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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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'96 DEC 16 P4:26

BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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 ANSWER IN OPPOSITION TO THE STATE OF OKLAHOMA'S
PETITION FOR REVIEW OF LBP-96-24

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December 16, 1996

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The NRC Staff (Staff) hereby files its answer in opposition to the State of Oklahoma's Petition for Review and Request to File Brief (Nov. 25, 1996) (State's Petition), regarding the Atomic Safety and Licensing Board's (Board) decision in LBP-96-24.¹ In LBP-96-24, the Board approved the Settlement Agreement between the Staff and General Atomics, and thereby dismissed the case. For the reasons set forth below, the State's Petition should be denied.

BACKGROUND

On October 15, 1993, the Staff issued an Order² against GA and Sequoyah Fuels Corporation (SFC) (1993 Order), alleging, *inter alia*, that GA and SFC are jointly and

¹ *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC ___, slip. op. (Nov. 5, 1996).

² 58 Fed. Reg. 55,087-92 (1993).

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 a financial assurance mechanism for adequate funds for the completion of decommissioning as described 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 hearing³ on the 1993 Order, and the matter has been in litigation since then.

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.⁴ The SFC settlement essentially provides that SFC must dedicate to

³ Sequoyah Fuels Corporation's Answer and Request for Hearing (Nov. 2, 1993); General Atomics' Answer and Request for Hearing (Nov. 2, 1993).

⁴ *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-95-18, 42 NRC 150 (1995).

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 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. The intervenors in this proceeding, Native Americans for a Clean Environment and the Cherokee Nation (Intervenors), as well as the State of Oklahoma (State), filed briefs in opposition to the

settlement, to which the Staff and GA filed replies.⁵ The Board approved the settlement on November 5, 1996, in a split decision, with Judge Bollwerk dissenting.

DISCUSSION

A petition for review may not exceed ten pages in length,⁶ and must be based on at least one of the considerations set forth in 10 C.F.R. § 2.786(b)(4):

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.786(b).

⁵ Intervenors' Opposition to Joint Motion for Approval of Settlement Agreement Between NRC Staff and General Atomics (Aug. 9, 1996); State's Response to NRC Staff's and General Atomics' Joint Motion for Approval of Settlement Agreement (Sept. 5, 1996); 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 (Oct. 11, 1996); 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 NRC Staff and General Atomics (Oct. 11, 1996).

⁶ At the outset, it should be noted that the State's Petition improperly exceeds the ten page limitation by reason of the State's attempt to incorporate by reference several separate documents totalling well in excess of fifty additional pages. See State's Petition at 2-3. The references to these separate documents should be stricken. *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-430, 6 NRC 457 (1977).

Beginning with Paragraph 6 of the State's Petition, the State claims that LBP-96-24 "fails to give adequate consideration to how the settlement agreement will affect the public interest and the state." State's Petition at 3. According to the State, the Board has failed to protect the interests of the public and the State by "allowing the NRC staff to unilaterally waive financial assurance requirements intended to protect the public interest, without disclosure to the public of critical information relied upon by the staff and without any independent review of the facts by the Board." *Id.* The State believes that the settlement is "premature" in light of the absence of a "final decision" on a decommissioning plan and costs, and asserts that the Board failed to give "proper notice and opportunity to participate to all states" affected by the settlement, assuming the settlement "may affect multiple states and facilities." *Id.* at 3-4. The State argues further that information concerning "these other state facilities has not been disclosed to" the State, and that such information as well as information regarding GA's "financial capabilities and responsibilities" is "inadequate to make an informed decision about the public interest and effect upon state concerns;" furthermore, "all information" should be provided "with adequate notice and an opportunity to respond, to all members of the public and all states potentially affected." *Id.* at 4-5.

The State also asserts that Commission review of settlements is "appropriate especially where" resources, both for litigation and for cleanup, are limited, and where "decisions are substantially influenced by information to which a confidentiality claim is being asserted." *Id.* at 5. In addition, the State complains that the Board "has failed to

require the parties to the agreements to disclose information necessary for an evaluation of how the public interest is or is not protected," thereby violating the rights of affected states and the public under the U.S. Constitution and federal law. *Id.* The State also claims that the Board's approval sets a "legal precedent," relating to balancing the interests in the disclosure and nondisclosure of information. *Id.*

Next, the State asserts that "approval of the settlement agreements will allow both SFC and GA to forego compliance with financial assurance requirements," will allow the payment of debts and retention of "profits which should be directed to decommissioning," and will allow "the parties to proceed without adequate reporting or oversight." *Id.* at 6.

The State concludes its Petition by requesting "review of additional legal issues" listed in the Petition. *Id.* at 6-7. It also claims that no exceptions to 10 C.F.R. § 40.36(e) are provided for in the NRC's regulations, and that the granting of an exception "would set a precedent in interpretation of the language of the regulations and in enforcement policy." *Id.* at 7. Finally, the State argues that if decommissioning costs are not covered by SFC or GA, "the Board's decision will ultimately have the effect of leaving the public, state, local communities, and private landowners, to bear the risks and costs." *Id.* at 8.

As is evident from the foregoing, the State's Petition is not written in a manner that readily permits one to determine which of the considerations listed in 10 C.F.R. § 2.786(b)(4) has been properly addressed, if at all. Rather, without using these considerations as a framework, the State sets forth general complaints it has with the

settlement or the Board's decision to approve it. The State further has raised several issues that are either unsupported by facts or law, or are based in speculation.

For example, the State asserts that the Board did not independently review the facts. However, the State provides no support for this assertion. To the contrary, facts such as the amount of the settlement, the estimated cost of cleanup set forth in the 1993 Order, and the revenues projected for SFC were all before the Board when it approved the settlement.⁷ While the Staff may have considered confidential information regarding GA's financial condition in its deliberations, such information was not necessary for the Board to review in order for it to approve the settlement. *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993). In *Gottlieb*, the appellants argued that the trial court could not have properly evaluated the settlement at issue there without information as to the defendants' financial condition and ability to pay. In response, the Court of Appeals stated that the "financial condition of the defendant is irrelevant to a determination of the value of the settlement," and further stated that while some courts may have considered the defendants' financial viability, "we have never held that courts are required to do so." *Id.* at 1015.

The State speculates that the settlement "may affect multiple states and facilities." However, the State points to nothing in the settlement that changes GA's responsibilities or legal obligations for its San Diego facilities or any other facilities elsewhere. While the payment of money by GA to settle the SFC matter could indirectly result in the reduction

⁷ In addition, the Board considered other matters, such as litigative risks, in rendering its decision. LBP-96-24, slip op. at 15-16 (Nov. 5, 1996).

of overall funds that otherwise could be spent on obligations GA has for its facilities in San Diego, the same may be said for such an indirect effect on any of GA's existing obligations. However, this cannot mean that approval of the settlement was inappropriate or must be reviewed because all states where GA may have a liability were not given "proper notice and an opportunity to participate."

The State fails to explain how its assertion that review is especially appropriate where resources are limited raises or highlights a substantial question with respect to any of the considerations contained in section 2.786(b)(4). The State further fails to support its vague claim that the Board's decision was "substantially influenced by information to which a confidentiality claim is being asserted." In addition, the State's allegations concerning a violation of the rights of affected states and the public "protected by the Constitution of the United States and federal law" is unsupported by any references to any provision of the Constitution or to any statute or case. Also, although the State asserts that the Board's decision set a "legal precedent" regarding the balancing of interests in disclosing information,⁸ the State does not articulate what the precedent is or explain how the Board departed from established law.

Given that settlements and compromises are provided for by the Commission's regulations, and further that exemptions from regulatory requirements are also provided for, *see, e.g.*, 10 C.F.R. § 40.14, the State's arguments that the Board's approval resulted

⁸ It is not even clear what "information" the State refers to, or whether it is relevant at all to the Board's approval of the settlement. *See Gottlieb*, 11 F.3d at 1015.

in the granting of "exceptions" or allowing SFC and GA to "forego compliance with financial assurance requirements" do not demonstrate that the approval of the settlement raises a substantial question regarding a section 2.786(b)(4) consideration.

The State's remaining assertions again either lack sufficient support or do not raise a substantial question with regard to the section 2.786(b)(4) considerations and thus do not provide a basis for Commission review of LBP-96-24. For example, the State notes that the settlement will allow the payment of debts, but does not explain where the settlement so provides, and even if it did, why this raises a substantial question. The State also asserts that the settlement will allow the retention of profits, does not provide for adequate oversight,⁹ and will leave the public to bear the "risks and costs" if decommissioning costs are not covered by SFC or GA. However, the State loses sight of what is really at issue here, namely whether the Board's decision to approve the settlement raises a substantial question under section 2.786(b)(4). Both the Staff and the Board considered the immediate benefits of a settlement, as well as litigative risks, including the fact that there is no direct NRC precedent for requiring GA to be responsible for any cleanup costs for the Sequoyah facility. The focus here is not whether the settlement meets all of the possible concerns and wishes of the State,¹⁰ or eliminates all questions concerning cleanup of the Sequoyah

⁹ These first two comments (as well as the immediately preceding comment about the payment of debts) do not even appear to be related to the GA settlement, but rather may apply to the SFC settlement, which is already under Commission review.

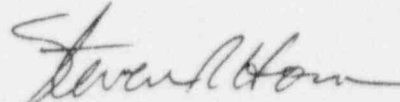
¹⁰ It is well established that the "essence of settlement is compromise," *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985), and that a settlement "will
(continued...)

facility, but whether the Board's approval of the settlement raises a substantial question, particularly in light of the fact that a possible outcome of litigation may be to obtain no relief from GA. The State has failed to explain how LBP-96-24 raises a substantial question with respect to any of the considerations in section 2.786(b)(4).

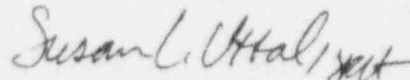
CONCLUSION

The State has failed to demonstrate that the Board's decision raises a substantial question with respect to the considerations in 10 C.F.R. § 2.786(b)(4). Accordingly, based on the foregoing, the State's Petition should be denied.

Respectfully submitted,



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Susan L. Uttal
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Dated at Rockville, Maryland
this 16th day of December 1996

¹⁰(...continued)

not be rejected solely because it does not provide a complete victory to the plaintiffs." *Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER IN OPPOSITION TO THE STATE OF OKLAHOMA'S PETITION FOR REVIEW OF LBP-96-24" 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 triple asterisk by hand delivery this 15th day of December 1996.

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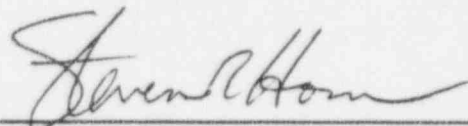
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