7. It is, of course, the agency's general practice that discovery is permitted only after a party has properly framed the issues it wants to litigate relating to a challenged activity. See 10 C.F.R. § 2.740(b)(1); see also Wisconsin Electric Power Co. (Point Beach Nuclear Power Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982). At this juncture, there is no settlement agreement to serve as a basis for intervenors to frame any contested issues that would be the subject of discovery. Nor have the intervenors presented anything that suggests following the usual practice on discovery is inappropriate in this instance.

negotiation process sufficient to persuade us to approve the three-month extension requested by GA. We will, however, require that GA and the staff provide a joint status report on their settlement discussion half-way through this period. As is spelled out below, that report should address the concepts relating to "significant progress" that were outlined in this issuance and our November 13 memorandum and order. Intervenors will be provided an opportunity to comment on the contents of this status report. Moreover, if GA and the staff are unable to complete their discussions within this three-month period, they must file a motion seeking an additional extension of discovery that addresses both the factors of "significant progress" and "substantial prejudice" outlined in this memorandum and order and our November 13, 1995 issuance. Intervenors will have an opportunity to respond to such a motion as well.

III. CONCLUSION

GA and the staff have met their burden of establishing grounds for an extending the discovery stay while settlement negotiations continue. The stay will be extended for three months, with GA and the staff required to file an interim status report. At the end of this period, if GA and the staff want an additional extension, they must file a request with the Board showing that (1) there has been significant progress toward settlement by a date certain, and (2) there

will be substantial prejudice to the settlement process if the stay is not extended.

For the foregoing reasons, it is this eighth day of December 1995, ORDERED, that:

1. GA's December 6, 1995 motion for leave to reply to the opposition of intervenors NACE and the Cherokee Nation to the motions for additional stay of discovery is granted.

2. GA's November 27, 1995 motion for extension of discovery stay beyond December 8, 1995 is granted and all discovery activities suspended in accordance with the Board's November 13, 1995 order are stayed through Friday, March 8, 1996.

3. On or before Monday, January 22, 1996, GA and the staff shall file a joint status report regarding their settlement negotiations in which they should address the four "significant progress" concepts set forth on page nine of the Board's November 13, 1995 memorandum and order.

4. Within ten days of the date of filing of the joint status report specified in paragraph three, intervenors NACE and the Cherokee Nation may file a response to that report.

5. If GA and the staff want an additional stay of discovery beyond March 8, 1996, on or before Monday, February 26, 1996, GA and the staff shall file a motion requesting a stay extension.

6. NACE and the Cherokee Nation shall have up to and including Monday, March 4, 1996, within which to file a response to a GA/staff request for a stay extension.

7. If either GA or the staff informs the Board that it does not wish to continue settlement negotiations, the stay entered by this order shall be terminated immediately.

8. If the stay extended by this order is terminated for any reason, all discovery activities shall recommence within five days of the date of termination under the same schedule that was in effect prior to entry of the Board's initial August 30, 1995 stay order.[5]

9. If the stay extended by this order is terminated for any reason the discovery completion date for this phase of the proceeding will be the date that is sixteen days from the date of the termination of the stay.

10. Besides service by regular mail, copies of any GA/staff status report, stay extension motion, or stay termination declaration, or any response to a GA/staff status report or stay extension motion shall be sent to the

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[5] For example, if on the date of the Board's August 30, 1995 order a party had three days remaining within which to answer certain interrogatories, that party would have eight days after the stay is terminated to answer the interrogatories. Any activities that were due to be completed before the August 30, 1995 order was entered but were delayed because of the pendency of the initial stay request are due within five days of termination of the stay. The parties previously have recognized that depositions scheduled but delayed by the discovery stay will have to be rescheduled by the new discovery completion date established under this memorandum and order.

Office of the Secretary, the Board, and counsel for the other parties before the Board by facsimile transmission or other means that will ensure its receipt by 4:30 p.m. EST on the day of filing.

THE ATOMIC SAFETY
AND LICENSING BOARD[6]

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

December 8, 1995

[6] Copies of this memorandum and order are being sent this date to counsel for GA, NACE, and the Cherokee Nation by facsimile transmission and to staff counsel by E-mail transmission through the agency's wide area network system.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

SEQUOYAH FUELS CORPORATION
GENERAL ATOMICS
(Gore, Oklahoma, Site Decontamination and Decommissioning Funding)

Docket No.(s) 40-8027-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (GRANTING ADDITIONAL..) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
James P. Gleason, Chairman
Atomic Safety and Licensing Board
Mail Stop T-3 F 23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
G. Paul Bollwerk, III
Atomic Safety and Licensing Board
Mail Stop T-3 F 23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Jerry R. Kline
Atomic Safety and Licensing Board
Mail Stop T-3 F 23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Thomas D. Murphy
Atomic Safety and Licensing Board
Mail Stop T-3 F 23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Steven R. Hom, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop O-15 B 18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Maurice Axelrad, Esq.
John E. Matthews, Esq.
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, DC 20036

Diane Curran, Esq.
c/o IEER
6935 Laurel Avenue, Suite 204
Takoma Park, MD 20912

Docket No.(s)40-8027-EA
LB M&O (GRANTING ADDITIONAL..)

Stephen M. Duncan, Esq.
Bradfute W. Davenport, Jr., Esq.
Mays & Valentine
110 South Union Street
Alexandria, VA 22314

John R. Driscoll
General Atomics Corporation
3550 General Atomics Court
San Diego, CA 92121

John H. Ellis, President
Sequoyah Fuels Corporation
P.O. Box 610
Gore, OK 74435

Lance Hughes, Director
Native Americans For A Clean Environment
P.O. Box 1671
Tahlequah, OK 74465

James G. Wilcoxen, Esquire
Wilcoxen, Wilcoxen & Primomo
P.O. Box 357
Muskogee, OK 74402

Betty Robertson
HCR 68 Box 360
Vian, OK 74962

Dated at Rockville, Md. this
8 day of December 1995

Office of the Secretary of the Commission