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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S REPLY TO INTERVENORS' OPPOSITION TO JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT BETWEEN NRC STAFF AND GENERAL ATOMICS AND TO THE STATE OF OKLAHOMA'S RESPONSE TO NRC STAFF'S AND GENERAL ATOMICS' JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT

Pursuant to leave granted by the Atomic Safety and Licensing Board (Board), the NRC Staff (Staff) hereby files its reply to Intervenors' Opposition to Joint Motion for Approval of Settlement Agreement Between NRC Staff and General Atomics (Aug. 9, 1996) (Intervenors' Opposition), and to the State [of Oklahoma]'s Response to NRC Staff's and General Atomics' Joint Motion for Approval of Settlement Agreement (Sept. 5, 1996) (State's Response). For the reasons set forth below, the Board should approve the Settlement Agreement between the Staff and General Atomics (GA).

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BACKGROUND

On October 15, 1993, the Staff issued an Order[1] against GA and Sequoyah Fuels Corporation (SFC) (1993 Order), alleging, *inter alia,* that GA and SFC are jointly and severally responsible for providing funding to remediate contamination at the SFC site in Gore, Oklahoma, and for providing financial assurance for decommissioning the SFC site in accordance with the requirements of 10 C.F.R. § 40.36. 1993 Order at 23-24. Neither SFC nor GA had provided the financial assurance of adequate funds for the completion of decommissioning as required by NRC regulations, although contracts involving a partnership, ConverDyn, not deemed to meet NRC financial assurance regulations, had been established under which SFC projected that it would receive revenues of approximately $72 million through the year 2003. *Id.* at 9. SFC had also projected that it would have an income of more than $17 million from other sources. *Id.*

Under the 1993 Order, GA was specifically directed to provide financial assurance for decommissioning and decontamination in the amount of $86 million on or before November 19, 1993, and to make up any shortfalls if revenues to SFC in any year are less than the ConverDyn or other revenues projected in the Preliminary Plan for Decommissioning submitted by SFC. *Id.* at 24-25. GA and SFC both requested a hearing[2] on the 1993 Order, and the matter has been in litigation since then.

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[1] 58 Fed. Reg. 55,087-92 (1993).

[2] Sequoyah Fuels Corporation's Answer and Request for Hearing (Nov. 2, 1993); General Atomics' Answer and Request for Hearing (Nov. 2, 1993).

SFC and the Staff entered into a settlement agreement in August 1995, which was approved by the Board on October 26, 1995, and is presently under review by the Commission.[3] The SFC settlement essentially provides that SFC must dedicate to decommissioning all of its present and future net assets and revenues as defined in the settlement agreement. It does not attempt to require that SFC must accumulate a specific minimum dollar amount. Rather, SFC is obligated "to furnish all of its assets and revenues that it would have to provide if a judgment were to issue against it in the proceeding." LBP-95-18, 42 NRC at 155.

The Staff and GA entered into a settlement agreement in July of this year following over ten months of intensive, complex negotiations. The principal features of the GA settlement include the following. It provides for GA to establish a trust in the amount of $9 million, or $5.4 million if the Internal Revenue Service does not agree with the Staff that the trust constitutes a qualified settlement fund. GA will have no control over the distribution of the funds in the trust for decommissioning activities. Rather, distribution will be governed by an NRC-approved trust agreement. In exchange, the Staff has agreed that it will withdraw the 1993 Order against GA and forbear from taking action against GA in the future relating to decommissioning funding for the SFC site, and forbear from asserting a "*de facto* licensee" claim against GA based on GA's oversight role regarding SFC, GA's exercise of reasonable business judgment, or the corporate relationships

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[3] *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-95-18, 42 NRC 150 (1995).

between GA and its parent, affiliates, or subsidiaries. The GA settlement was filed on July 11, 1996, by the Staff and GA, for approval by the Board.

DISCUSSION

The intervenors in this proceeding, Native Americans for a Clean Environment and the Cherokee Nation (Intervenors), as well as the State of Oklahoma (State), oppose the approval of the GA settlement for a number of reasons, some of which are shared by the Intervenors and the State. Viewed against all of the facts and circumstances, these reasons do not provide a basis upon which to disapprove the settlement. This reply by the Staff (Staff's Reply) will address the Intervenors' arguments first, followed by a discussion of the State's arguments.

I. Intervenors' Arguments

The Intervenors argue that the proposed settlement is "grossly inadequate to satisfy the objectives of the October 1993 Order." Intervenors' Opposition at 18.[4] The

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[4] At the conclusion of the Intervenors' argument under this heading, the Intervenors assert that "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." Intervenors' Opposition at 21. The outstanding lines of credit from GA to SFC enable SFC to meet current expenses if it encounters any cash flow problems. While the Environmental Protection Agency (EPA) may have an interest in SFC remaining viable, the NRC Staff likewise has such an interest and believes that the GA settlement is consistent with that interest. The Intervenors have not made any showing that the GA settlement has any impact on activities mandated by the EPA; furthermore, the EPA is not a party in these proceedings and has never sought to become a party. Accordingly, the Intervenors have not raised an issue that would warrant delaying or withholding the approval of the GA settlement.

Intervenors contrast GA's contribution[5] under the settlement with the directives to GA under the 1993 Order, as well as the potential total cost of cleaning up the SFC site, and assert that the GA settlement "doesn't come close to satisfying" the "goal" of the 1993 Order. *Id.* at 19.

In its Preliminary Plan for Decommissioning, SFC provided an estimate of $86 million for cleaning up the Gore site. Further studies are being conducted that may adjust such estimate upwards. However, a comparison of the amount of money to be contributed by GA under the settlement to the cost estimate of cleanup is certainly not the end of the analysis in determining whether the settlement is in the public interest. Assuming a favorable judgment at both the trial and appellate level, whether any judgment is in fact

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[5] The starting point in measuring GA's contribution under the settlement is either $9 million or $5.4 million, depending upon the Internal Revenue Service's opinion as to whether the settlement constitutes a qualified settlement fund. Settlement Agreement at 6. Moreover, the Staff believes that it is reasonable to expect that through investment by the trustee and the accrual of interest, the settlement fund will grow substantially above the specified contribution over time. However, the Intervenors appear to believe that the "value" of the contributions by GA into the trust fund should be discounted by virtue of whatever taxes SFC must pay upon receipt of the trust fund proceeds. *See* Intervenors' Opposition at 19 ("Income tax on expenditure of the funds may further reduce their value . . . ."). The Staff disagrees. Assuming the IRS opines that the settlement constitutes a qualified settlement fund, then GA is obligated to pay into the fund the full $9 million. (In this scenario, GA will have been able to deduct the $9 million from its taxable income, thereby reducing its taxes and enhancing its ability to fund the full $9 million. Proceeds of the fund subsequently paid to SFC for cleanup activities would be taxable as income to SFC when received, but would be able to be offset by the deductible expenses that would be paid by the proceeds of the trust. If the IRS does not agree that the settlement constitutes a qualified settlement fund, then GA will not be able to reduce its taxable income by the amount placed in the trust, thus reducing GA's available cash to fund the trust. However, subsequent distribution of the proceeds to pay for SFC cleanup expenses would not then be taxable income to SFC (having not been allowed as a prior deduction by GA), and SFC would still be allowed to deduct cleanup expenses.)

collectible is a critical factor that must be considered.[6] Furthermore, the risk of losing the litigation on the merits must be factored into an analysis of the reasonableness of a settlement.

With respect to litigation risk, the Intervenors assert that "the settlement must be examined in light of the relative strength of what was given up for the relative value of what was gained." Intervenors' Opposition at 28. This assertion may sound appealing, but its application here is entirely subjective. One possible way to characterize the settlement is that the Staff has agreed to give up a claim, based on allegations of fact not yet established and a legal theory without direct precedent, in exchange for $9 million in cash. Certainly, reasonable people could differ regarding whether the settlement favored either party. However, several things are clear: the Staff could win the case through the Court of Appeals, and still not be assured of collecting anything. In addition, the Staff could lose the case at the Board level, the Commission level, or at the Court of Appeals, and thus be assured of collect nothing.

In any litigation against any company, even assuming full victory on the merits, a plaintiff must take into account the likelihood of being able to collect a judgment when considering whether to settle. Being a privately held company, GA does not, and is not

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[6] The General Statement of Policy and Procedures for NRC Enforcement Actions (Enforcement Policy), 60 Fed. Reg. 34,381 (1995), sheds some light here. The Enforcement Policy makes it clear that when the NRC takes an enforcement action involving civil penalties, the ability of the respondent to pay is a consideration in determining the amount of penalties imposed. *Id.* at 34,387. Moreover, the NRC's intention is not to "put[] a licensee out of business." *Id.* The Enforcement Policy thus recognizes reality: nothing is to be gained by pursuing a monetary enforcement action for an amount beyond that which is recoverable.

bound by law to disclose its finances to the public. As an NRC licensee for its facilities in San Diego, California, however, GA does file proprietary financial reports with the NRC. When considering whether to settle this matter with GA, and in what amount, the Staff took into account all of the information available to it in order to arrive at its decision.

The Board is to "accord[] due weight to the position of the staff." 10 C.F.R. § 2.203. The Staff is in a unique position to weigh the possible risks and limitations associated with the collectibility of a judgment if this litigation were to be completed with the Staff victorious in every aspect. Thus, the Staff's judgment should be afforded considerable weight. While the Intervenors have not been privy to the proprietary information concerning GA that is available to the Staff, the Staff is not at liberty to release any such information. *See* 10 C.F.R. § 2.790(a)(4); 18 U.S.C. § 1905. The Staff believes that under these circumstances, the Board should "accord[] due weight to the position of the staff" regarding its analysis of the appropriateness of the settlement -- which has taken into account litigation risks and the chances that even a favorable judgment may not result in accomplishing all or even part of the objectives of the 1993 Order -- and reject the Intervenors' assertion that the Staff "did not secure a fair bargain for Intervenors or the public."[7]

The Intervenors argue that the Board "should not accept the terms of this proposed Settlement Agreement unless and until it has further adjudicated the reasonableness of the agreement . . . ." Intervenors' Opposition at 31 (emphasis added). The Staff submits that

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[7] Intervenors' Opposition at 28.

adjudication of the reasonableness of the settlement is beyond the scope of this proceeding, and is not provided for under the Commission's regulations. Section 2.203 provides that the Board "may order such adjudication of the issues as [it] may deem to be required in the public interest to dispose of the proceeding." 10 C.F.R. § 2.203. "The issues" in the context of section 2.203 are those "raised by the [1993 Order]," not every conceivable issue that may arise as a result of the negotiation of a settlement. *New York Shipbuilding Corp.* (Byproduct Material License No. 292204-2), 1 AEC 842, 845 (1961).[8] This point is particularly important because the Intervenors further argue that the Board "should refuse to approve the proposed settlement agreement until all documents related to the consideration of the cleanup costs for the [GA] San Diego facilities, and GA's ability to pay them, have been disclosed." *Id.* at 26. The Intervenors note that although the Board may lack the authority to release documents relating to the foregoing matters under the Freedom of Information Act, "it may order the production of [these documents] through discovery, under a protective order if necessary." *Id.* n.14.

Clearly, the Staff considered GA's responsibilities under its licenses for its San Diego facilities when it deliberated concerning the GA settlement.[9] The Staff would have been remiss if it had not considered any spillover effect a settlement here might have on the San Diego licenses. This does not mean, however, that the scope of this proceeding

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[8] The Commission's regulation at 10 C.F.R. § 2.203 regarding settlements codified the *New York Shipbuilding* case. *See* Note by the Secretary (Atomic Energy Commission Amendments to 10 C.F.R. Part 2, "Rules of Practice"), AEC-R 4/13 (Dec. 28, 1961), and attachments and enclosures thereto (relevant excerpts attached as Attachment 1).

[9] *See, e.g.*, NRC Staff's and General Atomics' Joint Status Report Regarding Settlement Discussions and Motion for Modification of Schedule (Jan. 22, 1996) at 4.

has now been extended to adjudicate matters relating to the San Diego facilities. The bottom line is that GA has liabilities, including those for decommissioning its San Diego facilities, and limited assets, which is true of any corporation. Having taken such matters into consideration, *i.e.*, the assets and liabilities, including regulatory liabilities, of GA, as well as the risks of litigation, the Staff achieved what it believes to be the best bargain in the public interest.

Under the GA settlement, GA shall establish a trust fund for the benefit of the NRC into which GA shall deposit a total of $9 million or $5.4 million in accordance with the schedule attached to the settlement agreement; the governing trust fund agreement is subject to the approval of the NRC, and shall be consistent with the model trust fund agreement set forth in NRC Regulatory Guide 3.66 to the extent applicable; and the trustee shall make payments from the trust as the NRC shall direct or under procedures that have been approved by the NRC. Contrary to the Intervenors' assertion, the relevant trust agreement has been established, and approved by the NRC. *See* Intervenors' Opposition at 23 n.10. The approved trust agreement follows the model set forth in Regulatory Guide 3.66, except for those model provisions that would not apply to the circumstances here. For example, in the model, SFC as the named licensee would be the grantor of the trust; in the approved trust agreement, GA is the grantor. Normally, the grantor has a reversionary interest in the trust funds; under the approved trust agreement, GA does not. The model allows payments to the fund to be in the form of noncash assets; under the approved trust agreement, GA must deposit cash only. In sum, these and other deviations from the model trust agreement either reflect the factual circumstances that are different

here from the usual situation to which the model was intended to apply, or more tightly restrict and control the release of funds from the trust. The Staff believes that it is not necessary for the Board to review and approve the trust agreement, which is a private contract between GA and the trustee, as long as the Staff, under the GA settlement, has the right to approve its terms. The approval of trust agreements for financial assurance instruments is one of the Staff's regular duties outside of this litigation, and should not now become subject to approval by the Board, despite the Intervenors' argument to the contrary. *See* Intervenors' Opposition at 22-23.

The Intervenors are correct that the GA settlement provides for two alternative payments by GA, *i.e.*, either $9 million or $5.4 million, subject to an IRS opinion as to whether the settlement constitutes a qualified settlement fund. *Id.* at 23. However, the fact that the final amount is still dependent upon an IRS opinion should not prevent the Board from considering whether to approve the settlement. As the Staff has discussed above, comparing the settlement amount to the estimated cost of cleaning up the SFC site is but one consideration in determining whether the settlement should be approved; in making this comparison, the total projected revenues to SFC from ConverDyn -- approximately $72 million -- should not be ignored. More importantly, the Staff carefully weighed the practical considerations of whether the 1993 Order may or may not be sustained by either the Board, the Commission, or the Court of Appeals, and what, if any, money could be collected at all, even assuming a favorable outcome. The Staff concluded that the GA settlement should be entered into, even if the ultimate contribution to the trust fund by GA is limited to $5.4 million.

The Intervenors "believe it should be possible to set up the trust fund in a manner that avoids the taxation of the funds and maximizes their availability for cleanup." *Id.* at 23-24. However, the Intervenors offer no supporting discussion. The Staff, as well as GA, spent a considerable amount of time analyzing all of the tax issues associated with establishing a trust fund, and certainly the goal was to maximize the funds that would be available for cleanup consistent with the tax laws. In summary, the tax laws provide[10] that funds paid to resolve litigation where a violation of law has been alleged, and placed in a trust pursuant to an order of an agency of the United States can be deductible when paid into the trust. *See generally* 26 C.F.R. §§ 1.468B-0-1.468-5. Normally, expenditures for cleanup are not deductible until actually spent for cleanup. Also, receipt by SFC of any trust funds usually would be taxable income at the time received. However, such income could then be offset by SFC's deduction of actual expenditures for cleanup. The Staff believes that by structuring the GA settlement as a qualified settlement fund, the settlement maximizes the funds available for cleanup. The only time trust proceeds would not be taxable income to SFC is if the IRS deemed the trust to be merely a transfer of funds between related companies.[11] However, in that case, GA would not be able deduct its contributions to the trust, thereby reducing the amount of cash it would have to place in the trust fund, as reflected in the alternative amounts contained in Annex B to the GA settlement.

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[10] The Staff is not waiving any attorney-client, attorney work product, or predecisional/deliberative process privileges by offering this discussion.

[11] GA and SFC file consolidated tax returns.

On another note, the Intervenors have resurrected the SFC settlement agreement, which was approved by the Board last year, as a basis to argue that the GA settlement should not be approved. *See* Intervenors' Opposition at 29. The Intervenors claim that there are issues which they have raised with respect to the SFC settlement, such as the failure to bar the payment of the debt to Kerr-McGee, or whether GA has control over ConverDyn to alter the flow of money due to SFC, and that the "proposed GA settlement does not cure any defects in the SFC settlement." *See id.* The Intervenors also question the omission from the GA settlement of a provision that prevents SFC from naming persons from GA to serve on the SFC board of directors; "nor does [the GA settlement] address the question of whether GA may exercise control over SFC" through subsidiaries or affiliates. *See id.* With respect to the argument that the GA settlement does not "cure defects" in the SFC settlement, the Staff believes that there are no such defects. Had there been any, the Board would not have approved the SFC settlement. As to the future constitution of the SFC board of directors, the Intervenors have not explained why this is of concern, particularly when SFC is now limited to performing decommissioning activities only. Of course, the degree of control GA may exercise over SFC is the key factual issue that would need to be resolved if there was no settlement and the litigation were to continue. Resolving that issue would be entirely inconsistent with the purpose of settling this case.

At the same time the Intervenors appear to complain that the GA settlement "does not explicitly preclude SFC from later appointing GA officials to the SFC board . . . .", *id.*, they argue that the resignation of the two GA officials under the settlement "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. *Id.* at 30. The Intervenors claim that because the Staff has agreed to forbear from asserting a *de facto* licensee theory against GA under certain circumstances, "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." *Id.* The Intervenors state that this aspect of the settlement "goes far beyond the scope of the October 1993 Order [and] effectively amends SFC's license without proper notice and safety evaluation, in violation of the Atomic Energy Act and NRC regulations" and thus cannot be approved by the Board. *Id.*

It is clear that nothing in the GA settlement explicitly changes the SFC license with respect to any named GA positions specified in the license. Furthermore, the Intervenors' claim that the GA settlement "effectively amends" the license is based on speculation and questionable assumptions. The Intervenors appear to assume that an enforcement action against GA would be appropriate if its personnel named by position in the SFC license did not perform in accordance with the license. They also assume that a *de facto* licensee theory would be the only theory upon which any such enforcement action would be brought. None of these assumptions has been established. Given that the GA settlement does not change the SFC license with respect to those sections where GA personnel are named by position, and that there is no other indication that GA has, by reason of the settlement or otherwise, now decided to make any person unavailable to perform functions

under the SFC license, the Intervenors' argument is also based on speculation, and in sum provides no grounds for rejecting the GA settlement.

Finally, the Intervenors argue that the GA settlement "improperly gives GA prior access to NRC press releases." Intervenors' Opposition at 30-31. The relevant provision of the settlement is as follows:

> [T]he NRC Staff agrees that the Office of Public Affairs of the NRC ("OPA") has represented to the NRC Staff that before OPA issues any news release describing the terms of this settlement, it will confer with General Atomics to confirm the accuracy of any statements of fact which it proposes to include in the news release.

GA settlement agreement, ¶ 11. This provision of the GA settlement clearly provides no basis to reject the settlement. First of all, the issue is moot; OPA issued a news release on August 2, 1996, describing the terms of the settlement. Secondly, notwithstanding the Intervenors' "understanding" that the provisions of paragraph 11 are "unprecedented for the NRC," *see* Intervenors' Opposition at 30, there is, in fact, precedent for settlement agreements between the Staff and respondents containing stipulations relating to the issuance of press releases. *See, e.g., General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), ALJ-87-6, 26 NRC 445 (1987) (Staff agreed to use joint press release to announce settlement);[12] *St. Mary Medical Center -- Hobart, et al.*, LBP-90-46, 32 NRC 463 (1990) (press release to be provided to licensees and intervenor 24 hours prior to issuance); *North American Inspection, Inc.*, ALJ-86-2, 23 NRC 459 (1986)

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[12] Here, the characterization of OPA's representations to the Staff did not include any indication that there would be a joint press release or that OPA would ever negotiate the terms of the release with GA.

(Staff agreed to issue press release, after providing contents to licensee prior to issuance, describing terms of settlement, and stating radiation levels met NRC requirements contrary to earlier press release). Therefore, there are no grounds to reject the GA settlement based on paragraph 11 of the settlement relating to press releases.

II. State's Arguments

The State first raises a concern that the State "could be precluded from requiring remediation of some contaminants due to federal preemption," and thus if the State is "preempted from addressing matters subject to the NRC's jurisdiction at the Gore facility, then it is of utmost importance that the NRC make certain that the proposed settlements[13] will provide for complete remediation of contamination . . . ." State's Response at 5. Unfortunately, the State's Response does not provide any details or analysis of how federal preemption principles "could" preclude the State from requiring remediation of "some contaminants," such that the Staff can provide an appropriate response without having to speculate as to the State's argument. What the State seems to be ultimately concerned about is whether the GA settlement guarantees complete cleanup of the SFC site so that the State will never have anything to worry about. As was fully discussed in response to the Intervenors' arguments, the GA settlement provides an additional amount of cash, to supplement SFC's revenues from ConverDyn, in an amount that the Staff concluded is in the public interest, weighing all of the risks of litigation, the time and resources that would be spent in litigation, and the prospects of collecting cash from GA even if the Staff's 1993 Order was sustained in all respects. The Staff would have clearly welcomed a settlement

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[13] The Staff assumes that the State is referring to both the GA and SFC settlements.

under which complete cleanup was in fact guaranteed through a financial assurance mechanism that met all of the requirements of 10 C.F.R. §§ 40.36 and 40.42. However, such a settlement was not offered, nor could it be attainable in the Staff's judgment. Not achieving everything that the 1993 Order sought certainly does not require that the GA settlement be rejected if under all of the circumstances, it is in the public interest as the best compromise that can be obtained.

The State appears to recognize that GA may not have unlimited financial resources, and seeks proprietary information on GA's finances, arguing that the "public interest in disclosure of that information must override any proprietary interest in the information GA may have . . . ." State's Response at 7.[14] The State cites to no authority in support of this argument. As the Staff has indicated earlier, it is not at liberty to disclose to the public any proprietary information in its possession. *See generally* 10 C.F.R. § 2.790; 18 U.S.C. § 1905. As a practical matter, to do so could threaten GA's competitive position and in turn threaten the funding of any settlement trust fund. Under these circumstances, and precisely because the Intervenors and the State do not have all of the information available to the Staff, the Staff's position should be given due weight. *See* 10 C.F.R. § 2.203.

On pages 8-13 of the State's Response, the State provides nine enumerated paragraphs of discussion that the State submits are "pertinent" to consideration of the approval of the "two settlement agreements." Since the Board has obviously approved the

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[14] The State also seems to acknowledge that it is possible that "due to financial or other considerations, the parties' proposed settlement is in the public interest . . . ." *See* State's Response at 13.

SFC settlement, and resolved those issues that may pertain to that settlement, it is far from clear how the nine paragraphs of discussion provided by the State bear specifically on whether the GA settlement should be approved.

In the first numbered paragraph, the State mentions the relationship between SFC and GA and points out that the State has previously raised questions regarding the appropriateness of "allowing" SFC resources to be transferred to GA in connection with several financial obligations SFC has to GA. According to the State, the "combined effect of the two settlement agreements will be to allow GA to receive all of these payments and benefits from SFC, allow SFC to incur new debts, and allow SFC to pay Kerr-McGee . . . ." Notwithstanding this discussion by the State, it is not clear what issue the State is attempting to raise with respect to the GA settlement. Having approved the SFC settlement, the Board has already considered whether it is appropriate to recognize that SFC may have legal debts; the GA settlement does not change that recognition.[15] If the State is arguing that the GA settlement does not cure what the State believes to be defects in the SFC settlement, this argument should be rejected because the SFC settlement has already been approved.

In the second numbered paragraph, the State notes that the final cost of decommissioning is uncertain, given that the NRC has not made a final determination on a method of decommissioning. State's Response at 9. Even if the final cost of decommissioning exceeds the $86 million estimate that SFC provided in 1993, this does

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[15] It does, however, ensure that GA may not "take any action that an independent observer would reasonably conclude will interfere with the ability of SFC to carry out the NRC-SFC Settlement Agreement . . . ." *See* GA settlement, Paragraph 10.

not mean that the GA settlement cannot be evaluated. In addition to factoring in the cost of cleanup, an analysis of the settlement must factor in, perhaps more importantly, the likelihood of collecting actual funds even if the litigation was successfully completed on the merits. The Staff has made its assessment, and based on it, the Staff has reasonably concluded, without knowing the final cost of cleanup to the dollar, that the GA settlement is in the public interest.

The State's third numbered paragraph discusses the uncertainties of the ConverDyn proceeds and suggests that GA can control the flow of the proceeds to SFC. *Id.* at 9-10. The State, however, acknowledges that it has not had access to detailed information concerning ConverDyn, given that it is confidential. It is not clear how the State's discussion sets forth a basis for rejecting the GA settlement. Under Paragraph 10 of the GA settlement, GA may not take any action that an independent observer would reasonably conclude will interfere with the ability of SFC to carry out the SFC settlement. The SFC settlement requires SFC to dedicate to decommissioning all of its present and future net assets and revenues. The Staff believes that Paragraph 10 precludes GA from manipulating in any way SFC's present and future net assets and revenues, which can be audited against existing ConverDyn contracts and documentation should a dispute arise.

The State's numbered paragraph 4 simply asks the question, "what recourse is available if SFC cannot finance the remaining costs of $85 million or more?" State's Response at 10. It does not appear to articulate any particular argument, to which the Staff can respond, against approval of the GA settlement.

In the State's numbered paragraph 5, the State creates calculations to show that in its view, the "net financial effect is to limit costs imposed upon GA to less than ten percent of the estimated cost of cleanup." *Id.* at 10-11. The State also notes that GA will be "free to continue to receive taxpayer funding for research and through government contracts . . . ." *Id.* at 11. Although the Staff assumes "less than ten percent" is unacceptable to the State for the purpose of approving the GA settlement, it is not clear what may be acceptable to the State. In addition, it is not clear whether the State is arguing that the settlement is defective because it does not bar GA from receiving government contracts. Without further clarification from the State, the Staff is unable to respond to the discussion in this numbered paragraph.[16]

The State's numbered paragraph 6 discusses the fact that the settlements with SFC and GA release them from providing "any financial assurance in the form of cash, bond or other reliable means." With respect to the GA settlement at issue here, the settlement does in fact provide that GA must establish a trust over which GA has no further control. The State also raises some question about federal preemption once more (whether "claims by the state are preempted by federal law is a critical question -- if so, then the present settlement proposals are the public's last real hope for achieving a fair commitment from these parties for financing cleanup"), but again does not provide any analysis or authority on which it is based. It appears that the State might simply be attempting to underscore

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[16] Assuming that the State is, in fact, arguing that the GA settlement should not be approved because it does not bar GA from obtaining further government contracts, the State has cited no authority that would enable the NRC to institute such a bar. In any event, the Staff believes that GA's government contracts are irrelevant to whether this settlement should be approved.

the finality of the settlements, which the Staff certainly appreciates, but this alone does not weigh against approving the GA settlement.

In the State's paragraph numbered 7, it suggests that "it may be more efficient to proceed with litigation against GA." *Id.* at 12. The State also notes that the issue of GA's liability "is one of significant interest," and that establishing a full administrative record would allow review by the Court of Appeals. The Staff does not comprehend how continuing the litigation "may be more efficient" than achieving a settlement in the public interest now. Furthermore, the issuance of the 1993 Order was never intended to be an academic exercise. A settlement that clearly obligates GA to put up cash, which can generate even more cash beginning immediately through investments, is certainly in the public interest in comparison to a litigation that might not be resolved for years, will deplete resources for legal expenses, and may yield no tangible benefit for cleanup efforts.

The State's paragraph numbered 8 asserts that "[t]he nature of the public interest in this matter is essentially that of a creditor of SFC and the public holds a constructive trust on funds and revenues in the hands of SFC, owed to SFC or other assets of SFC." *Id.* The State argues that the public interest is not protected "by conceding that other claims, including those of GA and [Kerr-McGee], shall take priority over the public's interest in decontamination and decommissioning." The State again appears to be arguing issues that may have pertained to the SFC settlement, rather than the GA settlement, and thus such issues are not relevant at this time. Even if the SFC settlement was still at issue, it has only been acknowledged in the SFC settlement that such settlement is "subject to the rights of senior lien-holders," whatever rights, if any, they may be. There has never been

a concession that certain claims shall, as a matter of law, take priority over decommissioning.

The State's paragraph numbered 9 states that the GA settlement "actually reduces GA responsibility if SFC does not repay them or if appeals are initiated and not resolved quickly." The State provides absolutely no support for this allegation. The State then claims that "[t]hese provisions have a chilling effect on efforts of the state or others to seek a "priority claim" to SFC funds or to protest this settlement." *Id.* at 13. The State leaves one to guess what provisions it is referring to, and simply fails to explain why such provisions have any chilling effect, and why, even assuming such an effect, such provisions render the GA settlement unacceptable.

In the State's "Conclusion," the State makes several suggestions to the Board. The first three propose that the Board order the production of documentation "to support the assertion that, due to financial or other considerations, the parties' proposed settlement is in the public interest or otherwise meets the financial assurance requirements of" 10 C.F.R. § 40.36, and that "appropriate participation" by the State and the Intervenors be allowed. *Id.* at 13-14. To ensure that there are no misunderstandings, the GA settlement has never been presented as providing full financial assurance in accordance with 10 C.F.R. § 40.36. On the other hand, the Staff believes that there are documents that support the assertion that "due to financial or other considerations," the GA settlement is, in fact, in the public interest. However, as the Staff has stated earlier in this Reply, the release of such documents, which are confidential proprietary documents, could jeopardize GA's competitive standing and, accordingly, indirectly threaten the ability of

GA to fund the trust under the settlement. The Staff believes that it has thoroughly evaluated all of the relevant information, financial or otherwise, to determine whether the GA settlement is in the public interest, and that no additional purpose would be served to have the State and the Intervenors duplicate such Staff efforts. Thus, the first suggestions by the State should be rejected by the Board.[17]

The State also suggests that the Board "retract its previous approval, or stay the effectiveness of the approval, of the SFC settlement until final determination of the combined effect of the two settlement agreements." *Id.* at 14. The State provides no legal basis on which the Board may simply "retract" its previous order approving the SFC settlement, particularly in light of that order now being reviewed by the Commission. To the contrary, once the Board issued the order and a petition for review of the order was filed,[18] the Board's jurisdiction to act further with regard to the SFC settlement ended. *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 NRC 23, 27 (1987). Furthermore, the Board obviously determined when it approved the SFC settlement that it was in the public interest, notwithstanding the terms of any settlement with GA that may later be proposed. Given that the SFC settlement is now before the Commission, the State's suggestion here makes little sense and is barred by law.

The State's next suggestion is for the Board to wait for an environmental impact statement to be completed or the development of more accurate cost estimates before

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[17] Of course, if an arrangement sufficient to protect the confidentiality of the relevant documents was possible and was acceptable to GA, the Staff would not object to the production by GA of such documents.

[18] *See* Intervenors' Petition for Review of LBP-95-18 (Nov. 13, 1995).

approving "both proposed agreements . . . and order interim requirements for both GA and SFC regarding payment of decommissioning and site characterization costs." *Id.* (Emphasis in original) As the Staff has discussed above, it is patently clear that the estimates of cleaning up the SFC site exceed the amount of money GA is to contribute under the GA settlement. This notwithstanding, the Staff has endeavored to explain why, under all of the facts and circumstances, taking into account litigation risks and evaluating what financial gain might actually be realized even if the 1993 Order was sustained on the merits, the GA settlement is still in the public interest. It is unclear what the State has in mind with respect to "interim requirements," so it is difficult for the Staff to formulate a response. However, the Staff does note that the issue to be considered by the Board in conducting this proceeding is "whether the [1993 Order] should be sustained," 1993 Order at 27, and to the extent the State is requesting that the Board take measures that go beyond the scope of this proceeding, such measures would be beyond the authority delegated to the Board by the Commission. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985).

The State's last suggestion is that the Board "rescind" or modify its approval of the SFC settlement if the Board approves the GA settlement, "since the effect of approving both agreements in current form would be to allow the parties to avoid posting adequate financial assurance . . . ." State's Response at 14. As discussed above, the Board's approval of the SFC settlement is now pending before the Commission, and thus the Board no longer has the authority to act further with respect to the SFC settlement. *Vogtle*, ALAB-859, 25 NRC at 27. Furthermore, although both settlements do not result in the

provision of full financial assurance meeting the requirements of 10 C.F.R. §§ 40.36 and 40.42, they do provide, in the Staff's judgment, the best assurance attainable that funds will be available for the cleanup of the SFC site. The SFC settlement is now out of the hands of the Board; the Staff respectfully requests that, notwithstanding the comments of both the State and the Intervenors, the Board approve the GA settlement now before it.

CONCLUSION

Based on the foregoing, the Staff submits that the Board should approve the GA settlement.

Respectfully submitted,

Steven R. Hom
Counsel for NRC Staff

Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
this 11th day of October 1996

ATTACHMENT 1

OFFICIAL USE ONLY

AEC-R 4/13

December 28, 1961

RETURN TO REGULATORY CENTRAL FILE
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COPY NO. 32

ATOMIC ENERGY COMMISSION

AMENDMENTS TO 10 CFR PART 2, "RULES OF PRACTICE"

Note by the Secretary

The attached report by the Director of Regulation and the General Counsel is circulated for consideration by the Commission at an early date.

W. B. McCool

Secretary

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General Counsel	13 - 22
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Congr. Liaison	25
Public Information	26 - 27
Inspection	28
Licensing & Regulation	29 - 38
Operational Safety	39
Radiation Standards	40
Reactor Development	41 - 43
Manager, Naval Reactors	44

AMENDMENTS TO 10 CFR PART 2, "RULES OF PRACTICE", AND INCORPORATION IN PART 2 OF 10 CFR PART 3, "RULES OF PROCEDURE IN CONTRACT APPEALS"

Report to the Commission by the Director of Regulation and the General Counsel

THE PROBLEM

1. To consider the issuance as an effective regulation of a generally revised form of 10 CFR Part 2, "Rules of Practice", incorporating as a subpart the substance of 10 CFR Part 3, "Rules of Procedure in Contract Appeals."

SUMMARY

2. 10 CFR Part 2, "Rules of Practice", which has been in effect since March 1956, has been amended from time to time. At Regulatory Meeting 1693 on February 1, 1961, the Commission adopted "A Report on the Regulatory Program of the Atomic Energy Commission," which was the basis of the recent reorganization of the regulatory staff. That Report recommended a sustained effort in the development of procedural as well as substantive regulations. In order to assist in the improvement of the performance of the regulatory function, the General Counsel has prepared a revision of the Rules of Practice (Appendix "A"), which recognizes the need for expediting proceedings without sacrificing the fair and impartial consideration and adjudication of issues.

3. The proposed revision embodies the results of experience gained under the existing rules, and is also based on a study of the Federal Rules of Civil Procedure and such rules of practice of other agencies as have appeared to be useful. A number of administrative practices which are followed by the regulatory

staff in licensing and regulation, or which have been customary in the conduct of proceedings, have been codified in accordance with the mandate of the Administrative Procedure Act, Sections 2(c) and 4, requiring the publication of the procedures of agencies.

4. Part 3, "Rules of Procedure in Contract Appeals", presently incorporates by reference the pertinent provisions of Part 2. In the interest of simplicity, Part 3 has now been incorporated in Part 2 as Subpart D.

5. The principal revisions of the existing Part 2 are:

a. Subpart A, "Procedure on Applications for Issuance, Amendment or Transfer of a License or Construction Permit and Renewal of a License", has been revised to state the procedures followed in the administrative review of certain types of applications, and to indicate how hearings on applications are initiated.

b. Subpart B, "Procedure for Imposing Requirements by Order, or for Modification, Suspension, or Revocation of a License or Construction Permit", has been considerably revised, and procedures have been simplified. The proposed rules would require that an order to show cause be answered and that a hearing may be demanded in the answer. Provision is also made for consent to the order, to be incorporated in the answer.

c. A settlement procedure has been provided, codifying the decision of the Commission in Matter of New York Shipbuilding Corporation, Byproduct Material License No. 29-2204-2, dated August 8, 1961.

d. Subpart D would incorporate the Rules of Procedure in Contract Appeals, which now appear in 10 CFR Part 3. Part 3 would be repealed.

e. Subpart G, "Rules of General Applicability", has been substantially revised in detail. The rules reflect the policy that, to the extent practicable and consistent with the requirements of law, proceedings shall be conducted expeditiously.

f. The requirements for appearance and practice before the Commission are stated in appropriate detail. Standards of conduct of attorneys appearing before the Commission are set out, and provision is made for attorneys' suspension or disbarment.

g. Additional detail is provided to describe procedures for intervention in a proceeding, and the conditions under which persons who are not parties may participate.

h. The Commission has not used the exemption to the ~~initial~~ separation of functions rule (See the present s 2.734, Appendix "B") for licensing proceedings, and the proposed rule therefore deletes that exception.

i. Additional provisions are incorporated for motion practice, discovery, procedures for the use of written testimony, prehearing conferences, stipulations, briefs, proposed findings and conclusions, and oral argument before a presiding officer.

j. There are new provisions for expediting procedures on the consent of all parties, and for waiver of rights to seek future review by the Commission or by a court.

k. Additional detail is provided for public rule making provisions.

6. The existing provisions of Parts 2 and 3 are designated Appendix "B" to this paper and will be furnished to the Commissioners separately.

7. It is proposed that the amendment be made effective 45 days after publication and that members of the bar, Commission contractors and others be invited to comment on the revised Rules with a view to possible future amendments. This course is consistent with the practice of regulatory agencies in adopting procedural regulations, and follows the practice which the Commission has employed in publishing Part 3 as well as other rules of practice. The Administrative Procedure Act, Section 4 (a), provides that there need be no prior publication for public comment in the case of rules governing agency procedure or practice.

STAFF JUDGMENTS

8. The Division of Public Information concurs in recommendation (e).

RECOMMENDATION

9. The Director of Regulation and the General Counsel recommend that the Atomic Energy Commission:

a. Approve the notice of rule making in Appendix "A".

b. Find that the amendment in Appendix "A" constitutes rules of agency procedure or practice, and that good cause exists why this amendment should be made effective, without the customary prior notice, forty-five (45) days after publication in the Federal Register.

c. Note that the rule will be effective forty-five (45) days after publication in the Federal Register, and that comments will be invited on the possible adoption of further amendments.

d. Note that the Joint Committee on Atomic Energy will be informed by letter such as Appendix "C".

e. Note that a public announcement such as Appendix "D" will be issued on filing the notice with the Federal Register.

f. Note that this paper is unclassified.

LIST OF ENCLOSURES

(d) An answer may consent to the entry of an order in substantially the form proposed in the order to show cause.

(e) The consent of the licensee to the entry of an order shall constitute a waiver by the licensee of a hearing, findings of fact and conclusions of law, and of all right to seek Commission and judicial review or to contest the validity of the order in any forum. The order shall have the same force and effect as an order made after hearing by a presiding officer or the Commission.

(f) When the Director of Regulation finds that the public health, safety, or interest so requires or that the violation is willful, the order to show cause may provide, for stated reasons, that the proposed action be temporarily effective pending further order.

2.203 Settlement.

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 regulatory staff and a licensee may enter into a stipulation for the settlement of the proceeding. The stipulation shall be subject to approval by the designated presiding officer or, if none has been designated, by the Chief Hearing Examiner, according due weight to the position of the regulatory staff. The presiding officer, or if none has been designated, the Chief Hearing Examiner, 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 shall be embodied in a decision and order settling and discontinuing the proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

96 OCT 15 A7:54

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

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO INTERVENOR'S OPPOSITION TO JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT BETWEEN NRC STAFF AND GENERAL ATOMICS AND TO THE STATE OF OKLAHOMA'S RESPONSE TO NRC STAFF'S AND GENERAL ATOMICS' JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT" in the above-captioned matter have been served on the following by deposit in the United States mail, first class; or as indicated by single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system; or as indicated by double asterisk via fascimile transmission; or as indicated by triple asterisk by hand delivery this 11th day of October 1996.

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