UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter Of	
Sequoyah Fuels Corporation and General Atomics Gore, Oklahoma Site Decontamination and Decommissioning Funding	Docket No. 40-8027EA Source Materials License No. SUB-1010 November 13, 1995

INTERVENORS' PETITION FOR REVIEW OF LBP-95-18

Introduction

Pursuant to 10 C.F.R. 2.786(b), Intervenors, Native Americans for a Clean Environment ("NACE") and the Cherokee Nation, hereby seek Commission review of LBP-95-18, Memorandum and Order (Approval of Settlement Agreement) (October 26, 1995) ("LBP-95-18"). In LBP-95-18, the Licensing Board approved the partial settlement of a Nuclear Regulatory Commission ("NRC" or "Commission") staff enforcement order against Sequoyah Fuels Corporation ("SFC") and its non-licensee parent, General Atomics ("GA"), for decommissioning funding for the severely contaminated site of SFC's former uranium processing plant in Gore, Oklahoma. 58 Fed. Reg. 55,087 (October 25, 1993) (hereinafter "October 1993 Order"). By resolving only SFC's and not GA's liability for decommissioning funding, the settlement undermines the NRC's regulatory authority over decommissioning funding, and seriously risks allowing the responsible parties to abandon the Gore site wthout providing adequate resources for cleanup.

Factual Background

In 1988, through its fully owned subsidiary Sequoyah Holding Corporation ("SHC"), General Atomics ("GA") purchased 100% of the

stock of SFC from its previous owner, Kerr-McGee. Although GA was not named as a licensee, GA took over the "corporate oversight and audit responsibilities" that were previously held by Kerr-McGee, and assumed various functions under the license. NRC Safety Evaluation Report at 2 (October 28, 1988).

In 1990, after finding significant radioactive and chemical contamination on the site, the NRC issued a series of enforcement orders, and the plant was temporarily shut down for 5 months in late 1991 and early 1992.[1] After resuming operations for a few months, the plant had an accident in November 1992, and never reopened. Instead, SFC notified the NRC of its intent to terminate operations and decommission the facility. GA helped to create a new business entity called "ConverDyn," whose purpose was to carry out the remainder of SFC's contracts for processing uranium.[2] SFC's ConverDyn revenues were to be dedicated to decommissioning. 58 Fed. Reg. at 55,090.

On October 15, 1993, the NRC staff issued an enforcement order against SFC and GA, holding that they were "jointly and severally responsible" for providing funding, financial

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[1] In support of SFC's bid to reopen the plant, GA promised the NRC commissioners that it would guarantee sufficient decommissioning funding to clean up the site at the end of the plant's life. After the plant shut down the following year, however, GA withdrew its decommissioning funding commitment.

[2] ConverDyn is a joint venture of Allied-Signal Energy Services and General Atomics Energy Services ("GAES"), which is a subsidiary of GA's parent, General Atomics Technology Corporation ("GATC"). GA Answer and Request for Hearing at 5 (November 2, 1993). GAES later transferred 90% of its ownership interest in ConverDyn to GAES Limited Partnership [GAESLP]. Id. at 6. GAES is the general partner of GAESLP and owns 10% of the partnership; GATC is a limited partner with 90% ownership. Id.

assurances, and updated and detailed decommissioning cost estimates for the cleanup of the SFC site. 58 Fed. Reg. at 55,092. The order also required GA and SFC to put up $86 million in decommissioning funds, the minimum amount estimated to be required to clean up the site. Id. GA and SFC both challenged the order, and this proceeding was commenced. NACE and the Cherokee Nation intervened in support of the order.[3]

On June 30, 1995, the Licensing Board bifurcated the case into two phases: an initial phase on the NRC's challenged jurisdiction over GA, to be followed by a merits phase regarding the adequacy of decommissioning funding for the SFC facility. LBP-95-12, 41 NRC 478, 486 (1995). Ongoing discovery on jurisdictional issues has been stayed pending settlement negotiations now being conducted between the staff and GA. Discovery on the merits of the proceeding has not even begun.

On August 24, 1995, the NRC staff and SFC submitted a proposed agreement which purported to settle the NRC staff's claims against SFC. The agreement committed SFC's "net assets and net revenues" to decommissioning.[4] Settlement Agreement at 4. The agreement established no dollar amount for SFC's contribution to the costs of decommissioning the site; nor did it estimate SFC's

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[3] See LBP-94-5, 39 NRC 54 (1994) and LBP-94-8, 39 NRC 116 (1994), affirmed, CLI-94-12, 40 NRC 64 (1994) (NACE intervention approved); LBP-94-19, 40 NRC 9 (1994), affirmed, CLI-94-13, 40 NRC 78 (1994) (Cherokee Nation intervention approved).

[4] "Net assets" were defined as being subject to "SFC's obligations to ConverDyn" and the "rights of senior lien-holders." Settlement Agreement at 3. "Net revenues" were defined as being subject to "reasonable and necessary expenses," again subject to ConverDyn obligations and the rights of senior lien-holder.

"necessary expenses," itemize the liens on SFC's assets, explain the nature and financial implications of SFC's "obligations to ConverDyn," or give any other indication of the size of SFC's debts and the expected remainder that would be left for decommissioning. Nor did the agreement state whether SFC's pre-existing decommissioning reserves, which had been established under NRC regulations and the terms of SFC's license, would be protected from creditors and conserved for decommissioning purposes.

Intervenors, the Attorney General of Oklahoma, and the U.S. Army Corps of Engineers, all opposed the proposed settlement agreement. See LBP-95-18, slip op. at 2, notes 2-4, for citations. Nonetheless, two members of the Board approved the agreement on October 26, 1995. A dissenting opinion was filed by Judge Bollwerk.

ARGUMENT

I. THE BOARD ERRED IN APPROVING THE SETTLEMENT AGREEMENT.

Pursuant to 10 C.F.R. § 2.203, a proposed settlement is "subject to approval by the designated presiding officer," giving "due weight to the position of the staff." The presiding officer "may order such adjudication of the issues as he may deem to be required in the public interest to dispose of the proceeding." Id. Thus, the presiding officer may order further adjudication if the reasonableness of the proposed settlement to protect public health and safety does not appear to be adequately supported in the record. Here, the Licensing Board has erred and abused its discretion in a number of significant respects, thus requiring that the Commission take review and reverse LBP-95-18.

A. Board Failed to Address SFC's Relationship With GA.

First, the Board erred in approving a settlement that was unsupported by adequate information about the nature of SFC's and GA's corporate and financial relationship, and the degree to which GA might use SFC's resources to serve its own financial interests rather than conserving them for decommissioning. The question of whether GA controls the affairs of SFC to the extent that it constitutes a de facto licensee is one of the central jurisdictional issues in this case that has yet to be fully investigated through discovery or adjudication. If, as it appears, GA controls the activities of SFC, then there can only be a real evaluation of the adequacy of the settlment when the Board has before it all parties to this action. As Judge Bollwerk stated in his dissent, the Board has not served the public interest by approving a partial settlement with SFC and the staff, but rather should have waited to give "'global' consideration to all settlements encompassing General Atomics (GA), SFC, and the staff." LBP-95-18 at 18.

Even "putting aside" the question of GA's control over SFC,

> there is a clear linkage between GA and SFC by reason of their parent-subsidiary relationship and the involvement of GA and its subsidiaries, including SFC, in the ConverDyn partnership agreements under which a substantial portion of any SFC revenue purportedly is to be generated. In light of these inter-relationships, it would seem that the Board's best opportunity fully to understand and assess the implications of any staff settlement with either GA or SFC would come when the Board has before it staff settlements with both parties that would resolve this case in toto.

Id.[5]

Two examples are illustrative. First, although the settlement agreement does not itemize the "liens" on SFC's assets, SFC has previously identified a major obligation of $10.6 million to Kerr-McGee. See Table 10-2 of SFC's Preliminary Plan for Completion of Decommissioning (February 13, 1993). In fact, this debt consists of a loan by Kerr-McGee to SFC and Sequoyah Holding Corporation for the 1988 purchase of SFC, which is secured by a lien on SFC's real property. Thus, since the note financed GA's purchase of SFC through SHC, it would be inappropriate for SFC to pay the entire amount, if any, of the $10.6 million debt to Kerr-McGee. Yet, the settlement agreement does not even mention, let alone protect against improper payment, of the Kerr-McGee note.[6]

Second, ConverDyn -- the source of a "substantial portion" of the SFC revenues designated for decommissioning funds [LBP-95-18 at 18] -- is controlled by an affiliate of GA, and not by SFC. SFC's net assets are defined as being subject to SFC's "obliga-

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[5] Indeed, as also noted by Judge Bollwerk, Id., there is no basis for finding that the partial settlement with SFC is consistent with 10 C.F.R. §§ 40.36 and 40.42, the NRC's decommissioning funding regulations, since SFC's resources alone are insufficient to meet its regulatory responsibilities, and must be supplemented by GA's resources -- which have not yet been identified, let alone committed. See 58 Fed. Reg. at 55,091-92.

[6] Kerr-McGee has written a letter to SFC, announcing "its intention to defer taking legal action" on the note until the completion of decommissioning. Letter from Russell G. Horner, Jr. to John Ellis (September 27, 1995), Attachment 1 to SFC's Reply to Intervenors' Renewed Opposition (September 29, 1995). However, the mere expression of Kerr-McGee's "intention" can in no way be relied on as an enforceable commitment.

tions to ConverDyn," although the nature of these obligations is not disclosed. In addition, there are "a number of other claims on ConverDyn revenues" -- none of which are described in the settlement agreement -- "that have higher payment priority than payments to SFC." 58 Fed. Reg. at 55,089. Given GA's potential control over ConverDyn, and the agreements failure to specify the nature of the claims on ConverDyn's revenues, there is no assurance that ConverDyn profits which were supposed to be dedicated to decommissioning actually will be conserved for that purpose, rather than dissipated or used by GA for its own financial ends.

B. The Board Erroneously Denied Its Authority to Ensure Adequate Conservation of Decommissioning Funds.

In denying Intervenors' concerns regarding the settlement agreement's failure to protect SFC's resources against plunder by creditors or manipulation by GA, the Licensing Board responded that the NRC "is neither impacted by nor involved in" the resolution of creditors' claims against SFC. LBP-95-18 at 5. In so holding, the Board completely abdicated the NRC's lawful authority and responsibility to ensure that licensees take adequate financial measures to ensure compliance with decommissioning funding regulations. Moreover, the Board ignored the fact that the key financial relationship involved is not between SFC and its creditors but between SFC and GA, SFC's parent -- over whom the NRC appropriately has asserted jurisdiction. Finally, the Board wrongly disregarded the fact that SFC, as a shut-down business without any future as a profit-making entity, no longer

has any institutional incentive to conserve its resources for the future. It is simply absurd to suggest that in the face of such circumstances, the NRC lacks any authority to ensure that funds committed by law to the cleanup of a severely contaminated licensed site are not improperly dissipated or diverted.

The Licensing Board claims that Intervenors' concerns can be addresed through the NRC's ability to take enforcement action if SFC transfers assets or revenues "to claimants which had no legal entitlement to them." LBP-95-18 at 5. As Judge Bollwerk notes, however, the staff does not view its authority as extending beyond requiring SFC to ask for the return of its money -- a remedy of questionable effectiveness.[7] Id. at 14. While the NRC may lack the authority to take money from non-licensees, it clearly does have the authority to take whatever enforcement action necessary to ensure the conservation of a licensee's funds in order to meet NRC decommissioning funding requirements, before those funds are dissipated.[8] The additional threat of bankruptcy

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[7] The Licensing Board's argument is also self-contradictory. If the Board has no authority to evaluate the validity of claims on SFC's resources in this proceeding and cannot amend the settlement agreement accordingly, as the Board claims, then on what authority is it to take enforcement action later when SFC pays on invalid claims?

[8] The Board also suggests that SFC's filing of annual financial statements, and the NRC's ability to review its financial documents, will protect against misuse of decommissioning funds. LBP-95-18 at 6. However, as Judge Bollwerk notes, the efficacy of a post hoc financial report which shows that resources have been dissipated improperly would be highly questionable. LBP-95-18 at 15 and note 3. It should also be noted that reporting requirements have been reduced significantly under the settlement agreement: whereas both SFC and SHC previously were required to submit annual financial statements, now only SFC will be required to submit them. See Letter from Leland C. Rouse (NRC) to Reau Graves (SFC) (October 27, 1988).

by SFC renders it all the more important that the NRC resolve its claim on SFC's resources now, since the NRC may assume the position of an unsecured creditor after bankruptcy. Bollwerk, LBP-95-18 at 15-17.

C. The Settlement Fails to Protect Committed Decommissioning Funds From Plunder by Creditors or Misuse by GA.

SFC has two legally required reserves that are dedicated exclusively to decommissioning: funds reserved by a $750,000 letter of credit required by 10 C.F.R. § 40.36, and a "decommissioning reserve" that was established in 1988 as a condition of GA's purchase of SFC, and which is incorporated into SFC's license.[9] There is no commitment in the settlement agreement that these funds will be used in their entirety for decommiissioning. Moreover, since the settlement agreement makes no attempt to quantify the value of the net assets and revenues that SFC will commit to decommissioning,[10] it is completely unclear whether this "net" amount will be any greater than the reserves that are already committed to decommissioning. Thus, the Licensing Board has no grounds whatsoever for asserting that these legally committed decommissioning reserves are "part of the net assets and revenues which, after the payment of reasonable and

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[9] Although SFC has not reported the exact amount in this account, it contained approximately $3.8 million in May of 1994. See Intervenors' Response to Joint Motion at 10.

[10] As suggested by Judge Bollwerk, by itself, the settlement agreement's failure to calculate the value of the net assets and revenues that will be dedicated to decommissioning violates 10 C.F.R. § 40.36. LBP-95-18 at 18-19, note 6.

necessary expenses, are pledged by the licensee to decommissioning." LBP-95-18 at 6-7. Indeed, given the total lack of information that has been provided about SFC's finances, it is equally possible that SFC's net assets and revenues will be less than the amount of these decommissioning reserves, and thus that the reserves will be used to pay SFC's debts and expenses rather than to pay for cleanup of the site, as required by law. The Licensing Board's refusal to allow or conduct further inquiry into the impact of the settlement agreement on these legally established funds violated 10 C.F.R. § 40.36 and SFC's license.

II. COMMISSION REVIEW IS WARRANTED

As demonstrated above, LBP-95-18 violates the NRC's decommissioning regulations and misinterprets the scope of the Commission's authority to ensure compliance with those regulations. Moreover, as discussed at length by Judge Bollwerk, the Board's decision fails to protect the public interest in assuring that SFC takes adequate measures to ensure that SFC's revenues and assets are adequately conserved for the purpose of protecting public health and safety through the cleanup of the site. Because the Board's decision sets significant adverse precedents that efffectively eviscerate the NRC's decommissioning funding requirements, ignore the significance of the corporate relationship between SFC and GA, and leave the neighbors of the severely contaminated SFC site without any assurance that cleanup will be paid for by the responsible parties, the Commission should take review and reverse it.

III. CONCLUSION

For the foregoing reasons, the Commission should take review of LBP-95-18.

Respectfully submitted,

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November 13, 1995

CERTIFICATE OF SERVICE

I certify that on November 13, 1995, copies of the foregoing INTERVENORS' PETITION FOR REVIEW OF LBP-95-18 were served by first-class mail on the following:

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