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)	)	

NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S BRIEF ON REVIEW OF LBP-96-24

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

COURT DECISIONS

ADMINISTRATIVE DECISIONS

INTRODUCTION

Pursuant to CLI-97-01, the Commission's Memorandum and Order of January, 22, 1996, intervenors Native Americans for a Clean Environment ("NACE") and the Cherokee Nation hereby submit this brief on review of LBP-96-24, Memorandum and Order (Approval of Settlement Agreement and Dismissal of Case) (November 5, 1996). In LBP-96-24, the Licensing Board approved the partial settlement of the Nuclear Regulatory Commission ("NRC" or "Commission") staff's October 15, 1993, enforcement order against General Atomics ("GA"), 58 Fed. Reg. 55,087 (October 25, 1993) (hereinafter "October 1993 Order"). The October 1993 Order sought a commitment from GA to make up any funding shortfall by its subsidiary, Sequoyah Fuels Corporation ("SFC"), for decommissioning the site of SFC's severely contaminated uranium processing plant in Gore, Oklahoma.

In settling the case, the NRC staff 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 as little as $5.4 million. Because the NRC staff has yet to provide a cost estimate for the cleanup of the SFC site, the value and effectiveness of the settlement to ensure safe and timely decommissioning of the SFC site remains at best unknown, and at worst disastrously inadequate to protect the health and safety of the facility's neighbors. Yet, the Licensing Board approved the settlement in LBP-96-24.

The Board's decision is invalid and must be reversed because the Board failed to make an independent determination, supported by the record, as to whether the settlement meets the paramount public interest consideration under 10 C.F.R. § 2.203: that it must ensure adequate protection of public health and safety by resolving the regulatory concerns raised in the initial enforcement proceeding. It was improper for the Board to defer to the staff's recommendation for approval of the settlement, when the staff had failed to support its recommendation with any assertion that the concerns raised in the October 1993 Order were resolved, or any information to demonstrate the issues were resolved. LBP-96-24 must also be reversed because the settlement agreement is an integral part of a secret global settlement of all NRC decommissioning funding claims against GA, which the Commission illegally approved via

unlawful ex parte communications. Finally, the Commission should reject the settlement because it fails to resolve significant deficiencies in the NRC staff-SFC settlement.

FACTUAL BACKGROUND

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. Although GA was not named as a licensee, GA assumed significant oversight functions under the license. See, e.g., Part I of SFC License §§ 2.1, 2.2, 2.3, 2.7.3, 2.5, 3.2.2.[1]

Shutdown of SFC Plant and GA Commitments in Support of Restart: In 1990, after finding significant radioactive and chemical contamination on the site, the NRC issued a series of enforcement orders against SFC. The plant, which had shut down for maintenance, remained closed for five 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.

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[1] 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 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 regula-

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).

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.[2] SFC's ConverDyn revenues were to be dedicated to decommissioning. 58 Fed. Reg. at 55,090. SFC's "Preliminary Plan for Completion of Decommissioning" (February 16, 1993) ("PPCD"), 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.

NRC's Enforcement Order And Adjudication: On October 15, 1993, the NRC staff issued an enforcement order against SFC and GA, concluding that SFC's decommissioning funding arrangements do not provide "the level of assurance required by the Commission that adequate funds will be available to fully decommission" the SFC site. 58 Fed. Reg. 55,087, 55,089. In particular, the staff found that: (a) SFC has no financial assurance mechanism in place under 10 C.F.R. § 40.36, and the ConverDyn arrangement is not the equivalent; (b) for

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(continued)
tions, and license conditions." § 2.1. Other GA responsibilities under the SFC license are described in the staff's October 1993 Order. 58 Fed. Reg. at 55,090.

2 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.

a number of reasons, projected ConverDyn revenues are "speculative;" (c) there is "uncertainty" regarding SFC's decommissioning cost estimate of $86 million, because it is based on an assumed onsite decommissioning strategy which may not ultimately be selected;[3] and (d) in order to satisfy the Commission's requirements, "supplemental financial assurance is required from SFC's parent corporation, GA." Id. Although GA had refused to guarantee decommissioning funding for SFC when it purchased the SFC plant, the staff found that GA's actions in control over the day-to-day operations and business of SFC, along with its 1992 commitment to guarantee decommissioning funding for the site, make GA responsible for decommissioning funding. 58 Fed. Reg. at 55,092. Therefore, the Order held SFC and GA "jointly and severally responsible" for providing funding, financial assurances, and updated and detailed decommissioning cost estimates for the cleanup of the SFC 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.

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[3] Notably, the staff has not endorse on-site disposal, on which the $86 million estimate is based. See staff viewgraph presented to the Executive Director for Operations on July 26, 1995, which declares that SFC's $86 million estimate "assumes on-site disposal, not endorsed by staff." Id. at 8. (The 7/26/95 viewgraphs are included as Attachment 3 to Intervenors' Brief on Appeal of LBP-95-18 (March 25, 1996)). In a Muskogee Phoenix article of November 11, 1995, 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. A copy of the article was attached to Intervenors' Opposition to Joint Motion for Approval of Settlement Agreement Between NRC Staff and General Atomics (August 9, 1996) (hereinafter "Intervenors' Opposition").

[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).

NRC Staff-SFC Settlement Agreement and LBP-95-18: On August 24, 1995, the NRC staff and SFC submitted a proposed agreement purporting to settle the NRC staff's claims against SFC. The agreement commits SFC's net assets and net revenues to decommissioning.[5] Intervenors opposed the settlement, on the grounds, inter alia, that it fails to provide any decommissioning cost estimate for the SFC site, establish any dollar amount for SFC's contribution to the costs of decommissioning the site, or protect SFC's assets against an outstanding $10.6 million loan by Kerr-McGee for GA's purchase of the property.[6] Nonetheless, two members of the Board approved the agreement. LBP-95-18, 11 NRC 150 (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 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 filed a petition for review of LBP-95-18, which the Commission granted. Intervenors filed their appellate brief on March 25, 1996. The appeal is still pending.

Global Settlement of GA's Decommissioning Funding Liability: In the fall of 1995, GA and the NRC staff also began settlement negotiations. During the course of these negotia-

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5 Id., par. 3. The agreement defines "Net assets" as being subject to "SFC's obligations to ConverDyn" and the "rights of senior lien-holders." Id., par. 1.d. "Net revenues" are defined as being subject to "reasonable and necessary expenses," again subject to ConverDyn obligations and the rights of senior lien-holder. Id., par. 1.e. The settlement agreement is published as an attachment to LBP-95-18, 11 NRC 150, 160 (1995).

6 The State of Oklahoma and the Army Corps of Engineers also opposed the NRC-SFC settlement. See LBP-95-18, 42 NRC at 150-51, notes 2-4, for citations.

tions, GA and the NRC staff informed the Board that the staff was weighing the impact of the SFC settlement on GA's ability to cover its decommissioning funding obligations for its facilities in California. See, e.g., NRC Staff's and General Atomics' Joint Motion for Extension of Stay of Discovery Through June 14, 1996 (May 6, 1996). Despite intervenors' requests for access to these deliberations, they were kept secret from the public, as was a memorandum from the staff to the Commissioners seeking the Commission's "negative consent" to the staff's proposal regarding "financial assurance for General Atomics facilities." This memorandum, SECY-96-124, Memorandum from James M. Taylor to the Commissioners (June 10, 1996) (hereinafter "SECY-96-124"), was later partially released to NACE under the Freedom of Information Act ("FOIA").[7] GA and the staff delayed submittal of the SFC-related settlement agreement until the Commission approved SECY-96-124. After the Commission gave its "negative consent" to SECY-96-124 in a July 8, 1996, Staff Requirements Memorandum ("SRM), GA and the staff submitted their motion for approval of the instant settlement agreement on July 11, 1996.

The released portions of SECY-96-124 strongly indicate that the NRC staff evaluated the "relative risks" of decommissioning GA's California facilities and the SFC site, on which it based a global settlement with GA that apportioned GA funding commitments among the facilities. It also appears that, in exchange for GA's commitment of $5.4 million or $9 million to the decommissioning of the SFC site, the staff agreed to forbear from enforcing its decommissioning funding regulations at GA's California facilities beyond a certain specified (but

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[7] See Final Response, FOIA-96-336 (October 10, 1996), in which the NRC identified nine documents responsive to NACE's August 22, 1996, request for the release of documents reviewed by the Commission in connection with its approval of SECY-96-124. The NRC released two documents in their entirety, partially released two documents, and withheld five others. On November 12, 1996, NACE filed a FOIA appeal. See Letter from Diane Curran to John C. Hoyle, Secretary to the Commission re: Appeal from Initial FOIA Decision. On February 12, 1997, the NRC staff denied the appeal with respect to a letter from Seymour H. Weiss and Robert C. Pierson to Keith Asmussen. Letter from Patricia G. Norry, Deputy Executive Director for Management Services, to Diane Curran. The remainder of NACE's FOIA appeal is still pending before the Commissioners.

undisclosed) dollar amount. See released portions of letter from Seymour H. Weiss and Robert C. Pierson, NRC, to Dr. Keith E. Asmussen, GA (July 9, 1996) ("Weiss Letter").[8]

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. Under the settlement, the NRC staff agrees to permanently rescind its October 1993 Order against GA, and commits to forbear from taking any other action against GA for decommissioning funding for the SFC site. In exchange, GA conditionally proposes to deposit a maximum of $9 million in a decommissioning trust fund. The commitment to provide $9 million in decommissioning funding is conditioned upon receipt of an IRS ruling that the contribution is tax deductible, i.e., that Uncle Sam will pay a portion of the bill. In the event that the IRS denies a deduction, GA intends to deposit only $5.4 million.

The 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. 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.

Like the SFC-NRC staff agreement, neither the GA-staff agreement nor the supporting motion provides a current dollar estimate of decommissioning costs for the SFC site. Nor does the NRC staff make any assertion regarding the settlement's adequacy to resolve the concerns raised in its October 1993 Order. Instead, the settlement agreement states that GA and SFC believe that SFC's net assets and revenues will provide "adequate capital resources" to complete environmental remediation and decommissioning. Settlement Agreement at 4. The staff remains conspicuously silent on this point.

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[8] The Weiss letter, SECY-96-124, and the SRM were appended to intervenors' Petition for Review as Attachments A, B, and C, respectively.

Intervenors opposed the settlement on the grounds, inter alia, that it failed to provide reasonable assurance of adequate decommissioning funding for the SFC site; that it illegally failed to disclose the terms of the global GA settlement of which it was a part; that it failed to resolve a number of problems raised by the SFC-NRC staff settlement; and that it unlawfully granted GA an unconditional and indefinite waiver of decommissioning funding requirements without public notice and opportunity for a hearing. Intervenors' Opposition to Joint Motion for Approval of Settlement Agreement Between NRC Staff and General Atomics (August 9, 1996) ("Intervenors' Opposition").

LBP-96-24 and Appeal: Overriding intervenors' objections, on November 6, 1996, two members of the Board approved the settlement in LBP-96-24. Judge Bollwerk again dissented, on the ground that the Board's review was insufficient to support a "public interest" finding. LBP-96-24, slip op. at 19-24. In particular, Judge Bollwerk found the settlement unsupportable absent the staff's provision of specific information regarding whether the concerns raised in the October 1993 Order are satisfied. Id., slip op. at 21.

On January 22, 1996, in CLI-97-1, the Commission granted intervenors' petition for review of LBP-96-24.

ARGUMENT

I. THE BOARD ERRED IN APPROVING THE SETTLEMENT.

A. Standard for Licensing Board Review of Settlements Under 10 C.F.R. § 2.203

NRC regulations at 10 C.F.R. § 2.203 provide that:

> At any time after the issuance of an order designating the time and place of hearing in a proceeding to modify, suspend, or revoke a license or for other action, the staff and a licensee or other person may enter into a stipulation for the settlement of the proceeding or the compromise of a civil penalty. The stipulation or compromise shall be subject to approval by the designated presiding officer . . . according 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. If approved, the terms of the settlement or compromise shall be embodied in a decision or order settling and discontinuing the proceeding.

Section 2.203 codifies the standard used by the Commission in In The Matter of New York Shipbuilding Corporation, 1 AEC 842 (1961), that a settlement should be approved if it is "in the public interest and will provide reasonable assurance that the public health and safety will be protected." Id. at 845 (emphasis added). The adequacy of the settlement to protect public health and safety must be the paramount "public interest" consideration addressed by the Board. Just as an agency should not refuse consideration of a settlement that is facially consistent with the agency's statutory purpose, Pennsylvania Gas & Water Co. v. FPC, 463 F.2d 1242, 1249-50, 1252 and note 45 (D.C. Cir. 1972), citing Michigan Consolidated Gas. Co. v. FPC, 283 F.2d 204 (D.C. Cir.), cert. denied, sub nom. Panhandle Eastern Pipe Line Co. v. Michigan Consolidated Gas Co., 364 U.S. 913 (1960), so it must reject a settlement that is inconsistent with its statutory purpose.

Thus, the Board's principal inquiry must be whether the proposed settlement is consistent with the NRC's statutory mandate to protect health and safety. See 42 U.S.C. §§ 2133, 2201. Such an inquiry must necessarily focus on whether the health and safety concerns raised in the initial enforcement order are resolved by the settlement. As the Board ruled in LBP-95-18,

> [t]he 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 North American Inspection, Inc., ALJ-86-2, 23 NRC 459, 460 (1986) (approval of settlement based in part on staff assurances that concerns raised in Notice of Violation were "resolved"); Radiation Oncology Center, LBP-96-4, 43 NRC 101, 102 (1996) (basing approval of settlement in part on compliance with statutory safety standards); Dairyland Power Cooperative, (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 371 (1980) (Licensing Board held a hearing to inquire into the seismic risk issues posed by an enforcement order, after the NRC staff had made a decision to withdraw that order.) If the proposed settlement will not achieve the regulatory compliance sought in the enforcement order, then it must be rejected. See Attorney General's Manual on the Administrative Procedure Act (1947), cited in In The Matter of New York Shipbuilding Corporation, 1 AEC at 845: "Where an agency believes that the informal settlement of an alleged violation or certain classes of violations will not insure future compliance with law, it would be justified in concluding that such settlement by consent would not be in the public interest."[9]

B. Licensing Board's Role on Review of Settlements

Section 2.203 gives the Licensing Board the authority and responsibility for reviewing the adequacy of proposed settlements in contested cases. As the Board held in Dairyland Power Cooperative, LBP-80-26, 12 NRC at 371,

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[9] In LBP-96-24, the Licensing Board applied an additional set of factors that are used by the courts in review of class action settlements, such as "the intensity of negotiations, the complexity of questions of law and fact in the proceeding placing its ultimate outcome in doubt, the value of an immediate recovery compared to the mere possibility of prevailing after protracted and expensive litigation and the judgment of the parties concerning the fairness and the reasonableness of the settlement." Slip op. at 15, note 9, citing Gottlieb v. Wiles, 11 F.3d 1004, 1014 (1993). These factors, if they are considered at all, must remain secondary to the Board's primary concern, which is whether the settlement is adequate to protect health and safety. See discussion, infra, in Section C.4.

> [a]bsent a formal proceeding, the staff clearly has authority to rescind or modify or reach a compromise with respect to a show-cause order. But once a notice of opportunity for hearing has been published and a request for a hearing has been submitted, the decision as to whether a hearing is to be held no longer rests with the Staff but instead is transferred to the Commission or an adjudicatory tribunal designated to preside in the proceeding -- in this case, to this Board.

In conducting its review, the Board is bound by two constitutionally based principles of administrative law. First, the Board must remain independent of the parties. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-87, 16 NRC 1195, 1200 (1982) (holding that the staff does not occupy a "favored position at hearings"). Second, the Board must make a reviewable record of its decision. Pennsylvania Gas & Water Co. v. FPC, 463 F.2d at 1251.[10] As the Tenth Circuit held in Gottlieb v. Wiles, 11 F.3d 1004, 1015 (10th Cir. 1993), a decision on which the Licensing Board relies in LBP-96-24 (see slip op. at 15 note 9), on review of a proposed settlement the tribunal must:

> independently analyze the evidence before it in making its determination; it may not rely solely upon the assertions of the proponents of the settlement as to what the evidence shows. . . . It is the responsibility of the proponents of the settlement to provide sufficient evidence to support a conclusion that the settlement is fair, and where the proponents have failed in this regard, the district court may be justified in requiring more evidence or in declining to approve the settlement.

11 F.3d at 1015 (emphasis in original).

Under § 2.203, the Board must also give "due weight" to the staff's position. This weight is necessarily limited, however, by the Board's obligation to remain independent and to make a reviewable record. Thus, the Board may not substitute the staff's unsupported opinion for evidence supporting the adequacy of a settlement to protect public health and safety. Rather, it should respect the position of the staff, as proponent of the original enforcement

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[10] See also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41 (1977) ("the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained"); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227, 230 (1980) (principle that a finding without evidence is arbitrary and baseless "has constitutional underpinnings").

action, as to whether the concerns raised in the original enforcement action are adequately resolved.[11] Where the staff takes no position on the matter, the settlement is entitled to no deference. Under those circumstances, it is in the "public interest" for the Board to order further hearings on the enforcement order.

The Board's role also includes ensuring the protection and vindication of intervenors' procedural right to a meaningful opportunity to evaluate and challenge the adequacy of a proposed settlement. Intervenors' participatory rights stem from three sources. First, in admitting intervenors to this enforcement proceeding, the Board recognized their right to fully defend the October 1993 Order, even against its proponent, the NRC staff. As the Commission noted in CLI-94-12, "[w]hile the agency's enforcement discretion may be at its zenith as the agency decides whether to initiate an enforcement action, that discretion does not negate the participatory rights in agency proceedings under statute or regulation once a proceeding has been initiated or a matter set for hearing." 40 NRC at 70. These rights include the opportunity to "vindicate [intervenors'] interest in having the order sustained fully by demonstrating why the settlement proposal would not be in the public interest." LBP-95-5, 39 NRC at 66 note 8, citing Oncology Services Corp., LBP-94-2, 39 NRC 11, 26 n. 12 (1994).

Second, 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.

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[11] The Board opines that the rationale for the "due weight" provision is that the staff bears responsibility for public health and safety "in the end." LBP-96-24, slip op. at 13. The Board neglects to observe that if the staff is unwilling or unable to make any representations regarding the adequacy of a proposed settlement to protect public health and safety, as is the case here, then its general endorsement of the settlement is not worthy of deference. Moreover, the Board misses the point that § 2.203 was intentionally structured so that it is the Licensing Board and not the staff which "in the end" has the authority and responsibility to ensure that the staff's purported resolution of a contested safety issue is adequate to protect public health and safety.

Reg. 22,951 (April 29, 1994). The Commission previously recognized this obligation in CLI-94-12, 40 NRC 64, 80 note 4 (1994). 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 Nation's sovereign interests in protecting its citizens, property, and trust lands.[12] Thus, the Licensing Board must treat the Cherokee Nation as a sovereign government, providing access to material information affecting the Nation's tribal interests and giving due weight to the Cherokee Nation's views on any proposed settlement.

Finally, the Licensing Board is 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). This enforcement proceeding now constitutes the one and only proceeding in which the NRC proposes to address and resolve the issue of whether there is adequate decommissioning funding for the SFC plant. As members of the public whose health and safety may be drastically affected by the outcome of the decommissioning funding issue, and who were denied the opportunity to address that issue in a licensing proceeding based on the pendency of this proceeding, intervenors are entitled to a full and meaningful opportunity to

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[12] 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.

participate in this decisionmaking process.

The opportunity to participate cannot be deemed "meaningful" unless the material elements of the settlement are disclosed to the participants. Thus, in Girsch v. Jepson, 521 F.2d 153, 157 (3rd Cir. 1975), the Court found that parties objecting to a proposed class action settlement must have an opportunity to "test by discovery the strengths and weaknesses of the proposed settlement." Accordingly, the Licensing Board's role includes assuring that intervenors have access to material information supporting the reasonableness of the settlement.[13] The Board must also "deal with" the intervenors' objections "in detail" in its decision. Pennsylvania Gas & Water Co. v. Federal Power Commission, 463 F.2d at 1251.

C. LBP-96-24 Must Be Reversed Because It Fails to Make A Supportable Finding That The Settlement Is Adequate To Protect the Public Interest and Public Health And Safety.

As discussed above, the paramount public interest consideration required of the Board in its review of the proposed GA-NRC staff settlement agreement was whether the settlement dispelled or resolved the health and safety concerns underlying the staff's October 1993 Order -- namely, that SFC had provided insufficient decommissioning funding assurance for safe and timely cleanup of the SFC site, because SFC's anticipated revenues were both speculative and unsecured, and because SFC's decommissioning cost estimate was uncertain.

In LBP-96-24, the Board purports to address this question by asserting the negative proposition that "no basis exists for concluding that NRC's regulatory requirements for funding decommissioning will not be met." Slip op. at 16. This decision is fatally flawed in several respects. First, the Board unlawfully abdicates its burden of justifying the settlement on the record, based on an inflated concept of deference to the staff. Second, even if the Board could rely on the staff to such an extent, the staff has made no representations nor provided any evidence regarding the adequacy of the settlement to protect public health and safety

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[13] Although such information should be placed on the public record if possible, the Board may use protective orders where necessary to protect commercial information.

to which the Board could defer. Finally, the record does not support a finding that the settlement is adequate to protect public health and safety. Even if the Board could consider a settlement that was less than adequate to protect public health and safety, the staff has failed to provide sufficient information to allow a fair evaluation of whether it has indeed obtained "the best bargain in the public interest." NRC Staff's Reply to Intervenors' Opposition to Joint Motion for Approval of Settlement Agreement at 9 (October 11, 1996).

1. The Board unlawfully abdicates its burden of justifying the settlement on the record, based on an inflated concept of deference to the staff.

Rather than making an affirmative finding that the proposed settlement is adequate to protect public health and safety, the Board throws the burden onto intervenors to show that it does not. This apparently is based on the Board's interpretation of the "due weight" standard as allowing reliance on the staff "without more." LBP-96-24, slip op. at 13. Aside from the fact that the staff makes no representations at all about the settlement's adequacy to protect public health and safety that could be assigned any weight (see Section 2 below), the Board's concept of "due weight" is grossly inflated and inconsistent with the regulatory scheme.

The Board's interpretation of the "due weight" standard would unlawfully deprive § 2.203 of any meaning or effect, by turning the Board into a mere rubber stamp for staff proposals. Moreover, the Board's assertion that "in enforcement cases, the weight provided the Staff's position has uniformly resulted, without more, in Board acceptance of the agreements," is patently incorrect. LBP-96-24, slip op. at 13, citing Radiation Oncology Center, 43 NRC at 102; and North American Inspection, Inc., ALJ-86-2, 23 NRC at 460. Rather than reflecting unquestioning deference to the staff, both Radiation Oncology Center and North American Inspection, Inc. demonstrate the independent exercise of Licensing Board authority to review a proposed settlement and determine its adequacy to protect public health and safety. In each case, the proposed settlement was rejected on the first round, and was only approved

after the Licensing Board insisted on further development of the record. Radiation Oncology Center, 43 NRC at 102; North American Inspection, Inc., 23 NRC at 460. Moreover, in each case, the Licensing Board independently addressed the issue of whether the proposed settlement would protect public health and safety. In North American Inspection, Inc., the ALJ convened a conference call in part to obtain assurances from the staff "that the settlement agreement resolves the Staff's concern as expressed in the Notice of Violation." 23 NRC at 459-60. Similarly, in Radiation Oncology Center, the Board "[b]ased" its approval of the settlement not just on the staff's assertion that it was in the public interest, but on various sections of the Atomic Energy Act relating to safety and licensing of nuclear facilities. 42 NRC at 102.

Thus, the "due weight" standard does not absolve the Board of its responsibility to make an independent evaluation of the proposed settlement and support its approval on the record. As suggested in Pennsylvania Gas & Water Co. v. FPC, 463 F.2d at 1250-51, where material factual issues remain regarding the adequacy of a settlement to protect public health and safety, the Board must order further hearings. Such is the case here, where the settlement fails to resolve the key safety issues underlying the October 1993 Order.

2. The staff has made no representations regarding the adequacy of the settlement to protect public health and safety to which the Board could defer.

Even if the Board could substitute deference to the staff for a supportable record explanation as to how and why the settlement protects the public health and safety, there is no basis here for such deference. Nowhere in any of the pleadings submitted by the NRC staff in connection with this settlement does the staff retract or modify the safety findings made in its October 1993 Order. Nowhere does the staff assert that the concerns underlying those findings are now satisfied, or that the settlement is adequate to protect public health and safety. Although most of the proposed settlement agreement's assertions are jointly made by the NRC

staff and GA, the NRC conspicuously declined to join GA in making the key assertion that: "based upon SFC's actual experience to date, General Atomics and SFC believe that SFC's net assets and 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."[14] See LBP-96-24, slip op. at 14.

Moreover, as Judge Bollwerk observed in his dissent, the staff has provided no factual information on which the adequacy of the settlement could be evaluated. The staff has provided no decommissioning cost estimate to which the settlement could be compared; nor has it provided any current projections of ConverDyn revenues that the staff is relying on to cover most of the decommissioning costs; nor has it given any indication of how the SFC site cleanup will be funded if SFC and GA contributions fall short. LBP-96-24, slip op. at 21-23.

Accordingly, since the staff has taken no position and provided no information, on the issue of whether the concerns raised in its 1993 Order are resolved, there is no basis for giving the staff's position "due weight." If anything, the Board should have given "due weight" to the staff's resounding silence on the matter. Rather than foisting the burden of showing the settlement's inadequacy onto intervenors, the Board should have required GA to demonstrate why, in the absence of support from the staff, the settlement should be deemed adequate to protect public health and safety.

3. LBP-96-24 Is Not Supported By the Record.

As discussed above, the staff provided neither an opinion nor any factual evidence to support a finding that the concerns raised in the 1993 Order are resolved by the settlement.

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[14] The staff's aversion to making representations regarding health and safety in connection with this settlement is illustrated by its response to intervenors' Petition for Review of LBP-96-24. In reply to intervenors' assertion that the staff has failed to make any representations about the settlement's adequacy to protect health and safety, the staff pointedly declined the opportunity to make a clear statement on the matter. Instead, it chose to reiterate its obscure claim that the settlement "is in the public interest." NRC Staff's Answer In Opposition to the Intervenors' Petition for Review of LBP-96-24 at 7 (December 11, 1996).

The only evidence relied on by the Board in approving the settlement agreement's adequacy to protect health and safety is a declaration from a GA official which claims that ConverDyn revenues will be sufficient to cover decommissioning costs. LBP-96-24, slip op. at 14, citing Declaration of GA's Vice President-Administration, John E. Jones. The Jones declaration is completely inadequate to support the settlement. First, the declaration covers only the issue of the reliability of ConverDyn revenue projections, and completely fails to address the lack of a guarantee for those revenues or the adequacy of SFC's decommissioning cost estimates. Second, with respect to the reliability of anticipated ConverDyn revenues, the declaration is fatally vague and devoid of factual support.[15] As such, the affidavit is far from sufficient to provide reasonable assurance that the NRC staff's concerns are now resolved and that the ConverDyn revenues will be as high as projected by SFC. Accordingly, the Board has failed to demonstrate a basis for finding the settlement is adequate to protect public health and safety.

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[15] The affidavit refers to several unspecified "occasions" when GA gave the NRC staff spreadsheets showing ConverDyn's financial performance at an unspecified date. According to GA, these reports show ConverDyn "performing substantially as projected." Declaration of John E. Jones, par. 11 (October 10, 1996), attached to General Atomics' Response to the Opposition of the Intervenors and the Attorney General of Oklahoma to the Joint Motion for Approval of Settlement Agreement Between the NRC Staff and General Atomics (October 15, 1996). GA provides no dates or figures to substantiate these vague and undefined assertions.

4. Even if the Board could approve a settlement less than adequate to protect public health and safety, the staff failed to provide sufficient information to evaluate whether the settlement is "the best bargain in the public interest."

Even assuming that the Board could accept the settlement absent staff assurances of its adequacy to protect public health and safety, the Board deferred excessively to the staff in weighing other "public interest" factors, such as:

> the intensity of negotiations, the complexity of questions of law and fact in the proceeding placing its ultimate outcome in doubt, the value of an immediate recovery compared to the mere possibility of prevailing after protracted and expensive litigation and the judgment of the parties concerning the fairness and the reasonableness of the settlement.

LBP-96-24, slip op. at 15, citing Gottlieb, 11 F.3d at 1014. The Board has made no record which would allow a review of this determination. In effect, it asks the Commission to accept the settlement on the grounds that the staff knows best, and that something is better than nothing. As discussed above, giving the staff's position "due weight" does not allow the Licensing Board to abdicate its independent role, or to evade the requirement to make a reviewable record. Here, the record is devoid of any factual evidence that would allow an independent assessment of the value of the settlement, such as the total cost of decommissioning, the reliability of SFC's contributions to decommissioning costs, and GA's financial ability to pay decommissioning costs.[16] Without some sense of the value of GA's commitment in relation to total decommissioning costs, it is simply impossible to assess whether the certain recovery of an amount as little as $5.4 or $9 million made giving up a claim of indefinite liability by GA worthwhile.[17]

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[16] As discussed above in note 13, whether that information is placed in the public record or shared with intervenors under a protective agreement, it must be disclosed to the participants.

[17] The Board cites the risk of not prevailing in the litigation as a factor in support of the settlement. LBP-96-24, slip op. at 15. Although the risk exists, and indeed always exists in any case, it is important to recognize that the October 1993 Order demonstrates strong factual and legal grounds for holding GA liable as a de facto licensee. Moreover, the Board found these grounds adequate to sustain the Order against GA's motion for dismissal or summary disposition of the case. LBP-94-17, 39 NRC 359 (1994). See also arguments made in NRC Staff's Answer in Opposition to GA's Motion for Summary Disposition (April 13, 1994) and

D. LBP-96-24 Must Be Reversed Because It Violated Intervenors' Rights to Meaningful Participation in the Proceeding.

As discussed above, the Board was obligated to protect intervenors' participatory rights in this proceeding, including the right to disclosure of information material to the adequacy of the settlement. The Board illegally overran intervenors' participatory rights in two significant respects.

First, intervenors have had no access to the most fundamental factual information underlying the alleged reasonableness of this settlement. More than three years after this proceeding commenced, the NRC's own cost estimate for cleanup of the SFC site remains either unknown or a well-kept secret. No public accounting has been provided regarding SFC's and ConverDyn's performance in raising decommissioning funds, or the reliability of their financial projections. The Board's criticism of intervenors' failure to present "evidence" is nothing short of absurd, given the fact that intervenors have been kept in complete darkness regarding the most basic information regarding this settlement. By refusing to require sufficient disclosure to allow a meaningful evaluation of the settlement, the Board committed reversible error. Girsch v. Jepson, 521 F.2d at 159.

Second, the Board erred in refusing to condition approval of the settlement upon disclosure of the terms of the global settlement between GA and the NRC staff. See Intervenors' Opposition at 25; LBP-96-24, slip op. at 16-17. As Intervenors pointed out in their Opposition, 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, 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. Opposition at 25.

(continued)
Intervenors' Opposition to GA's Motion for Summary Disposition (April 13, 1994).

In defense of the settlement, the NRC staff and GA argued that the settlement of GA's liability for its California plants was outside the Board's jurisdiction, because it did not affect the amount of money GA pledged for the SFC cleanup. Motion at 2, note 3. The Board agreed, holding that "consideration of GA's license responsibilities at its facilities in San Diego, California, or anywhere else, does not bring the Staff review of such matters within our jurisdictional boundary." LBP-96-24, slip op. at 16-17.

Documents released to NACE under the Freedom of Information Act, however, indicate that the settlement of GA's obligation for the SFC plant was part of a global settlement, in which the NRC staff "evaluated the relative risks of the various GA facilities and the SFC site," and apparently apportioned some amount of GA resources among them, based on that risk assessment. See released portions of SECY-96-124. Moreover, the settlement was presented to the Commission, which is the ultimate decisionmaker in this case, in a secret ex parte briefing. As the U.S. Court of Appeals for the D.C. Circuit has observed, such ex parte contacts are:

> offensive in two fundamental respects: (1) They violate the basic fairness of a hearing which ostensibly assures the public a right to participate in agency decisionmaking, and (2) they foreclose effective judicial review of the agency's final decision.

National Small Shipments, Etc. v. ICC, 590 F.2d 345, 351 (D.C. Cir. 1978) (footnotes omitted). The agency must "inquire into the nature and source of all ex parte communications had in this controversy and to assure that any material so communicated is subjected to adversarial review at the hearing." Id. Accord, State of North Carolina, Environmental Policy Institute v. EPA, 881 F.2d 1250, 1258 (4th Cir. 1989), quoting United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519, 540, 542 (D.C. Cir. 1978) ("Only through disclosure of ex parte communications may we protect the public's 'right to participate meaningfully in the decisionmaking process' and 'the critical role of adversarial comment in ensuring proper functioning of agency decisionmaking and effective judicial review.'")

The only remedy for this affront to due process and the Commission's public participation requirements is full disclosure to the parties of all of the documents relating to the settlement, along with an opportunity to comment on their relevance to the settlement of NRC's claims against GA regarding the SFC site. Even if the Commission believes the California settlement does not implicate the SFC settlement, the very appearance of improper ex parte decisionmaking compels the disclosure of SECY-96-124 and related documents. An administrative hearing "'must be attended, not only with every element of fairness but with the very appearance of complete fairness.'" Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970), citing Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D. C. 1962)[18].

E. LBP-96-24 Fails to Demonstrate That Significant Deficiences in the SFC-NRC Staff Settlement Are Resolved by the NRC Staff-GA Settlement.

In his dissent from LBP-95-18, Judge Bollwerk recognized the "clear linkage" between SFC and GA, and argued against the approval of the SFC-NRC staff settlement unless and until it could be evaluated in conjunction with a settlement of the staff's claims against GA. Id., 42 NRC at 159. Now that both settlements have been completed, it is clear that SFC's net assets and revenues remain vulnerable to improper dissipation by GA. In particular, GA has a self-interest in forcing SFC to pay off the $10.6 million mortgage to Kerr-McGee.[19] GA may

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[18] Intervenors note that the secrecy of the global settlement violates the participatory and substantive rights of not only the neighbors of the SFC site, but also the neighbors of GA's California facilities. Under the NRC's decommissioning funding regulations, the Commission holds licensees fully responsible for the costs of decommissioning their facilities, including costs that go beyond the amount set aside under decommissioning funding plans. See Final Rule, General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,036 (June 27, 1988). By agreeing to forbear from enforcing the decommissioning funding requirements against GA beyond a specific dollar amount, the NRC staff has effectively agreed to a permanent waiver of the NRC's decommissioning funding regulations. Such a waiver is illegal unless accompanied by public notice and an opportunity for public comment. 42 U.S.C. § 2239(a).

[19] The extent of GA's control over SFC through its subsidiaries, SHC and SFIC, has never been resolved, because discovery on this issue was suspended during the NRC staff-GA settlement negotiations.

also seek to use its indirect control over ConverDyn to divert ConverDyn profits away from the SFC clean-up. See Intervenors' Brief on Appeal of LBP-95-18 at 16, 21. Had GA been held liable for any shortfall in SFC's decommissioning funds, it would have had an incentive to maximize the conservation of SFC's assets and revenues for decommissioning purposes, so as to minimize its own contribution. Now that the NRC staff has placed a cap on GA's liability for the SFC clean-up, that incentive is gone. The Board claims it lacks jurisdiction to address these issues; thus, they must be resolved by the Commission by ordering further hearings on the enforcement order.

II. CONCLUSION

For the foregoing reasons, LBP-96-24 should be reversed and this enforcement proceeding should be reopened for further hearings.

Respectfully submitted,

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February 18, 1997

CERTIFICATE OF SERVICE

I certify that on February 18, 1997, copies of the foregoing NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND THE CHEROKEE NATION'S BRIEF ON APPEAL OF LBP-99-24 were served by first-class mail on the following:

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