UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
Sequoyah Fuels Corporation	)	Docket No. 40-8027EA
and General Atomics	)	Source Materials
Gore, Oklahoma Site Decontamination	)	License No. SUB-1010
and Decommissioning Funding	)	

STATE OF OKLAHOMA'S AMICUS CURIAE BRIEF

I. Introduction

On November 16, 1995, the State of Oklahoma ("Petitioner" or "State") filed a Petition for Review of the Memorandum and Order of the Atomic Safety and Licensing Board (ASLB) issued October 26, 1995, which approved a Settlement Agreement between staff of the Nuclear Regulatory Commission (NRC) and licensee Sequoyah Fuels Corporation (SFC). The State restated its concerns that any proposed agreement or order should adequately protect the public interest and questioned the adequacy of financial assurance for decommissioning necessary at SFC's facility near Gore, Oklahoma. The State later filed an amended Petition and Requested Leave to File a Brief regarding the issues. This request was granted.

The State's concerns are consistent the views expressed in the separate statement issued by Administrative Judge Bollwerk in the ASLB Order of October 1995. Judge Bollerk's declined to approve the agreement and asked for additional information,

stating that he was not prepared to make the requisite "public interest" finding pursuant to 10 C.F.R. 2.203. Although the State has subsequently reviewed additional materials and the SFC has submitted additional information, the State's concerns still remain. The underlying basis for these concerns is that the agreement is inconsistent with the prior position taken by NRC staff, the terms of the agreement do not contain financial assurance as clearly required by the NRC's regulations, the agreement releases SFC from a mandatory responsibility without supporting reasons or documentation, and the public receives no reassurance that remediation of the property will be completed.

It appears that SFC and GA are willing to commit significant resources to effect a maze of business entities, limit liability, and engage in vigorous legal disputes, all the while complaining that they are unable (or unwilling) to comply with the regulations for financial assurance. The GA and SFC entities contend that this agreement is the most we can hope for. It appears however, that SFC income could be deposited to a trust account, insurance or similar method of financial assurance not subject to SFC's control, rather than being diverted to the benefit of potentially responsible parties (GA and Kerr-McGee). GA/SFC's aggressive pursuit of private profit may be understandable and certainly makes things difficult, but it does not relieve the NRC or other regulatory agencies from their responsibility to enforce the law and ensure that any settlement protect *public health and safety and the environment*.

Viewed in light of current information, there is no evidence to support a finding that this agreement is in the public's interest. On the contrary, it creates new and additional obstacles to agency enforcement action if that becomes necessary. The State believes that there can be a satisfactory resolution of the issues which complies with the law and achieves both public and private goals. Therefore, pursuant to 10 CFR 2.715d and the Order of the Nuclear Regulatory Commission (the Commission) CLI-96-3, the State of Oklahoma hereby submits its Brief and respectfully requests that the Commission deny approval of the Settlement Agreement as proposed at this time.

II. SUMMARY OF FACTS

The State hereby incorporates by reference the facts and allegations set forth in its earlier comments, Petition, Second Amended Petition and Request to file Brief, and supporting documents. The Intervenors' summary of the Factual Background contained at pp 2-7 of "Intervenors' brief on Appeal of LBJ-95-18 sets forth the relevant history of this matter. See also, the summary of facts by the Court in Bradley v. Sequoyah Fuels Corp., 847 F.Supp. 863 (E.D.Okla. 1994).

The Gore facility has been operated by SFC since 1970, when it was a wholly owned subsidiary of the Kerr McGee Corporation (KM). KM sold SFC in 1988 to General Atomics (GA), retaining liability for pending lawsuits related to violations at the plant. See Kerr McGee SEC 10-K filed 4/4/89 at page 6. The

SFC is owned by SF International (SFI), which is owned by Sequoyah Holding Corporation SHC), which is owned by GA, which is owned by another GA related entity. Since the SFC and GA entities are private entities and appear to be somewhat secretive, details of their relationship and finances are not known and will require discovery of additional information. The Oklahoma Secretary of State recoreds indicate that Kerr McGee, SFC and SFI are currently registered and in good standing with the Oklahoma Secretary of State. SHC and GA are not registered to do business in Oklahoma.

In August of 1990, SFC applied for license renewal. In September 1991, the facility shut down for routine maintenance and violations were discovered. NRC ordered a shutdown in October 1991 which lasted until April 1992. Operations started back up in June, but in November 1992, a release of nitrogen dioxide caused another shutdown. SFC met with GA management on November 21, 1992. GA decided to stop advancing funds to SFC and SFC decided not to continue operations due to loss of revenue and lack of financing. SFC requested to be allowed to "withdraw" its application for renewal; the state and Intervenors filed responsive comments and pleadings. The State identified the need for an adequate decommissioning plan and financial assurance.

SFC submitted a proposed decommissioning plan in February 1993 which was based upon estimated revenues from a joint venture named "ConverDyn", an entity formed and owned by GA entities and Allied Signal Energy Services. No financial assurance as required

by the regulations was submitted with the plan. Since SFC did not have adequate financial assurance, in October of 1993, the NRC Staff issued an order that held that both SFC and its parent corporation General Atomics (GA) were jointly and severally responsible for the site in question. The order further held that the costs to fully decommission the facility were in excess of $86 million, and directed GA and SFC to put up funds in that amount. Both SFC and GA have protested the order. SFC says it can't put up the funds and GA denies that it is liable and asserts that NRC has no jurisdiction. The ASLB decided that it would address GA's jurisdictional claims first, and then would deal with the matter of the funding needed for the SFC site. GA sued the NRC in the Federal District Court.. Ultimately the 9th Circuit held that there had been no final agency action yet and denied GA's appeal.

In the meantime, all discovery has been stayed. GA negotiations and financial information submitted to NRC staff have been kept strictly confidential. SFC submits abbreviated financial status reports. There continues to be inadequate information available to the public concerning GA and SFC's assets, liabilities, contract obligations and benefits, distributions of assets, related entities' involvement. SFC continues to negotiate with NRC over the current guarantee by GA of $750,000 line of credit for decommissioning, trying to release GA from this obligation. Costs of clean up are estimated at $86 Million.

III. ARGUMENT

A. The Agreement Does Not Comply with Federal Law or Mandatory Requirements of Commission's Regulations

Apparently, due to the wording of regulations in 10 CFR Part 40, a "loophole" existed whereby SFC had not been required to file a decommissioning plan and financial assurance adequate to cover the costs of decommissioning by the time of their license renewal appliction. This wording has now been "fixed" to prevent this in the future. See, 60 Fed. Reg. 38235, July 26, 1995, whereby decommissioning funding requirements are clarified to require that both a plan and full financial assurance is now required at the time of renewal application. Under the new amendments, licensees who submitted an application for license renewal before July 27, 1990, such as SFC, must submit financial assurance in compliance with 40.36(a) and (b) by November 24, 1995. 10 CFR 40.36(c) provides that a plan with a cost estimate for decommissioning and financial assurance in the amount of the cost estimate must be provided no later than the renewal application. NRC's position appears to be that this was required all along under the old rules.

The proposed agreement would, in effect, allow SFC to provide "self assurance" and retain access and control of all monies to be used for decommissioning. This is clearly contrary to the approved methods itemized by the regulations. Under the terms of the agreement, SFC retains complete control of financial decisions and is allowed to pay back GA, a potentially

responsible party. SFC may make payments on existing loans from GA and Kerr McGee, another potentially responsible party, in excess of approximately $13 million. SFC will make payments to ConverDyn, a joint venture between GA entities and Allied Signal. ConverDyn will also receive income from SFC contracts and GA will receive a portion of these proceeds through its partnership interest in ConverDyn. SFC is allowed to incur additional debts, including debts to GA and other related entities. There are no terms in the agreement providing for oversight or regular review/supervision of SFC's transactions. No security is provided for decommissioning. There is requirement for disclosure of assets or liabilities of SFC .

The previous and amended regulations for financial assurance in 10 CFR Part 40 require that financial assurance be provided in a form that either "guarantees" payment of decommissioning costs via secured instruments or insurance, or via another mechanism which places funds out of the licensees' reach and control. This is consistent with the provisions of the Atomic Energy Act, 42 USC 2012 (purposes include protection of health and safety of the public), Section 2201 (x) (standards to ensure an adequate financial arrangement will be provided to complete all decommissioning and other requirements) and cases construing such requirements as valid. See, e.g. Quivira Mining Co. v. U.S. Nuclear Regulatory Commission, 866 F.2d 1246 (10th Cir 1989).

The proposed agreement fails entirely to provide financial assurance in the form that is required by the applicable regulations.

B. The Commission Must Require Financial Assurance For The Entire Cost of Complete Decommissioning

It is obvious that NRC staff and the Commission have interpreted the Act and their duties of protecting public health and safety as requiring financial assurance as evidences by the language of the regulations. The regulations contain no exemption. Even if an exemption could be allowed, in light of their history of noncompliance and admitted unstable financial condition, SFC certainly would not be entitled to one. We can not reasonably rely on securing financing from GA, because as the issues raised by GA are of first impression and, as SFC points out, it is not safe to assume any agreement with GA will be reached.

The new regulations expressly require financial assurance in an amount adequate to cover the cost estimate for the decommissioning plan. The explanation for the revisions clarify that the amendments are for "clarification" of what NRC intended to require under the previous version of the regulations. It is difficult to understand how NRC staff or SFC can argue that they have complied with these requirements. There is no letter of credit, trust fund, insurance or other authorized mechanism

provided in the agreement for funding adequate to meet the cost estimate of $86 million.

C. Approval by Commission At This Time Will Result in Prejudice and Irreparable Harm to the Public's Interests and the Government's Ability to Enforce Remediation Requirements

Contrary to SFC and NRC staff's argument, the proposed settlement agreement does negatively affect pending proceedings with GA and the likelihood of success in obtaining recovery or assurance from GA, SFC or any related entity. The prejudice will affect not only NRC's ability to enforce decommissioning requirements, but also the ability of EPA and the State to ensure that remediation will proceed as to pollutants under their jurisdictions since the theories of liability are similar. This is obvious by examining settled principles of law and by comparison of the existing situation with the potential results due to activities allowed under the agreement:

STATUS QUO/EXISTING SITUATION

Potentially responsible parties = 1) GA and related entities: A. due to relationship of GA and SFC entities and alter ego/piercing corporate veil theories, B. as guarantor of the $750,000 credit line, C. per verbal commitment; 2) SFC, SHC, SIC and related entities as owners/operators and alter egos; and (3)

Kerr Mcgee: A. as prior owner/operator, and B. availability of monies received by GA/SFC via the $10 mil "loan" by KM for financing the purchase of SFC .

Assets: ConverDyn income - contract between GA entities and Allied Signal

Assets and equipment remaining after prior dispositions

Decommissioning reserves

Other cash reserves

Indemnity agreement Allied to GA on behalf of SFC

PROPOSED SETTLEMENT

Potentially responsible parties = 1) GA , if alter ego theory prevails, will assert new defenses of waiver, accord and satisfaction; will no longer be guarantor since SFC wants to substitute its own money or another credit agreement; 2) SFC, SHC, SIC and related entities as alter egos have all settled their responsibilities via SFC agreement; 3) Kerr McGee proceeds of $10 mil "loan" not available anymore since SFC can pay them back. Constructive trust theory as to that amount subject to defense of waiver.

Assets: Routing of ConverDyn income to SFC may be terminated at anytime through control of GA as partner in converdyn..

Assets and equipment may be distributed to GA or related entities or innocent third parties

Decommissioning reserves and other cash reserves depleted before we ever know what is there

Indemnity agreement may be independently cancelled or superseded by GA and Allied

$ 750,000 guarantee by GA no longer exists, making this available for use by GA in other transactions

$ GA's percentage of income from SFC contracts through ConverDyn diverted by GA to other entities

Under the agreement, SFC may incur a new debt of $750,000 to third party, new secured and/or unsecured debts, and may be held liable only if prove breach of the agreement, fraud or misrepresentation. Under existing situation, SFC is subject to penalties for noncompliance with regulations and any order to provide financial assurance.

D. The Settlement With SFC is Premature Until Discovery is Allowed, Information is Disclosed to the Public, and a Determination Is Made Regarding GA/SFC's Relationship and NRC's Jurisdiction

As before, it is obvious that:

"Because of these shortcomings the SFC funding plan based on the ConverDyn arrangement does not fully satisfy the requirements of 10 CFR 40.36 and 40.42. No financial assurance mechanism, as required by 10 CFR 40.36, is in place, and the ConverDyn arrangement does not constitute the equivalent. ...If more costly decommissioning alternatives are required by NRC as a result of its decommission plan, the $89 million in revenues from the ConverDyn arrangement and other sources are unlikely to be sufficient. ...Accordingly,

> to satisfy the Commission's requirements, the ConverDyn arrangement must be supplemented by funding assurances to protect against SFC revenue shortfalls, and to assure additional funding if more costly decommissioning alternatives are required. ... However, since the ConverDyn arrangement appears to be SFC's only source of income. SFC does not appear to be able to satisfy the Commission's financial assurance standards. Accordingly, supplemental financial assurance is required from SFC's parent corporation, GA". 58 Fed Reg 55089.

The Board has previously found both SFC and GA jointly and severally liable for the decommissioning costs of the SFC site. While SFC has held the actual license to the facility since it was acquired from the Kerr McGee Corporation, GA has exercised corporate oversight and audit responsibilities. NRC Report (October 28, 1988). The issue of GA's degree of control over SFC, whether SFC is a corporate alter ego of its corporate parent, is of vital concern to all parties, including the State of Oklahoma. The financial information furnished by SFC does not indicate that it has the financial resources to fund decommissioning costs and is totally inadequate to assess the situation and determine the relationship among the GA/SFC entities.

As Judge Bullwerk noted in his dissent to the approval of the Settlement Agreement::

> "there is a clear linkage between GA and SFC by reason of their parent-subsidiary relationship and the involvement of GA and its subsidiaries, including SFC, in the ConverDyn partnership agreements under which a substantial portion of any SFC revenue purportedly is to be generated. In light of these interrelationships, it would seem that

> the Board's best opportunity fully to understand and assess the implications of any staff settlement with either GA or SFC would come when the Board has before it staff settlements with both parties that would resolve this case in toto." LBP-95-18 at 19.

E. Delay of Settlement Would Preserve the Status Quo and Would Not Cause Irreparable Harm to SFC/GA

The Commission has inquired as to whether any prejudice will result if this matter was deferred until a settlement is reached with GA. There will be no prejudicial effect to either party since the agreement requires SFC to devote its remaining assets to decommissioning, an obligation that would not be affected by delay. A requirement to pursue resolution through the pending proceedings and respond to discovery does not constitute irreparable harm to SFC or GA. There is no prejudice in requiring adequate disclosure of necessary financial information and having a procedure for thorough review. This is not provided for in the proposed agreement. Delay of the settlement will apparently not prevent SFC or GA from doing anything it could do under the agreement, since the agreement doesn't really do much.

III. Conclusion

The Board's approval of the settlement in question constitutes an abdication of its responsibility pursuant to 10 CFR 2.203 to insure that settlements be in "the public interest". The failure to enforce compliance with the requirements set

forth in 40 CRF 40.36 regarding funding for decommissioning renders them meaningless, encourages future noncompliance and requests for "exemptions" and sets a dangerous precedent for future proceedings before the Commission. An exemption should not be allowed without adequate documentation and consideration. The public interest requires that the public have access to adequate financial information so that it can participate in a meaningful way, that SFC's resources be maintained for the eventual clean up of the site and that responsible parties, not the taxpayers, be required to pay. The State of Oklahoma respectfully requests that the Commission disapprove of the Settlement Agreement and issue appropriate orders to require that adequate information is obtained/disclosed, the available assets are preserved and the pending issues are resolved in compliance with the law.

Respectfully submitted,

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CERTIFICATE OF MAILING

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