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 28, 1997

INTERVENORS NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S REPLY TO GENERAL ATOMICS' OPPOSITION BRIEF ON APPEAL OF LBP-96-24

Introduction

General Atomics ("GA") has filed a brief suggesting that the Licensing Board was entitled to approve the decommissioning funding settlement between GA and the staff, without making any public health and safety finding or providing a basis for such a finding. General Atomics' Brief in Support of Affirmation of LBP-96-24 (March 17, 1997) (hereinafter "GA Brief"). As discussed in Intervenors Native Americans for a Clean Environment's and Cherokee Nation's Brief in Reply to NRC Staff's Opposition Brief (March 25, 1997) (hereinafter "Intervenors' Reply Brief"), GA has no lawful basis for this position.

I. LBP-96-24 MUST BE REJECTED BECAUSE IT LACKED INDEPENDENCE AND SUPPORT AND WAS NOT ACCOMPANIED BY A MEANINGFUL OPPORTUNITY FOR PUBLIC PARTICIPATION.

GA makes no response at all to the NRC precedents, cited by intervenors, which demonstrate that the primary public interest consideration under 10 C.F.R. § 2.203 must be whether a proposed settlement protects public health and safety. See 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"). Instead, GA claims that the settlement must be

judged against the "fair and reasonable" standard of 10 C.F.R. § 2.759. GA Brief at 8. Setting aside the fact that 10 C.F.R. § 2.759 applies to licensing proceedings and not enforcement proceedings, it does not relieve the Board from the obligation to evaluate the adequacy of the settlement to protect health and safety. This obligation is derived from the NRC's statutory mandate to protect public health and safety in its "orders" and regulatory decisions. Thus, the "reasonableness" of the settlement must be judged in the first instance against its adequacy to protect health and safety. See Intervenors' Brief at 9-10 and cases cited therein; Intervenors' Reply Brief at 2-5.

GA also argues that the settlement must be accepted unless it is "patently arbitrary or contrary to law." GA Brief at 8, quoting New York Ship Building, 1 AEC 842, 844 (1961). The language in New York Ship-Building quoted by GA, however, constitutes the position argued to the Commission by the NRC staff, which was not adopted in the Commission's own holding. The Commission's actual holding was that the Licensing Board must make a "finding that the settlement is in the public interest and will provide reasonable assurance that the public health and safety will be protected." Id. at 845. Thus, the Licensing Board is not to unquestioningly accept the staff's assertion that a settlement is acceptable, without making an independent evaluation of its adequacy to protect public health and safety. The Licensing Board itself must conclude that the settlement is adequate and lawful. Intervenors submit that the Board's failure to meet this obligation constitutes a "substantial basis for disapproving the settlement," and raises a "material issue requiring resolution." CLI-94-12, 40 NRC 64, 71 (1994).

Nor does the deference due the staff under 10 C.F.R. § 2.203 excuse the Licensing Board from making an independent and supportable safety finding. GA suggests a presumptive level of deference that has been upheld only in uncontested enforcement proceedings. GA Brief at 10. GA fails to recognize that the staff's discretion was immediately and significantly

circumscribed once GA and SFC challenged the NRC staff's 1993 order and requested a hearing. Dairyland Power Cooperative, (La Crosse Boiling Water Reactor), LBP-80-26, 12 NRC 367, 371 (1980). See also Intervenors' Brief at 10-11.

Other bases proffered by GA for giving the staff presumptive deference are similarly unpersuasive. First, the presumption of regularity in the conduct of agency officials has never been held to excuse an administrative tribunal from its responsibility under the Administrative Procedure Act to make independent and supportable decisions. GA Brief at 10 and note 24. Second, with respect to the staff's allegedly "far greater capability" to "appraise the effectiveness and the costs of disposal alternatives," and assess whether the settlement "meets the Staff's regulatory objectives to the extent possible," GA Brief at 10-11, there is no indication in the record that the staff made any evaluation of whether combined SFC and GA settlements are adequate to cover the costs or decommissioning, or even what those costs are.[1] Thus, the record contains no staff position on safety issues that could be to deferred to. See Intervenors' Reply Brief at 16-17.

Finally, GA appears to contend that the staff is entitled to significant deference because its view of the "public interest" is broader than the perspective of intervenors, who are "clearly concerned with their own special interests."[2] GA Brief at 10. Such a suggestion is not only absurd but offensive. The intervenors have no "special interest" in this proceeding other than to assure that they, the neighbors of the SFC site -- including this generation and generations

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1 Intervenors note that the staff has made no comment on the adequacy or reliability of SFC's latest revision to its cost and revenue projections, which is attached to GA's Brief. Intervenors also note that SFC offers no explanation for the changes in cost and revenue projections from the predictions that the NRC staff deemed insufficiently reliable in its October 1993 Order.

2 To the extent that GA may be asserting that the staff's broader public interest view took into account the effect of the SFC settlement on the cost of cleaning up GA's California facilities, then the public was entitled to be apprised of and comment on such considerations. See Intervenors' Brief at 20-22, Intervenors' Reply Brief at 8.

to follow -- will not be threatened by the contamination of the environment with radioactive and toxic chemicals. This alleged self-interest is the very same public interest that the NRC staff is obligated to protect. Had the NRC staff actually fulfilled its public interest responsibilities during the twenty-odd years that GA's subsidiary unrestrainedly dumped tons of contaminants into the environment, this proceeding would not be happening at all. Intervenors can hardly be considered unreasonable in demanding some accounting of whether the staff has now reached a settlement that will correct the harm done by its previous failure to protect the "public interest."

Notably, none of the factors asserted by GA to be relevant to whether the settlement was in the "public interest" pertain to protection of public health and safety. Instead, GA cites factors such as the intensity of the settlement negotiations, the complexity of the litigation and risk of not prevailing, the value of an immediate recovery in comparison to waiting for a judgment, and the dissipation of GA's resources through litigation. GA Brief at 13-15. These are all factors considered in reviewing settlements of class action suits, which do not have the component of a statutory responsibility to protect public health and safety. The Board had no authority to ignore health and safety and base its approval of the settlement on these factors alone.

Moreover, GA's assertions that these factors weigh in favor of the settlement are unsupported. First, there is no substantive information in the record about the parties' settlement positions or how they were resolved to support a fair judgment about their intensity. The fact that the negotiations took ten months and that high-level officials were called in at various junctures tells nothing about their substance or how intensively various issues were negotiated. Moreover, throughout the proceeding, GA and the staff assiduously avoided reporting to the Board on the merits of the negotiations.

Second, GA exaggerates the litigative risk posed by the October 1993 Order. Although GA is correct that a corporation and its shareholders are deemed separate entities for most pur-

poses, GA Brief at 13, it is well-established that the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy." Bangor Punta Operations, Inc. v. Bangor & Aroostook RR Co., 417 U.S. 703, 713, 94 S.Ct. 2578, 2584 (1974). See also First Natl City Bank v. Banco para el Camerico Exterior de Cuba, 462 U.S. 611, 630, 103 S.Ct. 2591, 2601 (1983); Town of Brookline; 667 F.2d 215, 221 (1st Cir. 1981); Alman v. Danin, 801 F.2d 1, 3 (1st Cir. 1986); Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1220 (2d Cir. 1987); Capital Telephone Co. Inc. v. FCC, 498 F.2d 734 (D.C. Cir. 1973); Klinger v. Baltimore & Ohio R.R., 432 F.2d 506 (2d Cir. 1970); Schenley Distillers Corp. v. U.S., 326 U.S. 432, 66 S.Ct. 247 (1946). As discussed at length in Native Americans for a Clean Environment's Opposition to General Atomics' Motion for Summary Disposition or For an Order of Dismissal (April 13, 1994), the NRC had an adequate legal basis for holding GA liable for decommissioning funding.

Finally, there is no record basis for an evaluation of the third and fourth factors cited by GA -- the value of an immediate recovery in comparison to waiting for a judgment, and the dissipation of GA's resources through litigation -- because GA failed to provide either the Board or the parties with any factual information regarding its financial situation, such as tax returns and financial statements. See Intervenors' Brief at 19-20, Intervenors' Reply Brief at 7. Moreover, the NRC staff provided no evaluation of the cost of cleaning up the SFC site that would allow an assessment of the "value" of the settlement in comparison to what is needed for the cleanup.[3] See Intervenors' Brief at 16-17. Thus, none of the factors cited by GA support a finding that the settlement is in the "public interest." Moreover, the Board's

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[3] GA insists that the GA settlement must be considered completely apart from the SFC settlement. See GA Brief at 5. However, the value of the GA settlement must be assessed in relation to what is needed to compensate for any shortfall in the SFC settlement. In addition, the Board must also assure itself that GA will not 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.

failure to require disclosure of this information violated intervenors' right to a meaningful opportunity to participate in the proceeding for the approval of the settlement. See Intervenors' Brief at 7-8; Intervenors' Reply Brief at 7-8.

With respect to the global settlement of all NRC staff decommissioning funding claims against GA, GA does not even attempt to address the language in SECY-96-124, Memorandum from James M. Taylor to the Commissioners (June 10, 1996), which states that the staff considered the "relative risks" of the California and SFC sites. See Intervenors' Brief at 21-22, Intervenors' Reply Brief at 8. Instead, GA insists that the California proceeding has "nothing to do" with the instant case. GA Brief at 26. As discussed in Intervenors' Reply Brief at 8, this claim is contradicted by the words of SECY-96-124, which establish a connection between the two settlements and strongly indicate that the staff and GA made an overall compromise on GA's decommissioning funding obligations for all its facilities, including SFC, based on the comparative risks of the various sites. Since the settlement discussed in SECY-96-124 was approved by the Commission, it is incumbent upon the Commission either to acknowledge the settlements' relationship, disclose the relevant documents, and offer an opportunity for comment on the global settlement's impact on the SFC settlement; or to demonstrate that the appearance of an improper relationship between the settlements is unfounded, by disclosing the relevant documents in full.

II. CONCLUSION

For the foregoing reasons, the Commission should reject the arguments made by GA and reverse LBP-96-24.

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March 28, 1997

CERTIFICATE OF SERVICE

I certify that on March 28, 1997, copies of the foregoing NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND THE CHEROKEE NATION'S REPLY TO GENERAL ATOMICS' OPPOSITION BRIEF ON APPEAL OF LBP-99-24 and ERRATA TO INTERVENORS NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S REPLY TO NRC STAFF'S OPPOSITION BRIEF ON APPEAL OF LBP-96-24 were served by first-class mail on the following:

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UNITED STATES OF AMERICA DOCKETED
NUCLEAR REGULATORY COMMISSION USNRC

BEFORE THE COMMISSION

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In the Matter Of	OFFICE OF SECRETARY DOCKETING & SERVICE BRANCH
Sequoyah Fuels Corporation and General Atomics	Docket No. 40-8027EA Source Materials License No. SUB-1010
(Gore, Oklahoma Site Decontamination and Decommissioning Funding)	March 28, 1997

ERRATA TO INTERVENORS NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S REPLY TO NRC STAFF'S OPPOSITION BRIEF ON APPEAL OF LBP-96-24

Intervenors Native Americans for a Clean Environment and the Cherokee Nation hereby makes the following corrections to their Reply Brief, filed March 25, 1997:

Page:	Line:	Change:
1	title	Change "LBP-99-24" to LBP-96-24"
8	3	Delete "'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" and substitute "in reaching the settlement."

A substitute page 8 is attached.

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Thus, contrary to the staff's argument, intervenors had no access to any information the staff may have relied on in reaching the settlement. 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 "_ _."