UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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)	)	March 25, 1997

INTERVENORS NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S REPLY TO NRC STAFF'S OPPOSITION BRIEF ON APPEAL OF LBP-99-24

Introduction

In LBP-96-24, the Board approved a decommissioning funding settlement between the Nuclear Regulatory Commission ("NRC") staff and General Atomics ("GA"), without making a finding that the settlement ensures compliance with NRC decommissioning funding requirements or otherwise provides adequate protection of the public health and safety. Nor is there any evidence in the record that the concerns which prompted the NRC to issue its October 1993 enforcment order have been resolved.

In the NRC Staff's Brief in Support of Affirmation of LBP-96-24 (March 10, 1997) (hereinafter "NRC Staff Brief"), the staff provides no further information that would support a safety finding by the Board, or even allow the Board to make some determination as to how far short the settlement falls. Instead, the staff asks the Commission to defer unquestioningly to its judgment that the settlement is fair and reasonable by some standard that has no safety basis, and on which the intervenors were provided no supporting information.

The staff's position is unfounded. The Board was required to make an independent, supported and reviewable determination that the settlement was adequate to protect public

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health and safety, or the settlement must be rejected. Even assuming for purposes of argument that the Board had the authority to accept a settlement that provided less than adequate protection, it was required to evaluate the settlement in light of the degree to which the settlement satisfied the concerns raised by the staff's 1993 order.

I. THE SETTLEMENT MUST BE REJECTED BECAUSE IT IT FAILS TO MAKE A SUPPORTABLE FINDING THAT THE SETTLEMENT IS ADEQUATE TO PROTECT THE PUBLIC INTEREST AND PUBLIC HEALTH AND SAFETY.

In their initial brief, intervenors demonstrated that the primary public interest consideration under 10 C.F.R. § 2.203 must be whether a proposed settlement protects public health and safety. Native Americans for a Clean Environment's and Cherokee Nation's Brief on Appeal of LBP-96-24 at 9-10 (February 18, 1997) (hereinafter "Intervenors' Brief"). Consideration of a settlement's adequacy to protect public health and safety is not only required under New York Shipbuilders, 1 AEC 842 (1961), but is an essential part of the NRC's statutory mandate to protect the public from undue risk. 42 U.S.C. §§ 2201(b), 2133(d). Although some factors may be compromised in a settlement, the NRC simply has no statutory authority to compromise public health and safety.[1] Thus, a settlement by the NRC staff that does not fulfill its statutory mandate to protect public health and safety should not be approved.

The NRC staff does not dispute that the adequacy of a settlement to protect public health and safety must be considered in reviewing the settlement; nor does it challenge New York Shipbuilders, or dispute the relevance of NRC decisions in which Licensing Boards based their approval of settlements under 10 C.F.R. § 2.203 on a finding that they would adequately protect public health and safety and/or ensure compliance with NRC safety requirements.[2] Nevertheless, the staff makes no attempt to explain how public health and safety is

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1 For instance, the NRC may compromise the amount of a monetary penalty for noncompliance with a standard, or agree on an alternative means of complying with a standard -- but it may not negotiate away compliance with the standard or accept a compromise that jeopardizes public health and safety.

2 See cases cited in Intervenors' Brief at 10.

protected by this settlement. Instead, the staff attempts to skip over public health and safety considerations, arguing that the Commission should consider other factors such as the practical value of a judgment if the enforcement case had proceeded and the litigative risk of pursuing the enforcement action.[3] NRC Staff Brief at 13-14.

In making this argument, the staff relies for "guidance" on the Commission's regulations governing review of settlements in licensing cases, 10 C.F.R. § 2.759. NRC Brief at 8-9. In this standard, the Commission recognizes that the "public interest may be served through settlement," and encourages the "fair and reasonable settlement" of contested issues. Nothing in 10 C.F.R. § 2.759, standard, however, allows the Licensing Board to ignore or minimize public health and safety considerations in its review of settlement agreements. In fact, NRC decisions approving settlements of contested licensing issues under 10 C.F.R. § 2.759 uniformly include a finding of regulatory compliance and/or adequacy to protect public health and safety. In Consolidated Edison Co. of New York (Indian Point Nuclear Generating Station, Unit No. 3), CLI-85-14, 2 NRC 835 (1985), for example, the Commission found that the proposed settlement of an intervenor claim under the National Environmental Policy Act ("NEPA") "is appropriate in the circumstances of this case, meets the requirements of NEPA, and is otherwise in the public interest." Id. at 837 (emphasis added). The Commission emphasized that:

> the parties may not simply stipulate that there has been compliance with NEPA. As the Appeal Board rightly recognized, the Commission and its Boards have an independent obligation to assure that the important policies of that act have been protected in the agreed course of action.

Id. at 838. Similarly, in Maine Yankee Atomic Power Co. (Maine Yankee Power Station), LBP-84-14, 19 NRC 834, 836 (1984), the Board "independently considered" a proposed settle-

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[3] Intervenors agree with the staff's contention that the sufficiency of ConverDyn revenues to cover decommissioning costs is also relevant to the adequacy of the settlement. Id. Indeed, this is a key consideration in determining whether the public health and safety will be protected by the settlement. However, as discussed below, the staff has not provided any information to support a positive finding on the issue.

ment and found nothing "which would in any way compromise the public health and safety." In Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Unit 3), ALAB-532, 9 NRC 279 (1979), the Appeal Board approved a stipulation between the applicant, staff, U.S. Environmental Protection Agency, and two affected states regarding the cooling system for the Peach Bottom plant, over the objection of the intervenor. The Appeal Board recognized its own obligation to "examine the short-term thermal discharge limitations and cooling system required," pending a final EPA determination on the matter. Id. at 283, 284. The Board made an independent finding that "given the level of performance attainable by the five helper cooling towers, the stipulated solution is in the public interest." Id. at 284 (emphasis added). In other words, the Appeal Board's "public interest" finding consisted of a conclusion that the proposed helper cooling towers would be sufficient to protect public health and safety.

Here, in contrast to Philadelphia Electric Co., there is no supportable finding in the Board's decision or the record regarding the "level of performance" of the proposed GA settlement. The NRC staff has made no representations regarding the likely cost of the SFC cleanup or the adequacy of SFC's and GA's combined resources to cover those costs;[4] nor has it stated that the concerns expressed in the October 1993 order regarding the reliability of SFC's cost estimate and revenue projections have been resolved.[5] Thus, there is no basis for the kind of independent, supported, and reviewable safety finding that is required under 10

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[4] In fact, the NRC concedes that it does not expect to have this information until it finishes the EIS for the decommissioning process sometime in the next one to two years. NRC Brief at 25.

[5] Although the staff states that the Board has considered SFC's projections for ConverDyn revenues, the staff itself makes no representations regarding the adequacy of SFC's projections. In particular, the staff does not retract or otherwise change the assertions made in the October 1993 Order that those cost projections are both "uncertain" and unsecured. 53 Fed. Reg. 55,087, 55, 089 (October 15, 1993). Nor does it explain why the Board should deem those concerns to be resolved.

C.F.R. § 2.203 and the Commission's statutory mandate to protect public health and safety.[6] The lack of evidence demonstrating that the settlement is adequate to protect public health and safety constitutes a "material issue that requires resolution." CLI-94-12, 40 NRC 64, 71 n. 10 (1994). Accordingly, LBP-96-24 must be reversed.

Even if the Board could accept a settlement that was less than adequate to protect public health and safety and approve it based on other considerations, the Board must nevertheless address the extent to which the settlement is inadequate to protect public health and safety. Whatever "flexibility" the Board may have in adjusting its review to the "circumstances" of an individual case does not include ignoring the safety issues that were raised in the original enforcement order. See LBP-95-18, 42 NRC 150, 155 (1995) (the "appropriateness" of the settlement should be "viewed in the light of the allegations made by the Staff in the October 15, 1993 Order," including the "fundamental" charge that SFC's decommissioning funding plan "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.")[7] The NRC staff has conceded that "if" the decommissioning funding requirements apply to GA, GA "falls short" of meeting them; however, it does not state in what respect GA falls short. NRC Brief at 12.

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[6] The staff vaguely suggests that public health and safety might be adequately protected without the decommissioning funding regulations, or under an exemption to the regulations. NRC Staff Brief at 11. Aside from being completely unexplained, these suggestions are absurd: without adequate funding to cleanup the badly contaminated SFC site, the site remains dangerous and unusable, posing offsite health threats from the spread of contaminated groundwater. Moreover, regulatory exemptions do not lie within the enforcement discretion of the agency: if the staff wished to issue an exemption, it was required by § 189a of the Atomic Energy Act to provide public notice an opportunity for a hearing on the staff's speculation that the public would be just as well off without a decommissioning funding rule.

[7] Moreover, contrary to the staff's suggestion, the Board had no authority to place unquestioning reliance on the staff by giving "significant deference" to the staff's views. NRC Brief at 10. As discussed in Intervenors' Brief at 15-16, any deference owed to the staff must be balanced against the Board's obligation to make an independent and reviewable decision. In any event, the staff has made no public health and safety findings in this settlement proceeding to which the Board could have deferred.

Moreover, the staff makes no representations regarding the adequacy of the combined SFC and GA settlements to cover the costs of decommissioning the SFC site. If the staff considers that these funds are likely to be inadequate, it must say so, explain the basis for its view, and explain the extent to which the settlement falls short of assuring the adequate cleanup of the site.[8] Otherwise, the Licensing Board has no grounds for evaluating the adequacy of the settlement to protect public health and safety -- the key factor in determining whether the NRC struck the "best bargain" possible, as asserted by the NRC staff.

Moreover, the staff's discussion of the other factors it asserts should be considered fails to justify approval of the settlement. The staff asserts that it might not be able to recover funding from GA if a judgment were ultimately entered -- however, there is no information in the record to indicate that GA would later be unable to pay more than $5 or $9 million, the relatively small amount it promises now. GA and the staff have hidden all information about GA's financial resources from the Board and the public. The staff also argues that to pursue the litigation would be risky, because of the novel legal issues raised by the October 1993 Order. The Order itself, however, was carefully documented and well-defended by the NRC staff and intervenors in the summary disposition proceeding brought by GA. Again, the staff has provided no information about either GA's ability to pay for decommissioning at SFC, or how GA's contribution compares to the actual cost of decommissioning, that would allow a fair appraisal of whether the NRC has obtained a good bargain.[9]

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[8] As suggested by Judge Bollwerk, the staff and the Board should also address what other sources of funding or legal avenues are available to ensure that the site can be safely decommissioned.

[9] The staff cites Gottlieb v. Wiles, 11 F.3d 1004, 1014 (10th Cir. 1993), a court challenge to a class action settlement which held that the financial condition of a settling party is "not necessarily a factor which must be considered in assessing the adequacy of a settlement." NRC Brief at 13. As the staff implicitly acknowledges, however, other courts have held that the financial condition of a settling party is relevant to the adequacy of class action settlement. Girsch v. Jepson, 521 F.2d 153, 157 (3rd Cir. 1975). In any event, as suggested in the language of 10 C.F.R. § 2.759, the "fairness" of a settlement is a relevant consideration in NRC reviews of settlement agreements. Comparing the "fairness" of the settlement to GA and the affected public necessarily involves an evaluation of whether the settlement offers an appropriate share of GA's resources.

II. LBP-96-24 MUST BE REVERSED BECAUSE IT VIOLATED INTERVENORS' RIGHT TO MEANINGFUL PARTICIPATION IN THE PROCEEDING.

As discussed in Intervenors' Brief at 20-22, LBP-96-24 must be reversed because the Board did not require sufficient disclosure of information to allow intervenors a meaningful opportunity to comment on the settlement agreement. In fact, intervenors were kept completely in the dark about the basic information underlying the settlement. Id.

The NRC staff does not dispute that intervenors were entitled to review the data pertinent to the settlement, but contends that intervenors did have such an opportunity. NRC Brief at 15. See also NRC Brief at 17 ("all of the fundamental information underlying the settlement is information that Intervenors already know"). In particular, the staff argues that intervenors had access to GA tax returns and financial statements. NRC Brief at 12.

This representation is false. Although intervenors requested GA's tax returns, financial statements, and other financial documents in discovery, and repeatedly sought to review the documents, GA refused to produced them. See Native Americans for a Clean Environment's and Cherokee Nation's First Set of Interrogatories and Request for Production of Documents to General Atomics at 10-17 (July 10, 1995); Intervenors' Opposition to General Atomics' Motion for an Order Scheduling Briefing of Intervenors' Motion to Compel at 2-3, 5 (August 3, 1995); Order (Establishing Schedule For Response to Intervenors' Motion to Compel) (August 8, 1995); Intervenors' Motion to Compel General Atomics and Sequoyah Fuels Corporation to Answer Intervenors' First Set of Requests for Production of Documents at 2 (August 17, 1995); Native Americans for a Clean Environment's and Cherokee Nation's Opposition to Joint Motion for Additional Stay of Discovery at 4 and note 8 (October 11, 1995). The Board suspended discovery in the case on August 30, 1995, and repeatedly renewed the stay until the settlement agreement was submitted; thus, intervenors were never able to review the documents they requested.

Thus, contrary to the staff's argument, intervenors had no access to any information the staff may have relied on "even if the 1993 Order was sustained in its entirety, there was a substantial question as to the practical value of such a judgment." NRC Brief at 13. Similarly, intervenors had no basis for evaluating whether GA's contribution to the cleanup of the SFC site constituted a "fair" portion of its available resources. 10 C.F.R. § 2.759.

As discussed in Intervenors' Brief at 22-23, intervenors were also denied any information about the global settlement of GA's decommissioning funding obligations for the SFC site and GA's other facilities in California. The NRC responds to this charge by denying that the settlement of GA's decommissioning funding obligations for the California plants had any relevance to the settlement on the SFC site. NRC Brief at 17-18. This claim is flatly belied by SECY-96-124, unexcerpted portions of which state that:

> Confidential information concerning GA's finances has been made available to the staff. Such information supports the conclusion that _____ financial assurance requirements for its San Diego facilities _____ contributing a significant amount of cash to settle the SFC litigation, or _____ a method of financial assurance provided by the regulations (other than a parent company guarantee), on top of the cash contribution to settle the SFC litigation, ti would be at the _____.
>
> Given the limited resources of GA, the staff has evaluated the relative risks of the various GA facilities and the SFC site. _____[10]

SECY-96-124 at 3 (June 10, 1996) (emphasis added). Despite the partial deletions, the released portions of SECY-96-124 convey the unmistakable impression that the NRC compared the relative risks of the GA's California and SFC facilities as they relate to decommissioning funding needs and apportioned funding as it considered appropriate. The Commission must either acknowledge the relevance of the global settlement and provide an appropriate opportunity to comment, or it must disclose all of the relevant documents to dispel the unmistakeable impression that it made a secret ex parte deal with GA and the NRC staff

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10 Excerpted portions of SECY-96-124 are denoted by "___."

regarding decommissioning for the SFC site and other GA facilities, from which the public was excluded.

III. CONCLUSION

For the foregoing reasons, the Commission should reject the arguments of the NRC staff and reverse LBP-96-24.

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CERTIFICATE OF SERVICE

I certify that on March 25, 1997, copies of the foregoing NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND THE CHEROKEE NATION'S REPLY TO NRC STAFF'S OPPOSITION BRIEF ON APPEAL OF LBP-99-24 were served by first-class mail on the following:

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