UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter Of	
Sequoyah Fuels Corporation and General Atomics	Docket No. 40-8027EA Source Materials License No. SUB-1010
(Gore, Oklahoma Site Decontamination and Decommissioning Funding)	August 9, 1996

INTERVENORS' OPPOSITION TO JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT BETWEEN NRC STAFF AND GENERAL ATOMICS

I. INTRODUCTION

Intervenors, Native Americans for a Clean Environment and the Cherokee Nation, hereby respond to the Nuclear Regulatory Commission ("NRC" or "Commission") staff's and General Atomics' ("GA's") Joint Motion for Approval of Settlement Agreement (July 11, 1996). Intervenors oppose the proposed settlement, which effectively abandons the NRC staff's original goal of obtaining compliance with NRC decommissioning funding regulations and assuring the sufficiency of funding for the cleanup of the SFC site. See Sequoyah Fuels Corporation General Atomics (Gore, Oklahoma, Site Decontamination and Decommissioning Funding) (October 15, 1993), 58 Fed. Reg. 55,087 (October 25, 1993) (hereinafter "October 1993 Order). The NRC staff has traded away its claim that GA must share the potentially massive costs of the SFC site cleanup, in exchange for a relatively minor sum of $9 million, or perhaps much less. The actual funds available for

decommissioning as a result of this settlement may be as little as $3.9 million.[1] As a result, the settlement deprives the public of any reasonable assurance that cleanup of the SFC site will be completed in a safe and effective manner, thus posing a threat to public health, the environment, members of NACE, and the ability of the sovereign Cherokee Nation to protect its citizens and its trust lands.

The proposed settlement agreement must also be rejected for its failure to provide sufficient information that would allow a positive public interest finding. Indeed, the GA-NRC staff settlement culminates a process in which the public has been deprived of the most fundamentally important information regarding the basis for and adequacy of the settlements. More than two and a half years after this proceeding commenced, the staff still has not provided the Licensing Board and the public with an estimate of the cleanup costs for the SFC site. Nor does either settlement agreement contain a firm statement of the amount of money that is or will be available for decommissioning: the SFC agreement contains no funding amount at all, and the GA agreement

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[1] As discussed in more detail below, GA only intends to spend $5.4 million on decommissioning of the SFC site. Thus, it will only contribute $9 million to the decommissioning fund if it can obtain a tax deduction of $3.6 million for the expenditure. It also appears that operation of the trust fund is to be structured in a such a way that expenditures from the fund will be taxable as income to SFC or GA. Thus, if GA contributes only $5.4 million, assuming a corporate income tax rate of 28%, the actual amount of funding available for decommissioning could be as little as $3.9 million.

is so full of unknowns and conditions that it is not clear whether the decommissioning funding yielded by the agreement amounts to $9 million, $5.4 million, or less than $4 million. Without such information, the Board has no grounds for finding that the public interest is served by this settlement. Therefore, in the absence of greater disclosure by the staff and GA and an opportunity for further public comment, the proposed settlement must be rejected.

II. FACTUAL BACKGROUND

A. GA's Purchase of SFC

In 1988, through its fully owned subsidiary Sequoyah Holding Corporation ("SHC"), GA purchased 100% of the stock of SFC from its previous owner, Kerr-McGee. Although GA was not named as a licensee, GA took over the "corporate oversight and audit responsibilities" that were previously held by Kerr-McGee, and assumed various functions under the license. NRC Safety Evaluation Report at 2 (October 28, 1988). In a series of subsequent transactions, SFC became the wholly-owned subsidiary of Sequoyah Fuels International Corporation ("SFIC"), which in turn is a wholly-owned subsidiary of SHC.[2]

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[2] As described in General Atomics' Answer to NRC Staff's First Set of Interrogatories at 2 (June 29, 1994):

> On November 4, 1988, SHC purchased Sequoyah Fuels Corporation from Kerr-McGee Corporation. On August 29, 1989, New Sequoyah Fuels Corporation ("NSFC") was incorporated in Delaware as a wholly-owned subsidiary of Sequoyah Fuels Corporation. On December 29, 1989, the NRC amended the Sequoyah license to authorize a change in the Licensee's name to NSFC, the incorporation of NSFC, and a transfer of assets to NSFC. On December 31, 1989, Sequoyah Fuels Corporation and NSFC entered into a Transfer Agreement

B. GA's Licensed Responsibilities for SFC Functions

Apart from the decommissioning funding responsibilities charged in the NRC staff's October 1993 Order, GA has significant licensed responsibilities for health and safety related activities at the SFC site.[3] For instance, SFC's license identifies senior GA personnel as the responsible parties for key health and safety duties at SFC: GA's Manager for Health Physics is responsible for preparing "corporate radiation health and safety standards and procedures." §§ 2.1, 2.7.3. GA's Corporate Director for Licensing, Safety, and Nuclear Compliance (who reports to GA's Vice President, General Counsel, and Secretary) must be "capable of providing authoritative advice and counsel in

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(continued)
in which Sequoyah Fuels Corporation transferred its assets and ongoing business (excluding certain farm-related business and assets and certain conversion contracts with international customers) to NSFC.

On January 19, 1990, Sequoyah Fuels Corporation's name was changed to Sequoyah Fuels International Corporation (SFIC). The current Sequoyah Fuels Corporation is now a wholly-owned subsidiary of SFIC. SFIC is a wholly-owned subsidiary of Sequoyah Holding Corporation ("SHC"). SHC is a wholly-owned subsidiary of General Atomics. General Atomics is thus a third-tier parent company of Sequoyah Fuels Corporation.

[3] Intervenors note that although SFC recently obtained NRC approval of major changes to its management organization, these changes did not significantly alter GA's licensed responsibilities. See license amendment application of May 6, 1994, as revised November 23, 1994 and March 3, 1995. The Licensing Board rejected Intervenors' challenge to the amendments in LBP-96-12 (June 12, 1996).

matters related to NRC licensing, regulations, and procedures." § 2.5. This position is also responsible for approving "the radiation health and safety standards and procedures of Sequoyah Fuels Corporation," in order to "ensure compliance with the current company radiation health and safety standards and procedures, applicable federal and state regulations, and license conditions." § 2.1. These reviews must be documented, with recommendations for "new or revised standards and procedures," and submitted to high level GA officials, including GA's Corporate Vice President, General Counsel, and Secretary. Id.

The Corporate Director for Licensing, Safety, and Nuclear Compliance's responsibilities also include directing quarterly audits at SFC "to evaluate and verify compliance" with applicable federal and state standards and NRC license conditions. § 2.2. Not only must GA conduct quarterly audits to "evaluate and verify compliance" with applicable standards and license conditions, but they must be followed up "to ensure corrective actions is being taken in a timely manner." § 2.8.

GA's Corporate Manager, Health Physics, is responsible for "the preparation of detailed corporate standards dealing with the control of radiation, spread of radioactive contamination, and the monitoring of personnel and nuclear facilities." This position is also "responsible for auditing procedures and plant operations in the health physics area." § 2.2. This position reports to the GA Corporate Director, Licensing, Safety and

Nuclear Compliance. He or she also chairs the ALARA [As Low as Reasonably Achievable] Committee, which is responsible for conducting and evaluating the results of quarterly ALARA audits, and making recommendations to SFC for measures to reduce radiation exposures. § 3.2.2. SFC must respond in writing to GA's Manager, Health Physics regarding these recommendations. Id.

SFC's license also contains a separate section entitled "Safety Review," which describes the "independent overview functions carried out under GA's Corporate Vice President, Human Resources." § 2.3. These functions include:

-- establishing corporate standards for contamination control and radiation protection,

-- establishing corporate standards for safe operations procedures, conducting periodic inspections against these criteria,

-- maintaining "technical liaison with regulatory agencies, of local, state, and federal government,"

-- offering "expert professional advice and counsel to corporate [GA] and Sequoyah Facility Management in health and safety matters, and

-- procuring "special audit services, inspections, or calculational capability" from GA "when it appears that an adequate solution definition exceeds the capability of the staff." Id.

SFC's license also establishes "personnel education and experience requirements" for GA personnel having a role in the oversight of SFC's operations. For example, the Corporate Vice

President of Human Resources "shall have a minimum of five years of nuclear industry management experience of high level general management nature." § 2.5. Educational and training requirements are also established for GA's Corporate Director, Licensing, Safety and Nuclear Compliance, who must also "be capable of providing authoritative advice and counsel in matters related to NRC licensing, regulations and procedures." Id. Similarly, minimum educational and experience requirements are established for GA's Corporate Manager, Health Physics and the Corporate Manager of Industrial Safety. Id.

C. Shutdown of SFC Plant and GA Commitments for Restart

In 1990, after finding significant radioactive and chemical contamination on the site, the NRC issued a series of enforcement orders, and the plant was shut down for 5 months in late 1991 and early 1992. In the spring of 1992, the NRC permitted SFC to resume operations, based in part on oral and written commitments by GA CEO J. Neal Blue to fulfill any decommissioning funding requirements that could not be met by SFC. See, e.g., October 1993 Order, 58 Fed. Reg. at 55,089-90, quoting letter from J. Neal Blue to Ivan Selin (March 19, 1992). The NRC ordered the restart in reasonable reliance on GA's promise to fulfill this commitment. Id., 58 Fed. Reg. at 55,090-55,091.

However, GA reneged on its promise after the uranium processing operation was permanently shut down following an accident in November of 1992. GA then announced -- without providing any

documentary support -- that its commitment to guarantee decommissioning funding for SFC had been conditioned upon the assumption that the plant would go on operating for another license term. Letter from J. Neal Blue to Robert M. Bernero (February 16, 1993).

D. Creation of ConverDyn

In lieu of guaranteeing decommissioning funding for the SFC site, GA helped to create a new business entity called "ConverDyn," whose purpose was to carry out the remainder of SFC's contracts for processing uranium. ConverDyn is a joint venture of Allied-Signal Energy Services and General Atomics Energy Services ("GAES"), which is a subsidiary of GA's parent, General Atomics Technology Corporation ("GATC"). GA Answer and Request for Hearing at 5 (November 2, 1993). GAES later transferred 90% of its ownership interest in ConverDyn to GAES Limited Partnership [GAESLP]. Id. at 6. GAES is the general partner of GAESLP and owns 10% of the partnership; GATC is a limited partner with 90% ownership. Id.

SFC's ConverDyn revenues were to be dedicated to decommissioning. 58 Fed. Reg. at 55,090. SFC's "Preliminary Plan for Completion of Decommissioning," submitted on February 16, 1993, projected that estimated CoveryDyn revenues of $71,760,000, taken together with about $18 million in other revenue, would generate about $89 million for payment of SFC's estimated $86 million decommissioning costs. PPCD, Table 10-2.

E. NRC's October 15, 1993 Order And Adjudication

On October 15, 1993, the NRC staff issued an enforcement order against SFC and GA, holding that they were "jointly and severally responsible" for providing funding, financial assurances, and updated and detailed decommissioning cost estimates for the cleanup of the SFC site. 58 Fed. Reg. at 55,092. The order also required GA and SFC to put up $86 million in decommissioning funds, the minimum amount estimated to be required to clean up the site. Id. GA and SFC both challenged the order, and this proceeding was commenced. NACE and the Cherokee Nation intervened in support of the order.[4]

On June 30, 1995, the Licensing Board bifurcated the case into two phases: an initial phase on the NRC's challenged jurisdiction over GA, to be followed by a merits phase regarding the adequacy of decommissioning funding for the SFC facility. LBP-95-12, 41 NRC 478, 486 (1995) Ongoing discovery on jurisdictional issues was stayed for about ten months, pending settlement negotiations between the staff and GA. Discovery on the merits never began.

F. NRC Staff-SFC Settlement Agreement

On August 24, 1995, the NRC staff and SFC submitted a proposed agreement purporting to settle the NRC staff's claims

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[4] See LBP-94-5, 39 NRC 54 (1994) and LBP-94-8, 39 NRC 116 (1994), affirmed, CLI-94-12, 40 NRC 64 (1994) (NACE intervention approved); LBP-94-19, 40 NRC 9 (1994), affirmed, CLI-94-13, 40 NRC 78 (1994) (Cherokee Nation intervention approved).

against SFC. The agreement commits SFC's "net assets and net revenues" to decommissioning.[5] Agreement at 4, 42 NRC at 163. The agreement provides no decommissioning cost estimate for the SFC site; nor does it establish any dollar amount for SFC's contribution to the costs of decommissioning the site. Moreover, the agreement does not protect SFC's assets against an outstanding $10.6 million loan by Kerr-McGee for GA's purchase of the property; nor does it state whether SFC's pre-existing decommissioning reserves, which had been established under NRC regulations and the terms of SFC's license, will be protected from creditors and conserved for decommissioning purposes.

Intervenors, the Attorney General of Oklahoma, and the U.S. Army Corps of Engineers, all opposed the proposed settlement agreement. See LBP-95-18, 42 NRC at 150-51, notes 2-4, for citations. Nonetheless, two members of the Board approved the agreement on October 26, 1995.

Judge Bollwerk filed a "Separate Statement," declaring that he was unable to make "the requisite 'public interest' finding pursuant to 10 C.F.R. § 2.203," and that he would ask for "additional clarification from SFC and the staff regarding several matters," including the NRC's authority to recover funds

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[5] "Net assets" are defined as being subject to "SFC's obligations to ConverDyn" and the "rights of senior lien-holders." Settlement Agreement at 3. "Net revenues" are defined as being subject to "reasonable and necessary expenses," again subject to ConverDyn obligations and the rights of senior lien-holder.

improperly disbursed by SFC, the adequacy of staff oversight of SFC spending, and the implications of an SFC bankruptcy filing. 42 NRC at 156-58. Judge Bollwerk also found that approval of a separate settlement with SFC was not in the public interest, but should await "global" consideration in conjunction with an expected settlement agreement between the staff and GA. Id. at 159.

Intervenors appealed LBP-95-18 to the Commission on March 25, 1996. The appeal is still pending.

G. NRC Staff-GA Settlement Agreement

On July 11, 1996, the NRC staff and GA filed the proposed settlement agreement at issue, along with a motion seeking its approval. Among other things, the proposed agreement provides for the establishment of a trust fund into which GA is to deposit a maximum of $9 million [par. 1], with a schedule for deposits. Annex "A". However, the commitment to provide $9 million in decommissioning funding is conditioned upon receipt of an IRS ruling that the contribution is tax deductible. Id., par. 1. In the event that the IRS denies a deduction, GA intends to deposit only $5.4 million. Id. Thus, in effect, the agreement requires actual expenditures by GA of only $5.4 million: whatever the IRS refuses to deduct is deducted from the settlement price.

The proposed agreement also provides for the extinguishment, by December 31, 1998, of $7 million in revolving loans by GA to SFC, in connection with the Environmental Protection Agency's

("EPA's") August 3, 1993, Administrative Order on Consent for the remediation of the SFC site. Id. at 3 and par. 8. If SFC does not meet the December 31, 1998 deadline, GA will delay, by a year, half of the trust fund payment that is due on that date. Id., par. 8.

Although it is described as "governing" the $9 million or $5.4 million deposit by GA [par. 1], the trust agreement was not submitted with the proposed settlement agreement, nor have GA and the staff committed to submit it for Board approval. Indeed, it does not even appear to exist yet. Motion at 3 and Agreement, par. 1.

The proposed agreement also provides for the permanent rescission of the NRC staff's October 1993 Order against GA and commits the staff to forbear from taking any other action against GA for decommissioning funding for the SFC site. Par. 12. The NRC staff and GA have also agreed that the staff will confer in advance with GA on the "accuracy" of press releases regarding the settlement. Par. 11.

At least two provisions of the agreement may affect aspects of SFC's decommissioning operation other than decommissioning funding. For instance, the agreement generally precludes NRC from claiming that GA is a "de facto licensee" based on GA's performance of its responsibilities under the SFC license, its business performance, or the nature of its ownership relationships with other companies. Par. 13. Thus, the agreement appears to

preclude the NRC from taking enforcement action against GA with respect to any of its other licensed responsibilities for SFC, such as quality assurance. In addition, the proposed agreement calls for the resignation of the two officers of GA who currently serve on SFC's Board of Directors. Par. 5.

III. STANDARD FOR APPROVAL OF PROPOSED SETTLEMENT

A. Adequacy of Decommissioning Funding Constitutes the Key Public Interest Consideration in This Review.

Pursuant to 10 C.F.R. § 2.203, the proposed settlement is "subject to approval by the designated presiding officer," giving "due weight to the position of the staff." The presiding officer "may order such adjudication of the issues as he may deem to be required in the public interest to dispose of the proceeding." Id. Thus, the presiding officer may order further adjudication if the reasonableness of the proposed settlement to protect public health and safety does not appear to be adequately supported in the record.

The key public interest consideration in this review of the proposed GA-NRC staff settlement agreement is whether the purpose of the staff's October 1993 Order -- to assure the sufficiency of funding to complete the safe cleanup of the SFC site, in conformance with 10 C.F.R. § 40.36 -- has been satisfied by the proposed settlement. As the Board ruled in LBP-95-18,

> The appropriateness of the Agreement submitted for our approval should be viewed in the light of the allegations made by the Staff in the October 15, 1993 Order that forms the foundation of this proceeding. The fundamental charge of that order is that the funding plan

> SFC proposes for decommissioning its facility at Gore, Oklahoma is not adequate to meet the Commission's regulations and that GA, as an active parent organization, is responsible for providing for any deficiencies therein.

See also Judge Bollwerk's Separate Statement, which asserts that a "central component of the public interest assessment" in reviewing the SFC-NRC staff settlement agreement was "the degree to which the agreement ensures that the already limited assets and revenues of SFC will be protected from inappropriate dissipation so as to be available for decommissioning." 42 NRC at 157.

Thus, the Board must evaluate whether the NRC staff has adequately served the public interest by abandoning its claim against GA for joint and several responsibility for compliance with NRC decommissioning funding regulations, in exchange for an extremely limited sum. Moreover, even assuming that the sum is acceptable, the Board must examine whether the settlement conserves the funding adequately to maximize its effectiveness for the cleanup of the site. Finally, the Board must examine whether the proposed settlement has adverse effects on any other aspects of the safety of SFC's cleanup operation.

B. Adequacy of Disclosure and Opportunity for Public Participation Are Also Central to the Board's Public Interest Determination.

Under Commission regulations, Licensing Board precedent regarding decommissioning funding for the Sequoyah Fuels plant, and Presidential guidance regarding agency consultation with Indian tribes, the Licensing Board is required to assure that the

Intervenors have a meaningful opportunity to participate in the proceeding for resolution of the NRC staff's October 1993 Order. Once GA filed its request for a hearing on the Order in November of 1993, the staff lost its "untrammeled discretion to offer or accept a compromise or settlement." Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994). See also this Board's ruling in Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), LBP-94-5, 39 NRC 54 (1994). As this Board has held, any staff action to relax or rescind the October 1993 Order is "subject to review by the Board with input from all parties to the proceeding." Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), LBP-94-5, 39 NRC 54, 66 note 8 (1994), citing Oncology Services Corp. (Order Suspending Byproduct Material License No. 37-28540-01), LBP-94-2, 39 NRC 11, 26 n. 12 (1994). Thus, the regulations require the Board to take into account Intervenors' comments on the public interest issue.

The Licensing Board is also required by its own precedent in the SFC license renewal case to provide Intervenors with a meaningful opportunity to participate in the resolution of the October 1993 Order. When SFC moved the Licensing Board for authorization to withdraw its 1992 license renewal application, Intervenors sought to impose decommissioning funding conditions on the license termination. However, the Licensing Board denied the request, based in part on its view that "the complex details

and extent of decommissioning financing will be more appropriately reviewed and resolved" in the adjudicatory proceeding regarding the NRC's enforcement order. Sequoyah Fuels Corporation (Source Materials License No. Sub-1010, MLA), LBP-93-25, 38 NRC 304, 322 (1993), affirmed, CLI-95-2, 41 NRC 179 (1995). Because the SFC and GA settlement agreements purport to dispose of the decommissioning funding issue for the SFC site once and for all, this is the critical juncture at which the Board must consider Intervenors' views on the issue.

Finally, the NRC, as an executive agency, is required by Presidential directive to "consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments." Government-to-Government Relations With Native American Tribal Governments, 59 Fed. Reg. 22,951 (April 29, 1994).[6] The SFC site poses a threat of long-term contamination and environmental and public health damage in the heart of the Cherokee Nation. Insufficient funding for the safe cleanup of the site would have a serious adverse impact upon the Cherokee

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[6] In affirming the admission of the Cherokee Nation to this proceeding, the Commission called the Licensing Board's attention to this directive. CLI-94-12, 40 NRC 64, 80 note 4 (1994). Intervenors note that, consistent with the Presidential directive, the NRC Staff has invited the Cherokee Nation to participate as a cooperating agency in the preparation of the EIS. Letter from Michael F. Weber, NRC to Principal Chief Joe Bird (October 24, 1995). The invitation was accepted by letter from George Thomas to Carol J. Paperiello (July 2, 1995).

Nation's sovereign interests in protecting its citizens, property, and trust lands.[7] Thus, the Licensing Board must treat the Cherokee Nation as a sovereign government and give due weight to the Cherokee Nation's views on the proposed settlement's impacts upon its tribal interests.

The opportunity to participate guaranteed by these regulations, precedents and directives is not meaningful unless it is accompanied by sufficient disclosure to allow Intervenors to evaluate the proposed settlement. Intervenors also note that, pursuant to the April 29, 1994, Presidential directive, executive agencies must "take appropriate steps to remove any procedural impediments to working directly and effectively with" tribal governments. To date, this proceeding has not provided sufficient disclosure to make a meaningful evaluation or comment on the proposed settlement agreement. This is largely because discovery on jurisdictional issues was suspended before it was completed, and discovery on the need for and adequacy of funding was never even commenced. The NRC staff's negotiations with both SFC and GA have been conducted in complete secrecy. Thus, Intervenors are not privy to critical information necessary to evaluate the proposed settlement, such as the terms of the trust agreement, whether GA continues to have any control over SFC through its

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[7] These trust lands include the bed and banks of the nearby Arkansas River, where testing by the Cherokee Nation's Office of Environmental Services under an EPA Superfund Cooperative Agreement (No. V-006577-01-1) reveals elevated concentrations of heavy metals.

subsidiaries and affiliates, the costs of decommissioning the SFC site, the adequacy of SFC's and GA's existing and anticipated resources to pay for the cleanup, and the size of GA's claimed liability for decommissioning costs at its San Diego facility.

Without such fundamental disclosure, it is impossible for Intervenors to exercise their right to participate in this proceeding in a meaningful way. Thus, the Board must refuse to approve the proposed settlement to the extent that it is based on assertions or assumptions that cannot be supported in the public record. In the alternative, the Board should order disclosure of such information.

IV. ARGUMENT

A. The NRC Staff and GA Fail to Demonstrate That The Proposed Settlement Is In the Public Interest.

As discussed above, the key consideration in evaluating this settlement agreement is the degree to which it fulfills the objectives of the October 1993 Order. As discussed below, the settlement falls far short of this goal. Moreover, the considerations asserted by GA and the NRC to justify this result are unsupported.

1. The proposed settlement is grossly inadequate to satisfy the objectives of the October 1993 Order.

As noted by Judge Bollwerk in LBP-95-18, one of the principal concerns behind the staff's October 1993 Order was the potential insufficiency of SFC's resources to cover the costs of decommissioning the SFC site. 42 NRC at 157. Thus, the NRC

staff ordered that GA must assume joint and several liability for any decommissioning funding needs that SFC could not satisfy. As the staff stated in its Answer in Opposition to GA's Motion For Summary Disposition,

> if revenues to carry out decommissioning activities in any year fall short of projections contained in the Preliminary Plan for Completion of Decommissioning (PPCD), or if the decommissioning alternative approved by the NRC proves more costly than those upon which the PPCD is based, then GA is to make up any shortfalls.

Id. at 2 (April 13, 1994), citing October 1993 Order at 24-25.

The proposed settlement agreement doesn't come close to satisfying this regulatory goal. First, rather than committing GA to satisfy whatever shortfall may arise as a result of SFC's inability to fully cover decommissioning costs, the agreement commits GA to provide only one lump sum, which may amount to no more than $5.4 million if GA does not receive a tax deduction from the IRS. Income tax on expenditure of the funds may further reduce their value: a tax of 28% on a fund of $9 million would reduce the fund to $7 million, and a tax of 28% on a fund of $5.4 million would reduce it to $3.9 million. There is not one iota of evidence in the record that a few million dollars is sufficient to cover a shortfall in SFC's funding.

In fact, the potential costs for cleaning up the SFC site range into the hundreds of millions of dollars, far beyond the most optimistic estimate of the resources committed by this settlement. For instance, in a Muskogee Phoenix article of November 11, 1995 (attached), SFC president John Ellis is said to

have estimated that offsite disposal of contaminated material from the SFC site could cost $150 million more than the $85 to $90 million in onsite cleanup costs. The NRC has yet to issue an Environmental Impact Statement evaluating and providing costs estimates for the onsite and offsite disposal alternatives, and has refused to commit to any particular alternative.[8] Clearly, if the cost of the cleanup is hundreds of millions of dollars, the combined SFC and GA settlements are completely inadequate to provide sufficient funds for decommissioning the SFC site.

It is absurd for the NRC staff to present, or for the Board to attempt to evaluate, a settlement of decommissioning funds where the agency has no idea what is the amount of funding that is needed. Under the circumstances, the Board should refuse to accept the settlement, or hold it in abeyance until the staff provides sufficient information, in the EIS or elsewhere, on which to judge the adequacy of the settlement.

Second, neither the SFC nor GA settlement agreement contains any information regarding the expected size of SFC's financial contribution to the decommissioning effort.[9] Intervenors also

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[8] Thus, for example, in viewgraphs presented to the Executive Director for Operations on July 26, 1995, the staff's outline declares that SFC's $86 million estimate "assumes on-site disposal, not endorsed by staff." Id. at 8. (These viewgraphs are included as Attachment 3 to Intervenors' Brief on Appeal of LBP-95-18 (March 25, 1996).

[9] The SFC-NRC staff settlement agreement states that SFC's net revenues and assets will be committed to decommissioning the site, but makes no attempt to quantify that amount. Nor has the NRC withdrawn the concern, stated in the October 1993 Order, that SFC's revenues may be insufficient to cover the costs of decommissioning.

Intervenors also note that the GA-NRC staff agreement asserts

submit that the agreement should not be permitted to take effect unless and until the staff and GA have defined such major terms as "the company" [see, e.g, par. 13] and "adequate capital resources." See page 4. Therefore, even if the amount of funding needed were known, there would be no basis for evaluating the adequacy of SFC's resources to fulfill that need, or the anticipated shortfall that GA would need to make up. Without this fundamental information, the adequacy of the proposed settlement cannot be assessed.

Third, the proposed settlement agreement stretches GA's payments out over a period of years, on a schedule that appears to have no relation to the demand for the funds. Thus, it fails to meet the Order's purpose of assuring that GA makes payments on a timely basis as they are needed.

Fourth, the settlement agreement appears to have an undisclosed impact on the EPA-mandated cleanup effort, because it sets a date for retirement of two large loans that are being used to finance the EPA cleanup. Agreement, par. 8. If these amounts are not paid off on schedule, then GA may delay a large payment

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GA's and SFC's belief -- but not the NRC staff's belief -- that "SFC's net assets and net revenues, as defined in the Settlement Agreement between the NRC Staff and SFC, will provide adequate capital resources to allow SFC to conduct its ongoing standby operations and to complete environmental remediation and decommissioning." Agreement at 4. Moreover, the term "adequate capital resources" is nowhere defined in the agreement.

into the decommissioning trust fund. Before a public interest finding can be made, GA and the NRC staff must be required explain the impact of this measure on the EPA cleanup.

2. The proposed settlement provides insufficient information about GA's commitment to the decommissioning of the site.

According to paragraph 1 of the proposed settlement agreement, GA is to put $9 million in a trust fund for cleanup of the SFC site. However, the conditions under which GA is making the contribution, and the actual amount of GA resources devoted to decommissioning, are not adequately established by the agreement. First, the $9 million is to be deposited into a trust fund for the benefit of the NRC, under a trust agreement whose terms do not yet exist. Moreover, the proposed agreement implies that this trust agreement may not conform to NRC guidance for such instruments. Agreement, par. 1. The trust agreement, which will "govern" the conditions under which the funds are deposited, maintained, and paid out, is a critically important part of this settlement. Yet, the agreement is not attached to the proposed settlement, nor have the NRC staff and GA stated that they will submit this trust instrument to the Board for its review. The settlement agreement should not be approved unless and until the trust instrument is provided to the Board and the parties and the Board is able to determine, after considering the parties' com-

ments, that it contains no undue or inappropriate restrictions or incursions on the decommissioning funds.[10]

Second, the settlement agreement unacceptably fails to resolve two tax liability issues which could significantly reduce the amount of GA's contribution to the fund. Despite having substantially delayed litigation in this proceeding to resolve the tax status of its contribution to the decommissioning fund, GA has yet to obtain an opinion or ruling from the IRS as to whether its planned $9 million contribution is taxable. As a result, GA reserves the right to reduce its contribution to a scant $5.4 million if the IRS does not grant it a tax deduction. The Board should not approve any settlement that provides a miserly $5.4 million to this massive decommissioning effort, nor should it approve a settlement that is based only on the hope that GA will contribute the full $9 million.

Moreover, in paragraph 1, the proposed settlement agreement suggests that payments into the fund may be taxable to SFC or GA if and when they are paid out. It is far from clear that funds spent by GA on the cleanup of a site that it owns should be taxed as income to SFC or GA. Intervenors believe it should be pos-

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[10] Intervenors note that on two occasions, GA obtained and received stays of discovery in order to resolve trust and tax liability issues. See GA's and the staff's motions for stays of discovery dated March 4, 1996 (at page 3) and June 14, 1996 (at page 4). Despite this delay, however, no trust agreement has been presented, or even established. Moreover, as discussed below, GA and the staff are still uncertain regarding tax issues that have a significant impact on the size of the settlement.

sible to set up the trust fund in a manner that avoids the taxation of the funds and maximizes their availability for cleanup. We are also concerned that GA, whose liability for cleanup is capped by the agreement at $9 million, has no institutional self-interest in seeing that these cleanup funds are not taxed to SFC. Thus, it is incumbent upon the Board to assert the public interest in conserving these funds for decommissioning, by requiring GA and the staff to address the tax issues on this record before the settlement agreement is approved.

Finally, the motion implies that the NRC has gotten as much money as it can out of GA without driving GA into financial ruin: GA asserts its belief "that if an adverse judgment of a potentially very large amount should be entered against GA, it is highly unlikely that it would be able to continue to operate as a viable business entity." Motion at 3. GA also claims that the continued existence of the October 1993 Order "has adversely and significantly affected the credit rating of GA and its ability to engage in its regular business activities."[11] Id. However,

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[11] The proposed settlement also alludes to GA's dependence on federal contracts, and claims to have been hurt by an alleged 30% cut in funding. Agreement at 5. However, based on conversations with two Department of Energy officials, it appears that GA's subsidy was cut by only 18%. Teleconferences between Lance Hughes, NACE Director, and Arthur Katz, DOE Office of Fusion Energy (August 2, 1996), and Joanne Wolfe, Budget Division, DOE Defense Programs (August 6, 1996). Moreover, GA's claims regarding the cut in its subsidy is not balanced by any discussion of the significant funding it has consistently received from federal taxpayers over the course of many years. Nor is there any discussion of the NRC staff and GA's implicit expectation that the taxpayers will also pay the bill for any SFC decommissioning expenses that GA is unwilling to pay.

there is not a shred of evidence in this record to support these dramatic claims, and thus they must be rejected out of hand.[12]

3. The proposed settlement provides insufficient information about the apparent division of liability among GA's facilities.

GA's and the staff's motion for approval of the settlement agreement states that in the course of the settlement negotiations, "consideration had to be given to any impact a settlement in this proceeding might have on GA's responsibilities" with respect to its nuclear facilities in San Diego, California. Motion at 2. Given the extremely small size of the settlement for the SFC site, it appears that the converse is equally likely: i.e., that consideration of GA's liability for its California sites had an extraordinary effect on the GA-NRC settlement. In fact, it appears that this settlement is part of a global settlement affecting all of GA's facilities, to which Intervenors have no access whatsoever. The staff has failed to disclose a memorandum to the Commissioners in which it apparently discusses the SFC settlement and the San Diego facilities, and the NRC has also refused to release the July 8, 1996, Staff Requirements Memorandum ("SRM") sent by the Commissioners to the NRC staff,

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[12] Moreover, as the NRC noted in its Answer in Opposition to GA's Motion for Summary Disposition, "GA advances no support for the notion that the drafters of the Atomic Energy Act intended to place private investment ahead of public health and safety." Id. at 18 (April 18, 1994).

which apparently approves the staff's proposed course of action.[13]

GA and the staff argue that "matters involving the California facilities" are "outside the scope of this proceeding and the jurisdiction of the Licensing Board." Motion at 2, note 3. This is sheer nonsense. If factual assertions regarding GA's liability for its San Diego facilities and GA's ability to pay those costs have had any effect on the amount of the settlement regarding the SFC site, the accuracy and reliability of those assertions is directly relevant to the validity of this settlement agreement, and must be subject to evaluation by the Board and parties. For instance, Intervenors question how the staff could compare the decommissioning funding needs of the San Diego and SFC sites, when it still has no idea whether the decommissioning costs for SFC will be in the tens of millions or hundreds of millions. The Board should refuse to approve the proposed settlement agreement until all documents related to the consideration of the cleanup costs for the San Diego facilities, and GA's ability to pay them, have been disclosed.[14]

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[13] Upon issuance of the SRM, Native Americans for a Clean Environment requested a copy from the NRC staff, but was told that it was being exempted from disclosure under the Freedom of Information Act. NACE filed a formal FOIA request for the SRM on July 12, 1996. Letter from Diane Curran to Russell Powell, Chief, FOIA-LPDR Branch. On August 2, 1996, the request was denied. Response to Freedom of Information Act, FOIA-96-286.

[14] Although the Licensing Board may lack authority to order the release of the documents under FOIA, it may order the production of this document through discovery, under a protective order if necessary.

4. The staff and GA fail to show that the staff's decision to abandon its October 1993 Order is justified by GA's concessions.

The staff and GA make only the most cursory attempt to justify the public interest in approving this settlement, and provide virtually no information to support it. First, GA and the staff assert that the Board recognized in LBP-95-18 that "the Commission has long encouraged settlements of contested proceedings, and that the avoidance of protracted and needless litigation is in the public interest." Motion at 2, citing LBP-95-18, 42 NRC at 154-55. However, that consideration does not apply here. As the Board recognized in LBP-95-18, the staff's claim of joint and several liability against GA was central to its October 1993 Order, but was not at issue in the SFC-NRC staff settlement. 42 NRC at 155. Here, in contrast, the central issue is whether the staff has justifiability abandoned that claim by giving up the litigation that is absolutely necessary, given GA's steadfast opposition to the Order, to secure it.[15] Intervenors submit that the staff has not met this standard.

Second, the staff and GA cite "significant risks" avoided by the settlement. Motion at 2. The staff asserts that it "recognizes that its theory of GA's liability may not be sustained by

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[15] Intervenors also question how much more "protracted" the litigation would have been than the settlement negotiations, which have taken over ten months but have yet to yield key elements that are essential to the agreement's approval, such as a trust agreement or a determination of whether and how the IRS will tax the fund.

this Board, the Commission, or the courts." Id. But the prospect of winning any case is never certain, and thus the settlement must be examined in light of the relative strength of what was given up for the relative value of what was gained. The staff's case against GA is a strong one, surviving summary disposition and a district court challenge in California.[16] In giving up such a strong case for joint and several liability by GA, in exchange for an amount that is very small in comparison to the potential cost of the cleanup, the staff did not secure a fair bargain for Intervenors or the public.

The staff also asks the Board to consider that continued litigation would consume significant staff resources that "could be more productively utilized in the public interest." Motion at 3. However, this vague assertion provides no assurance as to how staff resources would or could be devoted to filling the great hole that this settlement has left in the prospects for obtaining compliance with NRC decommissioning funding regulations and assuring the safe cleanup of the SFC site. It must also be noted that any litigation expenses incurred by the NRC and GA are minor in comparison with the size of the cleanup bill for the SFC site.

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[16] See also arguments made in NRC Staff's Answer in Opposition to GA's Motion for Summary Disposition and Intervenors' Opposition to GA's Motion for Summary Disposition (April 13, 1994).

5. The proposed GA settlement does not cure any defects in the SFC settlement.

In their comments on the SFC-NRC staff settlement, Intervenors raised numerous problems related to GA's potential exercise of control over SFC in a manner adverse to the public interest. For instance, Intervenors criticized the settlement agreement's failure to ensure that SFC would not be required to pay off a $10.6 debt incurred by it and Sequoyah Holding Corp. ("SHC"), another subsidiary of GA. GA may have an interest in having SFC pay off the debt of its subsidiary SHC. Intervenors also questioned the degree of control that GA has over ConverDyn and the designation or non-designation of its profits for decommissioning. These issues have not been resolved. Although the settlement provides for the resignation of two GA officials from the SFC board [par. 5], it does not explicitly preclude SFC from later appointing GA officials to the SFC board, nor does it address the question of whether GA may exercise control over SFC through its subsidiaries, SHC and Sequoyah Fuels International ("SFIC"), or its corporate affiliates.[17] Thus, these issues must be inquired into and resolved before the settlement can be approved.

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[17] As discussed in Intervenors' Brief on Appeal of LBP-95-18, viewgraphs presented by the NRC staff to the EDO on July 26, 1995, show a complex relationship between SFC, GA, and GA's affiliates GAES and GATC. Id. at 3, citing viewgraphs appended to brief as Attachment 3.

6. The proposed settlement adversely affects licensed GA safety functions.

The proposed settlement agreement provides for the resignation of the two officers of GA who currently serve on SFC's Board of Directors. Par. 5. This measure runs directly counter to SFC's license, which is based on the expectation of GA's close involvement in the management of the plant's safety operations. See discussion in Section II.B, above. Moreover, the agreement generally precludes NRC from claiming that GA is a "de facto licensee" based on GA's performance of its responsibilities under the SFC license, its business performance, or the nature of its ownership relationships with other companies. Par. 13. Thus, the agreement appears to preclude the NRC from taking enforcement action against GA with respect to any of its non-funding-related licensed responsibilities for SFC, such as quality assurance. In this respect, it goes far beyond the scope of the October 1993 Order. It also effectively amends SFC's license without proper notice and safety evaluation, in violation of the Atomic Energy Act and NRC regulations. Thus, this aspect of the settlement cannot be approved by the Licensing Board.

7. The proposed settlement improperly gives GA prior access to NRC press releases.

The NRC staff and GA have agreed that the staff will confer in advance with GA on the "accuracy" of press releases regarding the settlement. Agreement, par. 11. Intervenors understand that this practice is unprecedented for the NRC, and it wrongly allows

a private company the opportunity for improper influence on the public communications of a federal agency.

V. CONCLUSION

The settlement agreement proposed by the staff and GA falls far short of achieving the October 1993 Order's goal of assuring that GA complies with NRC decommissioning funding requirements by making up any shortfall in the funding needed to safely decommission the SFC site. It appears from this record that the staff has traded away its strong claim against GA for joint and several responsibility for decommissioning costs, in exchange for a paltry sum that will be grossly inadequate to the task at hand. GA got the best of this bargain by far, and the public is left with little hope of adequate funding for site cleanup.

At best, there is simply not enough information in this record to support a finding that the goal of the October 1993 Order is satisfied by the proposed settlement, or that the tradeoff by the NRC was worthwhile. It is absurd for the Board to even consider, let alone approve, a settlement agreement whose basic terms are undisclosed, and for which there is no factual basis on the record for determining its adequacy. Accordingly, the Licensing Board should not accept the terms of this proposed Settlement Agreement unless and until it has further adjudicated the reasonableness of the agreement to protect public health and safety and the environment in all of the respects discussed above.

Respectfully submitted,

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August 9, 1996

MUSKOGEE PHOENIX
November 16, 1995

▶ ENVIRONMENT

NRC wants more details on Sequoyah Fuels' cleanup

By a Phoenix Staff Writer and wire service reports

GORE — Sequoyah Fuels Corp. must come up with a more detailed plan of how it will dispose of radioactive contamination at its plant where it processed uranium for two decades, the Nuclear Regulatory Commission says.

At a meeting Tuesday with company officials, the NRC asked for a "conceptual design" of getting rid of the nuclear waste, including where it would be buried at the plant in Gore, 40 miles southeast of Muskogee.

Meanwhile, the leader of a environmental watchdog group has filed a protest against a recent settlement that allows Sequoyah Fuels to use its net assets and revenues for the cleanup.

Lance Hughes of Native Americans for a Clean Environment says the agreement doesn't specify how much Sequoyah Fuels should be required to pay.

From 1970 until it shut down in 1993, Sequoyah Fuels produced uranium hexafluoride, a process to make reactor fuel, and depleted uranium tetrafluoride, used in making armor-piercing bullets.

The company announced the closing in November 1992 after an inadvertent chemical release, the third such leak in three years.

Michael Weber of the NRC said the plant has an estimated 7 million to 8 million cubic feet of contaminated material. He said the NRC needs more information on disposal plans to complete an environmental impact statement.

Sequoyah Fuels already has described as too expensive an option of hauling the waste to a licensed dump. President John Ellis estimates the cost at up to $150 million over the $85 million to $90 million in estimated cleanup costs.

"(Sequoyah Fuels) doesn't have that kind of money," Ellis said.

NACE is challenging the Oct. 26 settlement between the NRC licensing board and Sequoyah Fuels, which is owned by San Diego-based General Atomics.

The group alleges that by approving the settlement, the NRC licensing board has violated the commission's regulations, failed to protect the public health and safety and did not provide assurance that responsible parties will clean up the site.

The NRC had previously ordered both Sequoyah Fuels and General Atomics to put up at least $86 million.

That order, supported by NACE and the Cherokee Nation, has resulted in legal disputes that led to the Oct. 26 settlement, in addition to a pending agreement between the NRC and General Atomics.

The Oklahoma Attorney General's office is petitioning for a review of the order approving the settlement agreement. Oklahoma is concerned the settlement agreement does not adequately protect the public interest or the environment, the petition said.

CERTIFICATE OF SERVICE

I certify that on August 9, 1996, copies of the foregoing INTERVENORS' OPPOSITION TO JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT BETWEEN NRC STAFF AND GENERAL ATOMICS were served by first-class mail on the following:

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